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1901-1950

(Civil, Criminal & Revenue)

BY

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PREFACE

No apology is needed for the publication of this Digest, which is a consolidated one covering the half century from 1901 to 1950. It will be easily appreciated that the bulk of our current case-law is contained in the decisions of this period. It is not necessary to expatiate at length on the virtues of consolidation, as otherwise, one will have to refer to a large number of publications for the same point.

On the importance of case-law, the late Sir William Holdsworth wrote: "Codes are lifeless things compared with the living law evoked by the decision of cases which turn upon the actual happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law."

In the Preface to the Corpus Juris (American), the following passage occurs: "Often the particular application or illustration stated will precisely fit the state of facts in his (the lawyer's) own case, and the argument of reason and logic may be fortified by pointing out that in prior litigated cases the rule has been applied in the manner contended for. No lawyer is content to depend alone upon his own reason and knowledge. Few have the presumption to assume that they would, unaided by the experience of the past, present all arguments that could be made in any case as to the application of a general rule. Precedents are valuable the same as experience is valuable. Reported decisions are valuable the same as history and science are valuable.... There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources, and in preparing a brief in an important case, should not stop until they find every case that has been decided upon the subject in question. (The Value of Precedents by J. W. McLoud in 28 Am Law Rev. 218)."

It can be seen from the above quotations how superficial is the oft-heard criticism against the growth of case-law in our country.

The enormous growth of case-law makes a Digest an indispensable publication for the legal profession. No doubt, we have now got in the field excellent commentaries and text books in which the decisions bearing on the respective subjects are exhaustively dealt with. But in our opinion, Commentaries and Digests are complementary to each other, and neither can dispense with the other.

In the first place, commentaries dealing exhaustively with the case law bearing on the respective subjects do not cover the entire field of law. In the next place, the point of view and the mode of treatment and dealing with the case-law in a Digest and a Commentary are entirely different. The approach, in each case, is, as it were, from opposite ends. Each system has its own special usefulness to the lawyer. If a lawyer is on the hunt for a parallel precedent, for a case on all fours, he naturally turns to a Digest. If he wants to study the principles bearing on a point, he first thinks of a Commentary or a text book. However exhaustive a Commentary may be, in point of case-law, the emphasis is more on the

underlying principles than on the facts and features of each case which are available only in a Digest. Though a Commentary may give a more correct insight into the legal position and the over-all state of case-law on any question, a Digest has to be resorted to for picking out the particular case which comes closest to the matter on hand.

Further, it has to be remembered that in a Commentary, the case-law is seen *as interpreted* by the Author. In a Digest, the reader has, as it were, a direct access to the case-law and he may bring to bear upon his study of the case-law his own point of view and may thereby be enabled to draw a conclusion which not only did not occur to the Author but was contrary to the Author's conclusion. In any case, a Digest will enable the reader to test the correctness of the conclusions set forth in the commentaries, before he proceeds to study the actual reports after he has selected the decisions for study by the above process.

As regards the special features of the present publication, the first point to be mentioned is that it is a Digest of full head-notes and not merely of short, truncated statements of the law. Separate points decided by a case are digested separately and are not jumbled up together in the same note.

Where the decisions bear upon statutory provisions they have been digested under the appropriate statutory headings. But care has been taken to give topical headings also in proper places with cross-references to the respective statutory headings.

Where the number of cases under a section or heading is very large, they are sub-divided into sub-headings. In such cases a synopsis of the headings and sub-headings also is given.

Where a decision overrules or reverses a previous ruling, this is noted under the decision.

Other features are like those of the well-known Digests published by the Madras Law Journal Office and All India Reporter hitherto, with which the Bar and Bench are already familiar and which they appreciate so much.

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Suits for money 2820
Suits for specific performance ... 2820
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This section and S. 100, T. P. Act ... 2821
Transfer or otherwise dealing with property 2822
Transferee 2824
Transfer under a right 2824

ABBREVIATIONS

REPORTS

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A. M. L. J. ... Ajmer-Merwara Law Journal.
Agra. H. C. R. ... Agra High Court Reports.
All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ... Allahabad Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
Avadh W. N. ... Avadh (or Oudh) Weekly Notes.
B. R. ... Bihar Reports.
Beng. L. R. ... Bengal Law Reports.
B. L. J. R. or Bihar L. J. R. ... Bihar Law Journal Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. H. C. R. ... Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. Tim. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).
C. P. L. R. ... Central Provinces Law Reports.
Cr. App. Rep. ... Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour. ... Criminal Law Journal.
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
E. P. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
I. L. R. Hyd. ... Indian Law Reports Hyderabad Series.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
I. T. R. ... Income Tax Reports.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
K. B. ... (Law Reports) King's Bench Division.
(L. J.) K. B. ... Law Journal Reports, King's Bench.
K. L. T. or Ker. L. T. ...Kerala Law Times.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T. ... Lahore Law Times.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal
Madh. B. L. R. ... Madhya Bharat Law Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.

Pak. Cas. ... Pakistan Cases.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. Tim. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.
Pat. W. N. ... Patna Weekly Notes.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
Sind L. R. ... Sind Law Reporter.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
Suth. W. R. ... Sutherland's Weekly Reporter.
I. L. R. Trav. Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Vind.-Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.

Other Abbreviations.

A. C. ... Appellate Jurisdiction, Civil.
A. Cr. ... Appellate Jurisdiction, Criminal.
App. ... Appendix or Appeal.
Appr. ... Approved.
Art. ... Article.
B. R. ... Board of Revenue.
C. A. ... Court of Appeal.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illu. ... Illustrations.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O. C. ... Original Jurisdiction, Civil.
O. Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Rel. on. ... Relied on.
Rev. ... Revenue.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
S. N. ... Short Notes of Cases.
V. ... Volume Number.

CHRONOLOGICAL TABLE OF INDIAN REPORTS

[1862 to 1952]

All India Reporter

1	2	3	4	5	6	7
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1934	1935	1936	1937	1938	1939	1940
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1941	1942	1943	1944	1945	1946	1947
22	23	24	25	26		
1948	1949	1950	1951	1952		

(I. L. R.) Allahabad

1	2	3	4	5	6
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1885	1886	1887	1888	1889	1890	1891
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1892	1893	1894	1895	1896	1897	1898
21	22	23	24	25	26	27
1899	1900	1901	1902	1903	1904	1905
28	29	30	31	32	33	34
1906	1907	1908	1909	1910	1911	1912
35	36	37	38	39	40	41
1913	1914	1915	1916	1917	1918	1919
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From 1937 citation by year

Allahabad Law Journal

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Allahabad Law Journal *(contd.)*

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1918	1919	1920	1921	1922	1923	1924
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1925	1926	1927	1928			

From 1929 citation by year.

Allahabad Weekly Notes

1	2	3	4	5	6	7
1881	1882	1883	1884	1885	1886	1887
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1888	1889	1890	1891	1892	1893	1894
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22	23	24	25	26	27	28
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Allahabad Weekly Reporter

1935 AWR
1935

Citation by year.

(I. L. R.) Assam

1	2	3	4	5	6	7
1949	1950	1951	1952	1953	1954	1955

Bengal Law Reports

1	2–3	4–5	6–7	8–9	10–11	12–13
1868	1869	1870	1871	1872	1873	1874
14–15						
1875						

Bihar Law Journal Reports

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1953	1954	1955	1956

Bihar Reports

1	2	3	4	5	6	7
1935	1936	1937	1938	1939	1940	1941
8	9	10	11	12	13	
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(I. L. R.) Bombay

1	2	3	4
1875–1877	1877–1878	1878–1879	1879–1880
5	6	7	8	9	10
1880–1881	1881–1882	1883	1884	1885	1886
11	12	13	14	15	16	17
1887	1888	1889	1890	1891	1892	1893
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1894	1895	1896	1897	1898	1899	1900
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1901	1902	1903	1904	1905	1906	1907

(I. L. R.) Bombay *(contd.)*

32	33	34	35	36	37	38
1908	1909	1910	1911	1912	1913	1914
39	40	41	42	43	44	45
1915	1916	1917	1918	1919	1920	1921
46	47	48	49	50	51	52
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53	54	55	56	57	58	59	60
1929	1930	1931	1932	1933	1934	1935	1936

From 1937 citation is by year.

Bombay High Court Reports

1	2	3	4
1862–1863	1864–1866	1866–1867	1867–1868
5	6	7	8	9	10
1868–1869	1869	1870	1871	1872	1873
11	12				
1874	1875				

Bombay Law Reporter

1	2	3	4	5	6	7
1899	1900	1901	1902	1903	1904	1905
8	9	10	11	12	13	14
1906	1907	1908	1909	1910	1911	1912
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1913	1914	1915	1916	1917	1918	1919
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1941	1942	1943	1944	1945	1946	1947
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Bombay Printed Judgments.

1	2	3	4
1872–1874	1875–1877	1878–1880	1881–1883
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1884–1887	1888–1890	1891–1893	1894–1896
9	10		
1897–1898	1899–1900		

Burma Law Journal

1	2	3	4	5	6
1922	1923	1924	1925	1926	1927

Burma Law Reports

1948 Bur L R / 1948 Citation by year

Burma Law Times

1	2	3	4	5	6	7
1908	1909	1910	1911	1912	1913	1914
8	9	10	11	12	13	
1915	1916	1917	1918	1919	1920	

(I. L. R.) Calcutta

1	2	3	4	5
1875-1876	1876–1877	1877–1878	1879	1880
6–7	8	9	10	11	12–13	14
1881	1882	1883	1884	1885	1886	1887
15	16	17	18	19	20	21
1888	1889	1890	1891	1892	1893	1894

(I. L. R.) Calcutta *(contd.)*

22	23	24	25	26	27	28
1895	1896	1897	1898	1899	1900	1901
29	30	31	32	33	34	35
1902	1903	1904	1905	1906	1907	1908
36	37	38	39	40	41	42
1909	1910	1911	1912	1913	1914	1915
43	44	45	46	47	48	49
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1930	1931	1932	1933	1934	1935	1936

From 1937 citation is by year.

Calcutta Law Journal

1–2	3–4	5–6	7–8	9–10	11–12	13–14
1905	1906	1907	1908	1909	1910	1911
15–16	17–18	19–20	21–22	23–24	25–26
1912	1913	1914	1915	1916	1917
27–28	29–30	31–32	33–34	35–36	37–38
1918	1919	1920	1921	1922	1923
39–40	41–42	43–44	45–46	47–48	49–50
1924	1925	1926	1927	1928	1929
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63–64	65–66	67–68	69–70	71–72	73–74
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75–76	77–78	79–80	81		82
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Calcutta Law Reports

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Calcutta Weekly Notes

1	2	3	4	5	6	7
1897	1898	1899	1900	1901	1902	1903
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1904	1905	1906	1907	1908	1909	1910
15	16	17	18	19	20	21
1911	1912	1913	1914	1915	1916	1917
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1925	1926	1927	1928	1929	1930	1931
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1939	1940	1941	1942	1943	1944	1945
50	51	52	53	54	55	56
1946	1947	1948	1949	1950	1951	1952
57	58	59	60			
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Central Provinces Law Reports

1	2	3	4	5	6	7
1888	1889	1890	1891	1892	1893	1894
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15	16	17				
1902	1903	1904				

Company Cases

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1931	1932	1933	1934	1935	1936	1937
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1938	1939	1940	1941	1942	1943	1944
15	16	17	18	19	20	21
1945	1945	1947	1948	1949	1950	1951
22						
1952						

Criminal Law Journal

1	2	3–4	5–6	7–8	9–10	11
1904	1905	1906	1907	1908	1909	1910
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1911	1912	1913	1914	1915	1916	1917
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1918	1919	1920	1921	1922	1923	1924
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1925	1926	1927	1928	1929	1930	1931
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1952 citation is by year

ILR (Cuttack)

1/1949 — Citation by year

Cuttack Law Times

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ILR Hyderabad

ILR 1951 Hyd / 1951 — Citation by year

Hyde's Reports

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Income-tax Reports

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1933	1934	1935	1936	1937	1938	1939
8	9	10	11	12	13	14
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(L. R.) Indian Appeals

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1876–1877	1877–1878	1878–1879	1879–1880
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1884–1885	1885–1886	1886–1887	1887–1888
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1888–1889	1890	1891 1892	1893 1894

(L. R.) Indian Appeals *(contd.)*

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1909	1910	1911	1912	1913	1914	1915
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1930	1931	1932	1933	1934	1935	1936
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1937	1938	1939	1940	1941	1942	1943
71	72	73	74	75	76	
1944	1945	1946	1947	1948	1949	

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1915	1916	1917	1918	1919	1920
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1921	1922	1923	1924	1925	1926
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1927	1928	1929	1930		1931
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Indian Rulings

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Jammu & Kashmir Law Reports

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(I. L. R.) Karachi

ILR 1939 Kar / 1939 — Citation by year.

Kerala Law Times

1949 K L T / 1949 — Citation by year.

Knapp's Reports, Privy Council

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(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	From 1937 to 1947 citation			
1934	1935	1936	by year			

(Pak. L. R.) Lahore

Pak. L. R. 1948 Lahore
1948

Citation by year.

Lahore Law Journal

1	2	3	4	5	6	7
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Law Reporter, Allahabad

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9	10	11	
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(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946
22	23					
1947	1948					

(I. L. R.) Madhya Bharat
Citation by year from 1952

Madhya Bharat Law Journal
Citation by year from 1952

Madhya Bharat Law Reporter
Citation by year from 1952

(I. L. R.) Madras

1	2	3	4-5	6
1876-1878	1878-1880	1881	1882	1883
7	8	9	10	11	12	13
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14	15	16	17	18	19	20
1891	1892	1893	1894	1895	1896	1897
21	22	23	24	25	26	27
1898	1899	1900	1901	1902	1903	1904
28	29	30	31	32	33	34
1905	1906	1907	1908	1909	1910	1911
35	36	37	38	39	40	41
1912	1913	1914	1915	1916	1917	1918
42	43	44	45	46	47	48
1919	1920	1921	1922	1923	1924	1925

(I. L. R.) Madras *(contd.)*

49	50	51	52	53	54	55
1926	1927	1928	1929	1930	1931	1932
56	57	58	59	From 1937 citation		
1933	1934	1935	1936	is by year.		

Madras High Court Reports

1	2	3	4
1862-1863	1864-1865	1866-1868	1868-1869
5	6	7	8
1869-1870	1870-1871	1871-1874	1874-1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904
15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22-23	24-25	26-27	28-29	30-31	32-33	
1912	1913	1914	1915	1916	1917	
34-35	36-37	38-39	40-41	42-43	44-46	
1918	1919	1920	1921	1922	1923	
46-47	48-49	50-51	52-53	54-55	56-57	
1924	1925	1926	1927	1928	1929	
58-59	60-61	62-63	64-65	66-67	68-69	
1930	1931	1932	1933	1934	1935	
70-71						
1936	From 1937 citation is by year.					

Madras Law Times

1	2	3-4	5-6	7-8	9-10	11-12
1906	1907	1908	1909	1910	1911	1912
13-14	15-16	17-18	19-20	21-22	23-24	
1913	1914	1915	1916	1917	1918	
25-26	27-28	29	30-31	32-33	34-35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3-4	5-6	7-8	9-10	11-12
1914	1915	1916	1917	1918	1919	1920
13-14	15-16	17-18	19-20	21-22	23-24	
1921	1922	1923	1924	1925	1926	
25-26	27-28	29-30	31-32	33-34	35-36	
1927	1928	1929	1930	1931	1932	
37-38	39-40	41-42	43-44	45-46	47-48	
1933	1934	1935	1936	1937	1938	
49-50	51-52	53-54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59	60	61	62	63	64
1945	1946	1947	1948	1949	1950	1951
65						
1952						

Madras Weekly Notes

1910 MWN
1910

Citation by year.

Moore's Indian Appeals

1	2	3	4
1836-1837	1837-1841	1841-1846	1846-1851
5	6	7	8
1851-1854	1854-1857	1857-1859	1859-1861
9	10	11	12
1861-1863	1863-1866	1866-1867	1867-1869
13	14		
1869-1870	1870-1872		

Mysore Law Reports

1	2	3	4	5	6	7
1878	1879	1880	1881	1882	1883	1884

Mysore Law Reports *(contd.)*

8	9	10	11	12	13	14
1885	1886	1887	1888	1889	1890	1891
15	16	17	18			
1892	1893	1894	1895			

Mysore Chief Courts Reports

1	2	3	4	5	6	7
1896	1897	1898	1899	1900	1901	1902
8	9	10	11	12	13	14
1903	1904	1905	1906	1907	1908	1909
15	16	17	18	19	20	21
1910	1911	1912	1913	1914	1915	1916
22	23	24	25	26	27	28
1917	1918	1919	1920	1921	1922	1923
29	30	31	32	33	34	35
1924	1925	1926	1927	1928	1929	1930

Mysore High Court Reports

36	37	38	39	40	41	42
1931	1932	1933	1934	1935	1936	1937
43	44	45	46	47	48	49
1938	1939	1940	1941	1942	1943	1944
50	51	52	53	54	55	
1945	1946	1947	1948	1949	1950	

From 1951 citation is by year.

(I. L. R.) Mysore

ILR (1951) Mys. citation by year.

(I. L. R.) Nagpur

ILR 1936 Nag / 1936 Citation by year.

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	
1932	1933	1934	1935	1936	1937	

From 1938 citation is by year.

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904

Oudh Cases *(contd.)*

8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR / 1934 Citation by year.

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930
8	9	10	11			
1931	1932	1933	1934			

From 1935 citation is by year.

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928
8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935
15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942
22	23	24	25	26	27	28
1943	1944	1945	1946	1947	1948	1949
29	30	31				
1950	1951	1952				

Patna High Court Cases

1917 PHCC / 1917 Citation by year.

Patna Law Journal

1	2	3	4	5	
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940
22	23	24	25	26	27	28
1941	1942	1943	1944	1945	1946	1947
29	30					
1948	1949					

Patna Law Weekly

1	2–3	4–5
1916	1917	1918

Patna Weekly Notes

1936 PWN / 1936 Citation by year

Pepsu Law Reports

1	2	3
1949	1950	1951

I. L. R. (Patiala)

From 1952 citation by year.

(I. L. R.) Punjab or East Punjab

1 (E P)	2 (E P)	3	4	5
1948	1949	1950	1951	1952

Punjab Law Reporter

1900 PLR / 1900 Citation by year upto 1923 and then

27	28	29	30	31	32	33
1926	1927	1928	1929	1930	1931	1932
34	35–36	37	38	39	40	41
1933	1934	1935	1936	1937	1938	1939
42	43	44	45	46	47	48
1940	1941	1942	1943	1944	1945	1946
49	50	51	52	53	54	
1947	1948	1949	1950	1951	1952	

Punjab Records

1872 PR / 1872 Citation by year.

Punjab Weekly Reporter

1905 Pun W R / 1905 Citation by year.

(I. L. R.) Rajasthan

1	2
1951	1952

Rajasthan Law Weekly

1	2	3
1950	1951	1952

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929
8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR / 1937 Citation by year up to 1947.

Saurashtra Law Reporter

1	2	3	4	5
1948	1949	1950	1951	1952

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913
8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920
15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927
22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934
29	30	31	32			
1935	1936	1937	1938			

Supreme Court Appeals
(C W N Supplement)
Citation by year from 1952

Supreme Court Journal
Citation by year from 1951

Supreme Court Reports

1	2	3
1950	1951	1952

Sutherland's Weekly Reporter

1	2–4	5–6	7–8	9–10	11–12	13–14
1864	1865	1866	1867	1868	1869	1870
15–16	17–18	19–20	21–22	23–24	25	26
1871	1872	1873	1874	1875	1876	1877

Travancore-Cochin Law Reports

1949 / 1949 Citation by year.

(I. L. R.) Travancore-Cochin
Citation by year from 1951

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri	2 Civ
1892–1903	1892–1903

From 1904 citation by year upto 1913 and then 2 / 1914–1916

3	4
1917–1920	1921–1922

THE FIFTY YEARS' DIGEST
1901--1950

(Civil, Criminal & Revenue.)

VOLUME XIII

PUBLIC HEALTH (EMERGENCY PROVISIONS) ORDINANCE (1944)

—S. 11.

——S. 11—Rules under—Rr. 3 and 4—Scope — Contravention of—What amounts—Test to determine.

In order to determine whether an advertisement or a signboard offends against Rr. 3 and 4 of the rules framed under S. 11 of the Public Health (Emergency Provisions) Ordinance, 1944, the language of the advertisement and the signboard have got to be regarded as they would be regarded by the man in the street and not as they would be regarded by members of the medical profession looking at them with the eyes of specialists. If an ordinary individual member of the public reading the advertisement or signboard would read it as an advertisement of the cure of venereal disease, it must be held that it clearly contravenes the provisions of Rr. 3 and 4 of the rules framed under S. 11. A I R (V 34) 1947 Cal 382 : 48 Cr L J 231 : 229 Ind Cas 103.

PUBLIC HIGHWAY
See (1) Civil P. C., S. 91.
(2) Easements Act.
(3) Highway.

PUBLIC INTEREST
See (1) Civil P. C., Ss. 91 and 92.
(2) Criminal P. C., S. 195.

PUBLIC NUISANCE
See (1) Criminal P. C., Ss. 91 and 133 to 143.
(2) Penal Code, Ss. 268 and 290.
(3) Tort—Nuisance.

PUBLIC OFFICE
See (1) C. P. Code, S. 9.
(2) Contract Act, S. 23.
(3) T. P. Act, S. 6.

PUBLIC OFFICER
See (1) Civil P. C., Ss. 2 (17) and 80.
(2) Criminal P. C., S. 197.
(3) Judicial Officers' Protection Act (1850).
(4) Penal Code, Ss. 21 and 161.
(5) Prevention of Corruption Act.

PUBLIC PLACE
See (1) Penal Code, S. 160.
(2) Public Cambling Act, 1867, S. 13.

PUBLIC POLICY
See Contract Act, 1872, S. 23.

PUBLIC PROSECUTOR
See Criminal P. C., Ss. 492, 494 and 495.

PUBLIC PURPOSE
See Land Acquisition Act.

PUBLIC RELIGIOUS TRUST
See (1) Civil P. C., S. 92.
(2) Hindu Law—Religious Endowment.
(3) Madras Hindu Religious Endowments Act (2 of 1927).
(4) Muhammadan Law—Wakf.
(5) Religious Endowment.
(6) Religious Endowments Act.
(7) Trusts.

PUBLIC RIGHT
See (1) Civil P. C., S. 92.
(2) Highway.

PUBLIC ROAD
See (1) Highway.
(2) Tort.

PUBLIC SERVANT
See (1) Civil P. C., Ss. 2 (17), 80 and O. 27.
(2) Criminal P. C., S. 197.
(3) Judicial Officers' Protection Act, 1850.
(4) Penal Code, Ss. 21 and 161.
(5) Prevention of Corruption Act.
(6) Public Servants (Inquiries) Act, 1850.
(7) Tort—Secretary of State.

PUBLIC SERVANTS (INQUIRIES) ACT (37 of 1850)

——Commissioners appointed under the Public Servants (Inquiries) Act (37 of 1850), to enquire into the conduct of a public servant, are a 'Court', within meaning of S. 195, Criminal P. C. and a complaint by them is necessary for prosecution in respect of offences committed before them. A I R (V 18) 1931 Lah 662 : 12 Lah 391: 32 Cr L J 1252: 32 P L R 939: 134 Ind Cas 818.

—S. 25.

——S. 25 — Tenure of civil servants is at pleasure of Crown — Suit for damages for dismissal on contractual basis does not lie — Such suit is barred by Public Servants (Inquiries) Act, 1850, S. 25 A I R (Vol 21) 1934 Mad 516 : 57 Mad 857 : 40 L W 146 : 67 M L J 123 : 154 Ind Cas 881 (DB).

PUBLIC STORES ACT, 1875 (38 & 39 Vic. Ch. 25)

——It is doubtful whether provisions of the Act are similar to those of S. 156 (1), Army Act. A I R (Vol 32) 1945 Cal 363 : 49 C W N 229 : 47 Cr L J 95 : 221 Ind Cas 154 (DB).

PUBLIC STREET
See (1) Civil P. C., S. 91.
(2) Highway.

PUBLIC SUITS VALIDATION ACT (11 of 1932)
——Scope.
One of the avowed objects of the Public Suits Validation Act is to validate suits pending at the time of its enactment which would otherwise be invalid by reason of the previous sanction of the Local Government not having been obtained as required by S. 93, Civil P. C. Under this Act, it is not necessary for a plaintiff to obtain any sanction of the Local Government during the pendency of the suit. A I R (Vol 20) 1933 Oudh 22 : 9 O W N 966 : 8 Luck 266 : 140 Ind Cas 896 (DB).

—S. 2.
——Ss. 2, 3—Scope—Dismissal of suit — Subsequent passing of Act—Restoration of suit on petition under S. 3—Court, duty of.
Section 3 is concerned only with the question of restoration by the trial Court of a suit which had been dismissed merely on the ground of defect in the sanction required by S. 93, Civil P. C. Once the order of restoration is made, the suit will have to be proceeded with and proceeded with in accordance with law. Section 2 is already a part of the law of the land and if, by its terms, the section is applicable to the suit as it then was, there can be no question that the suit cannot again be dismissed but should be proceeded with if S. 2 warrants such a procedure.

Where, at the time when the Act was passed, an appeal from the decree of the trial Court dismissing the suit was competent and open to the plaintiff, the suit is a pending suit within the meaning of S. 2 and once it is established that the suit was pending at that point of time, the provisions contained in S. 2 at once come into play. Section 2 being applicable to the suit as it then was there can be no question that the validity or otherwise of the consent with which the suit was originally instituted could no longer be enquired into and would consequently form no ground for dismissal of the suit once again. A I R (Vol 23) 1936 Cal 815 : 63 C L J 70 : 166 Ind Cas 954 (DB).

PUBLIC TEMPLE
See (1) Civil P. C., S. 92.
(2) Hindu Law—Religious Endowment.
(3) Religious and Charitable Endowment.

PUBLIC THOROUGHFARE
See (1) Civil P. C., S. 91.
(2) Highway.

PUBLIC TRUST
See (1) C. P. Code, S. 92.
(2) Hindu Law—Religious Endowment.
(3) Madras Hindu Religious Endowments Act.
(4) Muhammadan Law—Waqf.
(5) Religious Endowments.
(6) Religious Endowments Act.
(7) Trust.
(8) Trusts Act.

PUBLIC UTILITIES ACT (CANADA), 1927.
—S. 22.
——Ss. 22, 59—Contract for supply of public utility for more than ten years—Validity.
The capacity of a Company to contract for the supply of a public utility is by Ss. 22 and 59, Public Utilities Act (Canada), restricted to a period not exceeding ten years. A contract which purports to, or which may, on its terms, extend beyond that period is valid and binding during the period. A I R (Vol 26) 1939 P C 59 : 181 Ind Cas 444.

PUBLIC WAY
See (1) Civil P. C., S. 91.
(2) Highway.
(3) Tort.

PUBLIC WORSHIP
See (1) Civil P. C., S. 9.
(2) Religious Endowment.

PUISNE MORTGAGE
See (i) Mortgage.
(ii) T. P. Act, S. 74.

PUNISHMENT
See (1) Criminal P. C., Ss. 31 to 35.
(2) Criminal Trial.
(3) Penal Code, Ss. 53 to 75.

PUNITIVE POLICE
See Police Act (1861), S. 15.

PUNJAB ACTS, RULES & ORDINANCES, ETC.
Agricultural Produce Markets Act (5 of 1939).
Alienation of Land Act (13 of 1900).
Alienation of Land (Second Amendment) Act (10 of 1938).
Arbitration Amendment Act (1 of 1911).
Borstal Act (11 of 1926).
Canal and Drainage Act (8 of 1873).
Canal Colony.
See Grant—Crown Grant.
Chief Court Circulars.
Chief Court Circulars, Rules and Orders.
Chief Court Rules.
Colonization of Government Lands Act (5 of 1912).
Consolidation of Holdings Act (4 of 1936).
Court-fees (Amendment) Act (7 of 1922).
Court of Wards Act (2 of 1903).
Courts Act (18 of 1884).
Courts Act (3 of 1914).
Courts Act (6 of 1918).
Custom.
See Custom (Punjab).
Custom (Power to Context) Act (2 of 1920).
Customary law.
See Custom (Punjab).
Debtors' Protection Act (2 of 1936).
District Boards Act (20 of 1883).
District Board (Tax Validating) Act (3 of 1927).
Disturbed Areas Act (1 of 1947).
Electoral Rules.
Excise Act (12 of 1896).
Excise Act (1 of 1914).
Excise Manual.
Food Grains (Movement Control) Order (1943).
Frontiers Crimes (Validation of Acts, Orders and Proceedings) Act (7 of 1944).
Frontiers Crimes (Validation of Acts Orders and Proceedings) Ordinance (1 of 1944).
General Clauses Act (1 of 1898).
Government Tenants Act (Imperial Act 3 of 1893).
High Court Rules.
Jail Manual.
Lambardari Rules.
Land Alienation Act (13 of 1900).
See Alienation of Land Act (13 of 1900).
Land Revenue Act (1871).
Land Revenue Act (17 of 1887).
Land Revenue Rules.
Laws Act (4 of 1872).
Limitation (Ancestral Land Alienation) Act (1 of 1900).
Limitation (Custom) Act (1 of 1920).
Loans Limitation Act (1 of 1904).
Loans Limitation Repealing Act (3 of 1923).
Minor Canals Act (3 of 1905).
Municipal Account Code.
Municipal Act (20 of 1891).
Municipal Act (3 of 1911).
Municipal (Executive Officer) Act (2 of 1931).
Municipal Works Rules (1925).
Opium Smoking Act (6 of 1923).
Ordinance (1 of 1944) and Act (7 of 1944).
Panchayat Act (2 of 1939).

Police Rules, Chapter 16.
Pre-emption Act (2 of 1905).
Pre-emption Act (1 of 1913).
Pre-emption (Amendment) Act (1 of 1944).
Public Safety Act (2 of 1947).
Public Safety Ordinance (14 of 1946).
Pure Food Act (8 of 1929).
Redemption of Mortgaged Lands Act (2 of 1913).
Registration of Money Lenders Act (3 of 1938).
Regulation (17 of 1806).
Regulation of Accounts Act (1 of 1930).
Relief of Indebtedness Act (7 of 1934).
Rent Restriction Acts, 1941, 1947 and 1949.
See Punjab Urban Rent Restriction Acts, 1941, 1947 and 1949.
Restitution of Mortgaged Lands Act (4 of 1938).
Restriction of Habitual Offenders Act (5 of 1918).
Sikh Gurdwaras Act (8 of 1925).
Small Towns Act (2 of 1922).
Tenancy Act (16 of 1887).
Tenancy (N.W.F.P.) Amendment Ordinance (5 of 1948).
Trade Employees Act (10 of 1940).
Urban Immovable Property Tax Act (17 of 1940).
Urban Rent Restriction Act (10 of 1941).
Urban Rent Restriction Act (6 of 1947).
Urban Rent Restriction Act (3 of 1949).
Village Panchayat Act (3 of 1922).
Village Panchayat Act (11 of 1939).
Village Watchman Rules.

PUNJAB AGRICULTURAL PRODUCE MARKETS ACT (5 of 1939).

——Object of.

The object and scheme of the Act is to give protection to the growers from unscrupulous businessmen and to afford facilities to them so that they may obtain a fair price for their produce. A I R (Vol 33) 1946 Lah 260: 48 Pun L R 49 (DB).

——Rules under Act, R. 29.

If a fee has once been paid to the Market Committee on cotton seed as part of the harvested crop, a second fee cannot be levied in the same area on the same cotton seed as a separated produce. A I R (Vol 31) 1944 Lah 432 : 46 P L R 298 : 46 Cr L J 37: 216 Ind Cas 87 (DB).

——S. 2.

——S. 2 (a)—Agricultural produce includes rice only in form of paddy and not milled rice.

The word 'harvested' as used in S. 2 (a) of the Act is synonymous with the word 'stored' or 'collected' and qualifies all the nouns, i.e., wheat, barley, rice, etc., that follow it and does not qualify 'cotton' alone. It is used in relation to the crop that has been gathered from the fields as such. Consequently the definition of 'agricultural produce' in S. 2 (a) will include rice only in the form of paddy and will not include milled or manufactured rice. A I R (Vol 33) 1946 Lah 260: 48 Pun L R 49 (DB).

——S. 2 (a)—"Agricultural produce"—Milled rice.

It is harvested rice alone that has been included in the definition of the phrase 'agricultural produce' given in S. 2 (a) of the Punjab Agricultural Produce Markets Act. Harvested rice is synonymous with the word paddy and does not include within its ambit manufactured or milled rice. A I R (Vol 33) 1946 Lah 260: 225 Ind Cas 320: 48 P L R 49 (DB).

PUNJAB ALIENATION OF LAND ACT (13 of 1900)

——S. 1.

1. Applicability and scope.
2. Civil Courts' powers.
3. Retrospective effect.
4. Sale and mortgage.

1. Applicability and scope.

——S. 1 — An Afridi is a Pathan within the meaning of the N. W. F. P. Government Notification No. 5345, dated 21st November 1908 issued under the Act. AIR (Vol 31) 1944 Pesh 32: 217 Ind Cas 25 (DB).

——S. 1 — N. W. F. P. Government Notification No. 5345 dated 21st November 1908 — Interpretation of.

It is not correct to say that in order to be a member of an agricultural tribe, a man must have held land or must have been residing in the District when the notification was issued in 1908. A person would be a member of an agricultural tribe within the meaning of the notification if he held land in the District specified in the notification at the time when the question of his being a member of an agricultural tribe arises. AIR (Vol 31) 1944 Pesh 32: 217 Ind Cas 25 (DB).

——S. 1 — N. W. F. P. Government Notification under No. 1380 G, dated 13th July 1904 — Words "ordinarily residing"—Meaning of.

The fact that a person moves to his ancestral home at a certain place for the summer does not mean that he "ordinarily resides" there within the meaning of the Notification No. 1380-G issued by the N. W. F. P. Government on 13th July 1904. A I R (Vol 30) 1943 Pesh 77: 209 Ind Cas 8 (DB).

——S. 1—Sale of an interest in the land even if conducted by the General Receiver and not by the Collector is a matter which has nothing to do with the Act. AIR (Vol 24) 1937 Lah 112: 171 Ind Cas 926.

——S. 1 — The Act does not debar one member of an agricultural tribe from selling his land to another ; the mere existence of alienations among the Gul Shahi Awans has no bearing on the question whether they belong to a notified agricultural tribe or not. AIR (Vol 22) 1935 Lah 899: 160 Ind Cas 902.

——S. 1—Additional charges effected before Act.

It is beyond dispute that the deeds creating additional charges on mortgages effected before the Act came into force do not attract the provisions of the said Act. (1934) 35 P L R 606 (DB).

——S. 1 — Non-agriculturist creditor inducing agriculturist to take liabilities of his agriculturist debtor and take a mortgage of debtor's land—Mortgage not prohibited.

It is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power. Where, therefare, such a person induces an agriculturist, to pay off a debt due from the debtor agriculturist, and take a mortgage of land from him as security for himself, there is nothing in law to prevent such a course.

It is immaterial whether the mortgagee pays in cash or gives his bond, nor has he anything to do with the correctness of the account or real amount due from the debtor beyond what the debtor himself admitted and asked the mortgagee to pay. A I R (Vol 15) 1928 Lah 962: 114 Ind Cas 52.

——S. 1 — Notice of foreclosure within one year before Act—Act applies.

The Land Alienation Act does apply to a case where the service of notice of foreclosure is effected within one year before the Act came into operation. The proceedings for the enforcement of foreclosure of mortgage comprising a stipulation of conditional sale remain pending until the year of grace has expired. A I R (Vol 10) 1923 Lah 299 : 82 Ind Cas 987 (DB).

2. Civil Courts' powers.

——S. 1 — Decree against agriculturist — Mode of execution — Power of Court to effect permanent mortgage.

In the case of a decree against an agriculturist, ordinarily resort should not be had to a permanent

mortgage for the purpose of satisfying the decree if other means or remedies are available, for instance, possession of movable property or a temporary alienation where such a measure would be sufficient to satisfy the decree.

But where the circumstances are such that satisfaction of the decree can only be obtained by a permanent mortgage, the executing Court is justified in taking this step. (1931) 134 Ind Cas 798: 32 P L R 643.

——S. 1 — **Attachment of judgment-debtor's land—Report of Collector, whether binding on Civil Court.**

Where the land of a judgment-debtor is attached and the Collector is consulted as to what farm of the land should be arranged and the Collector reports that the case is not fit one for a temporary alienation, the Civil Court is not bound to follow the Collector's opinion if the decree-holder objects to the Collector's report. (1931) 131 Ind Cas 92 (Lah).

——S. 1—**Temporary alienation — Collector's advice —Court bound to seek but not to follow.**

Under the Act, the Court, understanding instructions, must seek the Collector's advice regarding the term of years for which the temporary alienation should be ordered and should ordinarily follow it, but is not bound to do so. A I R (Vol 12) 1925 Lah 425 : 90 Ind Cas 228 : 26 P L R 202 : 7 L L J 212.

3. Retrospective effect

——S. 1 — The Act is intra vires qua sales and mortgages of agricultural land effected after commencement of Act — But it is ultra vires qua transactions effected before passing of Act. A I R (Vol 28) 1941 Lah 182 : 43 P L R 198 : 195 Ind Cas 17 (FB).

——S. 1—The Act is not retrospective. AIR (Vol 19) 1932 Lah 281 : 13 Lah 70 : 33 P L R 1003 : 137 Ind Cas 820 (DB).

——S. 1 — **Mortgage prior to Act — Kureshis—Suit after notification as agriculturists—Maintainable.**

A mortgage effected by a member of a Kureshi tribe prior to the date when the Kureshis were notified as agriculturists under the Punjab Alienation of Land Act (XIII of 1900) can be given effect to in a suit filed subsequent to the said notification No. 44, dated 4th March, 1911, by which the Kureshis were included in the list of agricultural tribes. A I R (Vol 10) 1923 Lah 673 : 76 Ind Cas 135.

——S. 1—**Notification.**

When a tribe is actually notified in the Gazette to be agricultural, then only it can be held as agricultural; the notification does not take effect retrospectively.

If the tribe to which the plaintiff belongs, is not notified as an agricultural tribe under the Act XIII of 1900 on the date of suit, the member of such a tribe cannot sue for pre-emption of agricultural land at all. A subsequent notification of the tribe does not cure the defect in plaintiff's title. 7 P R 1910 : 14 P W R 1910 : 49 P L R 1910 : 5 Ind Cas 249.

4. Sale and mortgage.

——S. 1 — A sale as well as a mortgage for an indefinite period which was against the provisions of Punjab Land Alienation Act (1900) could not be enforced. A I R (Vol 25) 1938 Lah 789 : 40 P L R 784 : 181 Ind Cas 465.

——S. 1 — **Land of agriculturist—Sale in insolvency proceedings—Proceeds paid to creditors and debtor discharged—Subsequent objection to sale.**

Though the land of a member of an agricultural tribe cannot be sold in insolvency proceedings where a sale has taken place and relying upon the payment of the sale proceeds to the creditors, the insolvent applied for his discharge and obtained such an order, he cannot subsequently be allowed to object to the sale on the ground that the lands could not be sold under the Punjab Alienation of Land Act. A I R (Vol 20) 1933 Lah 250 : 34 P L R 486 : 142 Ind Cas 812.

——S. 1—Where Rs. 4430 out of a sale consideration of Rs. 5000 was found to be for necessity:

Held, that the sale could not be converted into a mortgage. A I R (Vol 19) 1932 Lah 218 : 33 P L R 63 : 137 Ind Cas 582 (DB).

——S. 1 — **Decree for sale of property — Objection. whether can be raised in execution.**

Where a decree orders the sale of a certain property for the realisation of a debt, the objection that the judgment-debtor is an agriculturist and the property cannot be sold in execution by virtue of the provisions of the Act cannot be raised in execution proceedings. A I R (Vol 18) 1931 Lah 545 : 131 Ind Cas 229.

——S. 1—**Sanction by Collector to permanent alienation—Date of operation—Pre-emption.**

The sanction of the Collector under the Act to a permanent alienation relates back to the date of alienation which is therefore effective from the date on which it is made. AIR (Vol 1) 1914 Lah 184 : 56 P W R 1914 : 143 P L R 1914 : 25 Ind Cas 59.

—S. 2.

——S. 2 (3) — **Enlarged definition of "land" in S. 2 (3), cannot be referred to to interpret Government of India Act.**

Per Tek Chand J. — Even with regard to sales and mortgages, the provisions of the Alienation of Land Act, which are preserved by sub-s. (2) of S. 298, must now be restricted only to agricultural land as used in its ordinary sense (i. e. land which is used for purposes of agriculture or purposes subservient to agriculture) and not in the extended meaning given to it in S. 2 (3), Punjab Alienation of Land Act. The Government of India Act does not contain any definition of "agricultural land"; the enlarged definition given in the Punjab Alienation of Land Act cannot, obviously, be referred to, to interpret an Act of Parliament. A I R (Vol 29) 1942 Lah 243 : 44 P L R 382 : 203 Ind Cas 404 (DB).

——S. 2 (3)—**"Land"—Test—Onus.**

The question whether land is or is not agricultural, is not to be determined on description in the revenue papers though these are valuable as throwing light on how much land has actually been used for a certain number of years. All the facts and the circumstances must be taken together in determining whether land is or is not agricultural land within the meaning of the definition. The mere fact that a judgment-debtor, as a last and desperate resort, proceeds to cultivate a few patches of land which has never been used for agriculture would not make the land agricultural land; nor would the fact that the land had lain fallow for one or two or more years necessarily make the land cease to be agricultural land.

The circumstances that the very long lapse of time during which the land has not been cultivated and the fact that the land is situate near the abadi within Municipal limits, and the fact that adjacent land is either a part of the abadi or is being used for building sites, would tend to show that the land had ceased to be agricultural land unless the judgment-debtor rebutted the presumption arising from all these circumstances by showing some circumstances which would tend to rebut the inference deducible from these circumstances. The onus is on the judgment-debtor to show that the land in dispute falls within definition of 'land' in S. 2 (3). A I R (Vol 27) 1940 Lah 438 : 42 P L R 499 : 191 Ind Cas 417 (DB).

——S. 2 (3)—**"Land", what is.**

'Land' should not be considered to fall within the

definition under S. 2 (3) unless it is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture or falls under the categories (a) to (g). The land which has been continuously used for a brick kiln from a long time does not fall within the definition under S. 2 (3). AIR (Vol 27) 1940 Lah 126 : 189 Ind Cas 782.

——S. 2 (3)—"Land", what is.

Where a plot of land which originally belonged to a non-agriculturist is shown in the revenue records till recently as banjar and is situated within the Municipal limits in a new abadi, it is not a "land" within the definition given in S. 2 (3). A I R (Vol 25) 1938 Lah 354 : 40 P L R 57 : 181 Ind Cas 140.

——S. 2 (3)—Land—Test—Onus.

The fact that the land is still assessed to revenue will not necessarily prove that it is "land" as defined in S. 2.

It is for the judgment-debtor and not for the decree-holder to prove that the property in dispute is "land" as defined in S. 2 (3) and therefore, exempt from attachment and sale. A I R (Vol 25) 1938 Lah 353 : 177 Ind Cas 434.

——S. 2 (3)—Land—Trees.

As trees cannot be brought within the four corners of the definition of 'land' in S. 2 (3), trees are not subject to the provisions of the Act and are liable to attachment and sale in execution of a decree. A I R (Vol 23) 1936 Pesh 47 : 161 Ind Cas 106 (DB).

——S. 2 (3)—Land.

The sites of the buildings and other structures referred to in S. 2 (3) (a) are those that exist on a portion of land which is actually under cultivation or is let or occupied for agricultural purposes or for purposes subservient to agriculture. A I R (Vol 22) 1935 Lah 901 : 160 Ind Cas 540.

——Ss. 2 (3), 15—Trees.

Trees, whether fruit trees or otherwise, cannot be considered to be "land" within S. 2 (3). Reading Ss. 2 (3) and 15 together, the term "land" in S. 2 (3) must be confined to the ordinary meaning of "land" especially as there is a distinction drawn in the Act itself between land and the products of the earth of land. A I R (Vol 20) 1933 Lah 880 : 144 Ind Cas 691 (1) and A I R (Vol 7) 1920 Lah 351 : 58 Ind Cas 638, Overruled. A I R (Vol 22) 1935 Lah 202 : 37 P L R 821 : 155 Ind Cas 659 (FB).

——Ss. 2 (3), 16—"Land"—Trees.

Trees are not land within the meaning of S. 2 (3) and therefore, the statutory prohibition in S. 16 (1) does not apply in the case of date trees. AIR (Vol 20) 1933 Lah 589 : 34 P L R 780 : 144 Ind Cas 690.

——S. 2 (3)—Mortgagee rights in land fall within the definition of 'land' given in the Act. A I R (Vol 20) 1933 Lah 91 : 34 P L R 163 : 141 Ind Cas 404.

——S. 2 (3)—Agricultural land — Nature of land at the date of alienation.— Subsequent transformation immaterial—Land paying revenue—Not necessarily agricultural.

The period to determine whether a land is agricultural or not, is the date of the sale or mortgage and a later transformation of the property would not affect the merits of the transaction. The mere fact that a land pays land revenue does not make it agricultural land as land revenue would continue to be assessed on land even though it is subsequently included in a village or town. AIR (Vol 16) 1929 Lah 164 : 115 Ind Cas 417 : 30 P L R 516.

——S. 2 (3)—"Land"—House in abadi.

A house in the abadi is not "land" within the definition of land as given in S. 2 (3). A I R (Vol 14) 1927 Lah 391 : 101 Ind Cas 592.

——Ss. 2 (3), (6)—'Land', if includes trees.

The term 'land' as defined in the Act includes trees situated on a land belonging to a member of the agricultural tribe; and so they cannot be sold in execution of a decree against an agriculturist. A I R (Vol 7) 1920 Lah 351 : 108 P R 1919 : 58 Ind Cas 638. Overruled in A .I. R. 1935 Lah 202 (FB).

——Ss. 2 (3) & 16—"Land"—Trees growing on land —Attachment.

The definition of "land" in S. 2 (3) of the Act is not exhaustive. Although the maxim quicquid plantatur solo solo cedit cannot be accepted in India as having the wide meaning attached to it in England it does cover the case of trees growing on the land. Standing trees are included in the definition of land in S. 2 (3) of the Act and are exempt from attachment and sale under S. 16 of the Act. AIR (Vol 7) 1920 Lah 7 : 54 Ind Cas 38.

——S. 2 (3)—"Right to receive rent", meaning of.

'A right to receive rent which is included in the definition of 'land' means a right to receive rent payable in future and not a right to realise arrears of rent already due. A I R (Vol 1) 1914 Lah 56 : 132 P W R 1914 : 230 P L R 1914 : 13 P R 1915 : 25 Ind Cas 68 (DB).

——S. 2 (3)—'Land', if includes mortgagee's rights in land.

The mortgagee's rights in land, prohibited by the Act to be alienated, are land within S. 2 (3). 12 P R 1911 : 6 P L R 1911 : 23 P W R 1911 : 9 Ind Cas 396 (DB).

——S. 2 (3) (b) — Trees on land of agriculturist, if liable to attachment.

The protection afforded by S. 2 (3) (b) extends only to incorporeal rights and therefore trees standing on the land of an agriculturist are liable to attachment in execution of a decree. A I R (Vol 7) 1920 Lah 71 : 68 P L R 1919 : 54 Ind Cas 262.

——S. 2 (8) (as amended by Act 10 of 1938) — Obiter: —(Per Dalip Singh J.)—The amendments introduced in the Punjab Alienation of Land Act by Act X of 1938 show that the Legislature did not think that S. 2 (8) was sufficient by itself to give a right of appeal against the orders of the Deputy Commissioner under any of the provisions of the Punjab Alienation of Land Act. AIR (Vol 29) 1942 Lah 194 : 44 P L R 353 : ILR (1942) Lah 758 : 202 Ind Cas 45 (FB).

——S. 2 (8) (as amended by Act 10 of 1938) — Section 2 (8) introduced by Act X of 1938 is not retrospective. AIR (Vol 29) 1942 Lah 194 : 44 P L R 353 : ILR (1942) Lah. 758 : 202 Ind Cas 45 (FB).

—S. 3.

——S. 3 — Exchange by agriculturists with non-agriculturists in Peshawar District is unaffected by Punjab Alienation of Land Act, S. 3. A I R (Vol 31) 1944 Pesh 37 : 215 Ind Cas 118 (DB).

——Ss. 3 and 14 — Acquisition in Peshawar District before March 10, 1922—Sanction was not necessary.

When the N. W. F. P. was separated from the Punjab, the Act was in force in the N. W F. P. but by a Notification No. 368-H of 18th August 1911, the District of Peshawar was exempted from the provisions of that Act other than Ss. 4, 10 and 16 and the Act was not re-applied to that district until that notification was cancelled by Notification No. 577-G of 10th March 1922. Consequently, before 10th March 1922, the sanction of Deputy Commissioner was in no circumstances necessary for acquisition of land in the District of Peshawar. AIR (Vol 31) 1944 Pesh 32 : 217 Ind Cas 25 (DB).

——S. 3—Operation of S. 3 — Government of India Act, 1935 (25 and 26 Geo V, Ch. 42), Ss. 298, 292, 293, effect of — Legality of alienations other than sale or mortgage.

Since two forms of alienations alone, namely, sales and mortgages are specifically mentioned in the saving clause in S. 228 (2), Government of India Act,

the others must be taken to have been excluded. The rule of construction is expressum facit cassvre tacitum (what is expressed makes what is not expressed to cease). Therefore, only those parts of the Punjab Alienation of Land Act are now in force in the Punjab which relate to sales and mortgages of agricultural land and the remaining provisions of that Act prohibiting or restricting other forms of alienations, being repugnant to sub-s. (1) of S. 298, Government of India Act, 1935 and not being within the exception contained in sub-s. (2) of that section are no longer law after 1st April 1937.

The effect of S. 298, Government of India Act, therefore, is that on and after 1st April 1937, a person belonging to a notified agricultural tribe under S. 3, Punjab Alienation of Land Act is free to exchange, gift or bequeath agricultural land or grant occupancy rights in it to a person who does not belong to any of the agricultural tribes in the same group and this, in spite of the provisions of Ss. 292, 293, Government of India Act. AIR (Vol 28) 1941 Lah 27 : 192 Ind Cas 303, Overruled. AIR (Vol 29) 1942 Lah 243 : 44 P L R 382 : 203 Ind Cas 404 (DB).

——**S. 3—(Before amendment by Act 10 of 1938) — Finality of—Deputy Commissioner's sanction.**

Per Full Bench.—The grant of sanction to a member of an agricultural tribe under S. 3 is within the absolute discretion of the Deputy Commissioner and there is nothing in the section to indicate that his discretion, once exercised, can be interfered with by any other authority. On the other hand, the plain wording of the section shows that as soon as sanction is granted the permanent alienation 'takes effect as such;" in other words, there is a valid transfer of ownership from the alienor to the alienee.

Both a priori and on a strict interpretation of the words of the statute as they stood before the Amending Act (X of 1938), the Legislature did not contemplate that there should be any appeal or revision from the sanction given by the Deputy Commissioner to a contemplated or completed alienation. The provisions of the Punjab Land Revenue Act relating to appeals and revisions are not applicable to a sanction given under S. 3. A I R (Vol 26) 1939 Lah 526 : 186 Ind Cas 332, Overruled. AIR (Vol 29) 1942 Lah 194 : 44 P L R 353 : ILR (1942) Lah 758 : 202 Ind Cas 45 (FB).

——S. 3 — (Before amendment by Act 10 of 1938) — Instruction to Deputy Commissioner by Financial Commissioners contained in para. 37, Douie's Land Administration Manual relating to sanction under S. 3 are departmental — Non-compliance with them does not render sanction under S. 3 invalid. A I R (Vol 29) 1942 Lah 194 : 44 P L R 353 : I L R (1942) Lah 758 : 202 Ind Cas 45 (FB).

——Ss. 3, 14—Benami sale—Sale of land by statutory agriculturist to another statutory agriculturist—Real purchaser not statutory agriculturist :

Held, that collaterals of vendor cannot challenge sale. AIR (Vol 27) 1940 Lah 47 : 41 P L R 704 : 186 Ind Cas 577.

——S. 3—Member of agricultural tribe selling land to non-member without the sanction required under S. 3—Vendees remaining in possession for 23 years—Subsequent application for sanction after 23 years—Sanction refused :

Held, that possession as a usufructuary mortgagee was only for 20 years. Subsequent possession for 3 years was as a trespasser and the claim for adverse possession could not succeed. AIR (Vol 24) 1937 Lah 408 : 38 P L R 391 : I L R (1938) Lah 183 : 173 Ind Cas 520.

——S. 3 — Revenue Officer making enquiry into indebtedness of alienor while sanctioning alienation :

Held, that the alienation can be challenged on ground of want of consideration and necessity. A I R (Vol 24) 1937 Lah 322 : 173 Ind Cas 710 (DB).

——**Ss. 3, 21—Gift made in good faith for religious or charitable purposes—Sanction, if necessary — Jurisdiction.**

If a gift can be held to be in good faith for a religious or charitable purpose, the question of the sanction by the Deputy Commissioner does not arise at all. Therefore, S. 21 does not oust the jurisdiction of the Civil Courts to decide whether the gift is made in good faith for a religious or charitable purpose. AIR (Vol 23) 1936 Lah 129 : 161 Ind Cas 672.

——**S. 3 — Sale of trees in execution of decree apart from land—Absence of intention to sell land.**

There is no contravention of the provisions of the Act if, in execution of a decree, trees are sold apart from the land as trees are not land within the meaning of the Act. To avoid any misunderstanding, it is desirable that in such cases the Court should make it clear in its order that the land underneath is not being sold.

The question whether the sale of trees necessarily involves the sale of the land underneath as a legal incident is one of intention. Where the Court has ordered the sale of trees because the land cannot be sold, there is no intention to sell the land. AIR (Vol 22) 1935 Lah 324 : 156 Ind Cas 793 (DB).

——**S. 3—Legality of.**

There is nothing illegal or opposed to public policy in one agriculturist taking the land of another agriculturist on mortgage undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist. A I R (Vol 21) 1934 Lah 433 : 35 P L R 361 : 36 Cr L J 20 : 152 Ind Cas 224.

——**S. 3—Dayas of Jhang.**

Dayas of Jhang are not a sub-division of the Jats. An alienation by a member of that tribe cannot be held to be an alienation by an agricultural tribe. AIR (Vol 20) 1933 Lah 58 : 145 Ind Cas 245.

——**Ss. 3, 14, 21 (a) — Non-agriculturist female marrying agriculturist—Change of status—Transfer opposed to Act—Duty of Court.**

A Muhammadan woman who is not a member of an agricultural tribe does not, by marrying an agriculturist, become a member of an agricultural tribe for the purposes of the Act.

A transaction which is opposed to the provisions of the Act, is not void. The Act only modifies its operation in case the Deputy Commissioner does not sanction it in the form in which it is entered. Therefore, where the Court finds that the transferee is not a member of an agricultural tribe, it should not declare the transaction void but should send a copy of its decree or order under S. 21 (a) to the Deputy Commissioner for sanction. A I R (Vol 20) 1933 Pesh 1 : 141 Ind Cas 268 (DB).

——**S. 3—Alienation in contravention — Sale by member of agricultural tribe to non-members is invalid.**

M mortgaged a plot of land to B. After M's death his widow K sold the land to the mortgagee B. M's reversioners brought a suit impeaching the alienation and to get funds for the litigation they entered into an agreement with L and S on 24th June, 1897, in pursuance of which half the land was to be given to L and S in the event of success. The reversioners succeeded and L and S obtained possession of the land in June 1921.

Held, that even if the transaction of 24th June 1897 by the reversioners was only an agreement to sell and not a sale, the sale took place on the date when L and S took possession of the land and as on that date the Punjab Land Alienation Act was in force and as L and S were not members of agricultural tribe, the sale to them by reversioners of M who

were members of agricultural tribe could not take place. 27 P L R 1906, Diss. from. AIR (Vol 17) 1930 Lah 140 : 30 P L R 747 : 121 Ind Cas 72 (DB).

——S. 3—Alienation in contravention of law—Mutation in vendee's name—Illegal—No title passes.

Where the alienation is in contravention of the provisions of Alienation of Land Act, the mere fact that mutation was effected in the name of the vendee does not confer any title upon him. The mutation is illegal in such a case. A I R (Vol 16) 1929 Lah 68 : 109 Ind Cas 633.

——S. 3—Burden of proof—Onus on person claiming membership—Benefit of doubt not applicable.

Law does not recognize the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. Burden of proving that a person is of an agriculturist tribe is on him, especially when entries in settlement record are against him. A I R (Vol 13) 1926 Lah 434 : 94 Ind Cas 158.

——S. 3—Trees.

The onus of proving that the Act prohibits the sale of trees is on the party contesting the sale. AIR (Vol 12) 1925 Lah 29 : 5 Lah 385 : 84 Ind Cas 89 (DB).

——S. 3—Trees.

Trees are not land as defined in the Act. AIR (Vol 12) 1925 Lah 29 : 5 Lah 385 : 84 Ind Cas 89 (DB).

—S. 3.

——Tea gardens.

The tea gardens of Gopalpur Tea Estate are agricultural lands within the meaning of S. 3, sub-s. 1 of the Pre-emption Act. AIR (Vol 11) 1924 P C 1 : 22 A L J 40 : 33 M L T 470 : 1924 M W N 172 : 51 I A 11 : 5 L R P C 55 : 5 Lah 50 : 29 C W N 395 : 46 M L J 536 : 79 Ind Cas 946.

——S. 3—Application for sanction — Sanction after alienation valid — Sanction, matter of discretion of Deputy Commissioner.

There is no provision in the Punjab Alienation of Land Act that an application for sanction must be made before an alienation takes place; sanction can be given after the act of alienation has otherwise been completed.

Although sub-s. (3) of S. 3 of the Punjab Alienation of Land Act provides that the Deputy Commissioner shall inquire into the circumstances of the alienation, the Deputy Commissioner has discretion to refuse or grant sanction; and once sanction is granted, the sale in respect of which it is granted becomes immune from Pre-emption Act, and the sanction cannot be objected to on the ground that the Deputy Commissioner did not make an enquiry. (1921) 63 Ind Cas 700 (Lah).

——S. 3—Alienation—Covenant to convey in future.

A covenant by a vendor that he would convey an equal extent of land in case the vendee was dispossessed of the plots actually conveyed, is not an alienation in praesenti but an agreement to convey in future and effected by S. 3. AIR (Vol 2) 1915 Lah 310 : 83 PWR 1915 : 166 PLR 1915 : 29 Ind Cas 751 (DB).

——Ss. 3 (2), 14, 21A (2) — Decree in violation of S. 3 (2)—Remedy—S. 14, application of—Alienation by decree of Court — Deputy Commissioner's power to change nature of alienation.

The only course open to the Deputy Commissioner in a case where a decree is passed by a Civil Court which offends against the provisions of S. 3 (2) and this defect is brought to the notice of the Deputy Commissioner is that under S. 21A (2) which authorises him to move the higher Civil Court for revision in accordance with the Act. The permanent alienation cannot be converted by himself under S. 14 into a temporary one. A I R (Vol 21) 1934 Lah 947 : 35 PLR 709 : 16 L 56 : 155 Ind Cas 615 (DB).

——S. 3 (2)—Decree passed in violation of S. 3 (2)—Legality.

A decree passed in violation of the terms of S. 3 (2) is not a nullity. Such a decree, unless set aside in appeal or revision, cannot be treated as a nullity. It is not a decree passed without jurisdiction. AIR (Vol 21) 1934 Lah 947 : 53 P L R 709 : 16 L 56 : 155 Ind Cas 615 (DB).

——S. 3 (2)—Amending Act, 1 of 1907—S. 9.

Decree in contravention of the Act is not a nullity unless set aside in revision or appeal. Civil Court should bring such a decree to the notice of Deputy Commissioner. 3 PWR 1909 : 211 PLR 1908 : 60 PR 1909 : 1 Ind Cas 13.

——S. 3 (2) (b) — Scope —Validity of gift— Conditions.

Section 3 (2) (b) of the Punjab Alienation of Land Act is not confined in its operation merely to cases of religious or charitable endowments. But in order to bring a gift within the purview of Cl. (b), it must be shown that the donor had in view some religious or charitable purpose which was the real object of his bounty and which was intended to be benefited by the gift.

The clause cannot be extended to a case in which the gift has been made without having any such purpose in view even though the donor may have been induced to make the gift by religious or charitable motive and may even believe that the gift would confer some religious merit on him. The object of the bounty need not necessarily be of a public character but the gift must certainly be intended to do something more than confer a personal benefit on the donee.

It may be that if a gift is made to a Brahman on some particular occasion and, in circumstances, in which it is generally believed by the community to which the donor belongs to be calculated to confer some religious or spiritual benefit on the donor, such a gift may reasonably be held to fall within the purview of the clause in question.

But a gift of land made to a Brahman merely on account of his being a purohit of the donor even though believed by such donor to be meritorious from a religious point of view cannot attract the application of the clause. A I R (Vol 36) 1949 East Punj 182.

—S. 4

——S. 4—Notification under—Retrospective effect.

A notification notifying a person or a tribe as members of a notified agricultural tribe will not confer rights which would prevent mortgages entered into by such persons to be enforced in Courts of law and mortgaged properties sold in execution of decrees so obtained, if the mortgages are of date prior to the 'notification'. A I R (Vol 37) 1950 East Punj 282 (DB).

——Ss. 4, 21 — Government previously declaring certain persons as members of agricultural tribe — Government if can subsequently declare those persons as not members of agricultural tribe.

Section 4 does not provide that the power of the Provincial Government to determine what persons are to be deemed to be members of agricultural tribe will be exhausted if it has once been exercised. It can continue to determine from time to time what bodies of persons in any district or groups of districts are to be deemed to be as agricultural tribes or groups of agricultural tribes.

If the Government had decided previously that certain persons were members of an agricultural tribe, there is nothing in the Act that could preclude it from determining subsequently that those who were once held to be members of an agricultural tribe would not, in future, continue to be regarded as members of such a tribe. AIR (Vol 30) 1943 Lah 305:

45 P L R 228 : I L R (1944) Lah 538 : 210 Ind Cas 272.

——S. 4 (as amended by Act 10 of 1938).

Section 4 (2) and (3) is intended to do away with the former provisions of the law under which decrees of Civil Courts passed in suits brought by individuals to have it declared that they do or do not belong to a particular tribe were binding on Revenue Officers and executive authorities. There is in the amending Act nothing to indicate that S. 4 (2) and (3) is intended to or did, in fact, cut down or otherwise affect the jurisdiction of the Civil Appellate Court or the High Court dealing with cases which are brought before these Courts by the Deputy Commissioner himself under the special procedure provided for in S. 21A. AIR (Vol 30) 1943 Lah 10 : 44 P L R 533 : ILR (1943) Lah 731 : 204 Ind Cas 148 (DB).

——S. 4 — Person holding land for time being as owner subject to possibility of Deputy Commissioner altering conditions.

In the Notification No. 1380-G, dated 13th July 1904 issued under S. 4, the word "holding" is to be interpreted in the absence of any definition in the Act in its ordinary dictionary meaning and when a man is holding land for the time being as an owner but subject to the possibility of the Deputy Commissioner altering the conditions under which he holds it, he must be considered to be a holder of land. AIR (Vol 29) 1942 Pesh 81 : 203 Ind Cas 203.

——S. 4—Groups in Act are territorial.

The groups in the Land Alienation Act, are territorial and a person who is a notified agriculturist in one district need not be an agriculturist for the purposes of the Land Alienation Act in another district. Similarly, a person belonging to a particular tribe or caste may be an agriculturist in a particular Tahsil for the purposes of acquiring property in that Tahsil and enjoying the other benefits of the Act in that Tahsil. Hence, a person cannot be regarded as statutory agriculturist merely because he belongs to a caste which has been notified as statutory agriculturist in a particular Tahsil and because his ancestors originally came from the same Tahsil. AIR (Vol 25) 1938 Lah 784 : 40 P L R 681 : 179 Ind Cas 815.

——S. 4—Sayed Alawi, whether agriculturist.

Quaere. — Whether a Sayed Alawi belongs to the general category of Sayeds and is, therefore, entitled to the advantages conferred upon this tribe in the District of Gurgaon under the Act. A I R (Vol 20) 1933 Lah 243 : 33 P L R 906 : 139 Ind Cas 712 (DB).

——S. 4—'Alienation,' meaning of — Fresh advance to mortgagee in possession on same terms, whether new mortgage—Validity.

Where a person belonging to an agricultural tribe mortgaged agricultural land with possession to a non-agriculturist before the enactment and, after the passing of the said Act, executed in favour of the mortgagee a deed declaring that he had taken from him a further advance of a certain amount on the security of the same property on the same conditions on which the original mortgage had been effected :

Held, that the subsequent transaction did not amount to a fresh alienation of an interest in the land and did not, therefore, contravene the provisions of the Act.

Dicta. — (When will the new transaction amount to fresh mortgage or a sale pointed out.) AIR (Vol 19) 1932 Lah 465 : 13 L 660 : 33 PLR 847 : 139 Ind Cas 49 (FB).

——S. 4 — Adoption of a profession — Effect of — Marriage with non-agriculturist.

The adoption of a profession cannot change a man's status for the purposes of the Act. Members of agricultural tribe do not cease to hold their status as such, if they adopt or if their ancestors adopted, prostitution as a profession nor can such adoption vary their custom in respect of inheritance.

Obiter.—If a Muhamadan belonging to an agricultural tribe marries a woman who is not a member of such a tribe, she does not attain the status of a member of his agricultural tribe. A I R (Vol 7) 1920 Lah 109 : 55 Ind Cas 236 (FB).

——S. 4 — Inclusion as an agricultural tribe in list under—Effect.

The inclusion of a tribe in the list under S. 4 of the Act is not conclusive proof that the tribe has adopted the general rule of customary law. 270 PLR 1913 : 171 PWR 1913 : 20 Ind Cas 207 (DB).

——Ss. 4 and 24—If affected by Notification No. 84.

The Punjab Govt. Notification No. 84 of 14th May 1902 under S. 24 of Act 1 of 1900 does in no way affect the provisions of S. 4 of Act 1 of 1900. 61 P W R 1909 : 7 P L R 1909 : 4 Ind Cas 551 (DB).

——S. 4 (1) and Proviso (as amended by Act 10 of 1938).

Mortgage decree passed—Mortgagor subsequently declared agriculturist under S. 4 (1) :

Held, that the alteration cannot attract the provisions of S. 16. The proviso of S. 4 also cannot be construed as a proviso to the new sub-section, viz. (1) and (2) to S. 4 and as saving only those decrees which declared a person to be an agriculturist or a non-agriculturist. A I R (Vol 29) 1942 Lah 14 : 43 P L R 646 : I L R (1942) Lah 464 : 198 Ind Cas 28 (DB).

——S. 4 (2)—Suit for declaration that plaintiffs are Awans by caste and not Maliars — S. 4 (2) does not apply.

If a person, who does not enjoy the status of a member of a notified agricultural tribe claims that he is really a member of the tribe, then the matter is certainly within the jurisdiction of the Deputy Commissioner as provided in S. 4 but where a person is already enjoying the status of a member of a notified agricultural tribe under the Punjab Land Alienation Act and he has all the privileges which that Act gives, then no question under the Act can possibly arise which the Deputy Commissioner can determine. Both Awans and Maliars are members of notified agricultural tribes in the district of Jhelum.

They are both members of the same group of agricultural tribes. Hence in a suit for a declaration to the effect that the plaintiffs are Awans by caste and that they have been erroneously entered in the revenue records as Maliars, there is no contest between the plaintiffs and the defendants as to whether the plaintiffs are or are not members of a notified agricultural tribe. Therefore sub-s. (2) of S. 4, Punjab Alienation of Land Act, has no application whatever to such a case and the Civil Court is entitled to give the plaintiffs the declaration as regards their caste and status. AIR (Vol 33) 1946 Lah 424 : 48 Pun L R 64 : 227 Ind Cas 415 (DB).

—S. 6

——S. 6—Further advance on security of mortgage of land on same conditions, if a new mortgage.

Where a mortgagor, having already mortgaged his lands with possession to the mortgagee prior to the Act takes a further advance from him after the Act on the security of the land already mortgaged, on the same conditions as the original mortgage, such a transaction does not amount to a new mortgage under S. 58, T. P. Act, and consequently, the provisions of the Punjab Alienation of Land Act are not attracted.

But if the new transaction purports to cancel the earlier one or contains conditions substantially different from those contained in the original mortgage, or an additional area of land is included in the security, the old mortgage is at an end and a new and wholly

different relationship between the parties is created to which ex necessitate rei the provisions of the Act will be attracted.

Similarly, if the new transaction raises the aggregate mortgage money to a figure in excess of the value of the land, it will really be a sale, though ostensibly given the form of a mere advance on the old security. Where, however, the new transaction is alleged to be really a sale, the onus is on the person alleging this to prove his assertion. A I R (Vol 30) 1943 Pesh 24 : 206 Ind Cas 137 (DB).

——S. 6—Mortgage of land with possession executed before passing of the Act—Further loan by mortgagor from mortgagee after passing of the Act on security of same property on same conditions :

Held, that the prior mortgage was not extinguished by the subsequent loan. AIR (Vol 29) 1942 Pesh 63 : 201 Ind Cas 722 (DB).

——S. 6 — Mortgage by agriculturist to agriculturist to pay debt due by mortgagor to non-agriculturist is not illegal. AIR (Vol 26) 1939 Lah 395.

——S. 6—Mortgagee whether can dig land.

There is no provision in the Act prohibiting the digging up of land by a lessee or mortgagee. Section 6 (1) (a) entitles the mortgagee to receive rents and profits of the land for a period of twenty years. Digging up the land and use of the earth would fall within the definition of receipt of profits of the land. AIR (Vol 24) 1937 Lah 112 : 171 Ind Cas 926.

——S. 6—Fresh mortgage, what is.

Where the land in dispute was already under two mortgages before the Act came into force and a third deed of mortgage was executed in 1927 after coming into ferce of the Act, and interest was payable under this third deed unlike the two previous deeds :

Held, that a mere additional term as to interest was not sufficient to justify the transaction of 1927 being treated as a fresh mortgage and that by the fact that an additional charge was created on the land, it could not be said that the provisions of the Act were contravened. AIR (Vol 23) 1936 Lah 225 : 38 P L R 739 : 163 Ind Cas 89.

——S. 6 — Sale of land opposed to the provisions of Act — Contract, if void ab initio — Defect, how removed — Usufructuary mortgage — Applicability of S. 65, Contract Act.

A contract of sale which is opposed to the provisions of the Act is not void ab initio because there is a provision in the Act enabling the vendee to have the defect in his title removed by securing the sanction of the Deputy Commissioner.

If he fails to apply for such sanction, or if such sanction is applied for and is refused, the so-called permanent alienation takes effect as a usufructuary mortgage in form (a) permitted by S. 6 for such term as the Deputy Commissioner considers to be reasonable.

Where, therefore, the vendee alleged himself to be a member of an agricultural tribe but was found by the Courts to be a non-agriculturist, the vendee is bound to restore the advantage, i. e., sale price under S. 65, Contract Act. A I R (Vol 21) 1934 Lah 979 : 151 Ind Cas 172.

——S. 6—Mohyal Brahmins—Unlimited usufructuary mortgage to non-Mohyal Brahmins—Validity of.

Mohyal Brahmins in the Punjab are members of an agricultural tribe though they were converted to Islam before the Act came into force. Consequently, an unlimited usufructuary mortgage in favour of a person not belonging to the same group is barred by the provisions of the Act. AIR (Vol 20) 1933 Lah 844 : 145 Ind Cas 733 (DB).

——S. 6—Decree against agriculturist—Case sent to Collector—Court, whether becomes functus officio—Power to hear objections of judgment-debtor.

Where land which is sought to be attached in execution is not liable to be sold and the matter is referred to the Collector for arranging a temporary lease, the Collector merely acts as a ministerial officer and the Court does not become functus officio as soon as it accepts the Collector's proposal and sends the records to him for necessary action.

Where such an order is made ex parte, the Court has still power to hear the objections of the judgment-debtor. AIR (Vol 20) 1933 Lah 441 : 144 Ind Cas 509.

——S. 6—Benami mortgage to non-agriculturist in the name of agriculturist—Suit by benamidar against real mortgagee for possession — Plea that defendant is real mortgagee.

In a suit for possession of land instituted by a mortgagee who is a member of an agricultural tribe against an alleged trespasser who is not a member of an agricultural tribe, if the latter pleads that he is the real mortgagee and that the mortgage was fictitiously entered in the name of the plaintiff to evade the provisions of the Act, the plea should be entertained by the Court, and, if it is established, the suit should be dismissed.

Where a member of an agricultural tribe makes an alienation, whether permanent or temporary, in favour of a non-agriculturist in contravention of the provisions of the Act, the contract is not void ab initio and the possession of the alienee is not necessarily unlawful in every case.

Similarly, if the alienation by a member of an agricultural tribe in favour of a non-agriculturist is by way of mortgage in a form not authorized by S. 6, his possession is still not unlawful. AIR (Vol 19) 1932 Lah 503 : 13 L 713 : 33 P L R 851 : 139 Ind Cas 17 (FB).

——S. 6—Temporary alienation—By way of mortgage —Not opposed to Act.

A mortgage by a member of an agricultural tribe is not altogether void. Although land belonging to a member of an agricultural tribe cannot be sold in execution of a decree, there can be no objection to its temporary alienation by way of mortgage.

A decree therefore in a suit for recovery of mortgage debt making the mortgage debt a charge on the land mortgaged is quite correct and does not offend against the provisions of the Act. AIR (Vol 17) 1930 Lah 331 : 121 Ind Cas 75.

——S. 6—Compromise on antecedent titles—Mortgage rights antecedent to Act — Decere on compromise subsequent — Right to possession under — Not affected by Act.

In 1899 H executed a deed of mortgage in favour of B of entire 10 biswas owned by him. In default of payment of interest for the successive half years, B was to take possession of the mortgaged property. Default was made by H, and B instituted a suit for possession in 1904 in which a decree was passed on compromise, and B was given possession of 7 biswas. In 1925 sons of H filed an application alleging that decree of 1904 contravened provisions of the Punjab Land Alienation Act, inasmuch as it put B who was not a member of agricultural tribe in possession of land without any limit of time. The Act being in force in 1904 B could be given possession for 20 years only.

Held, that the real point depended upon the question whether the compromise and the decree passed thereon amounted to a new alienation or they merely gave effect to antecedent rights which existed under the mortgage of 1897.

His right to recover possession as mortgagee was not in any way affected by the Punjab Land Alienation Act and the Court in enforcing it did not in any way contravene its provisions. The compromise proceeded on the assumption that there was an antece-

dent title of some kind in the parties and no new rights came into existence. Mere relinquishment by a promise of a portion of his pre-existing rights does not amount to new alienation. AIR (Vol 17) 1930 Lah 322 : 121 Ind Cas 731.

——S. 6—Mortgage on prescribed form.

Mortgages effected in a form prescribed in S. 6 (1) (b), which is one of the forms prescribed by law for mortgages granted by a member of an agricultural tribe in favour of a mortgagee who is not a member of an agricultural tribe, is valid. AIR (Vol 12) 1925 Lah 542 : 89 Ind Cas 615 : 6 Lah 344 : 26 P L R 691 (DB).

——S. 6—Mortgagee undertaking to pay debts—Not illegal.

There is nothing illegal or opposed to public policy in a third party coming in and taking the land of an agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist. (1921) 60 Ind Cas 463 (Lah).

——S. 6—Scope of Act.

The Act does not prohibit a non-agriculturist from inducing an agriculturist to liquidate a debt due to him and to a mortgage of land from his debtor as security for himself. AIR (Vol 4) 1917 Lah 71 : 119 PLR 1916 : 114 PWR 1916 : 37 Ind Cas 193.

——Ss. 6, 7 and 8—Punjab Redemption of Mortgages Act, S. 1 proviso.

Section 1, proviso of the Redemption of the Mortgages Act excludes from the operation of that Act mortgages under Alienation of Land Act, S. 6. 7 P R 1917 Rev : 2 P W R 1917 Rev : 42 Ind Cas 383.

——Ss. 6 and 7 (3) —Power of Deputy Commissioner to fix proportion of mortgage debt.

Under the Act the Dputy Commissioner is required to inquire into the extent of realizations by mortgagee towards his debt and if it is liquidated he may grant redemption without any further payment. The equitability of the proportion is to be determined by him irrespective of arithmetical calculations. 2 P R 1917 Rev : 6 P W R 1917 Rev : 39 Ind Cas 341.

——Ss. 6 and 9 — Bond by agriculturist in favour of mortgagee—Non-agriculturist—Consideration.

Where A, in consideration of money due to C, executed a registered mortgage of his land to B, without contravening the Punjab Alienation of Land Act, and B executed a registered bond for the same amount in favour of C, the bond by B, in favour of C is supported by consideration. AIR (Vol 2) 1915 Lah 327 : 4 P L R 1916 : 105 P W R 1915 : 30 Ind Cas 509 (DB).

——S. 7.

——S. 7 (3)— Redemption during currency of mortgage—Interest payable to mortgagee.

If the mortgagor wishes to redeem his land during the currency of the mortgage, the Deputy Commissioner in determining the amount payable by him to the mortgagee under S. 7 (3) of the Alienation of Land Act should allow interest at a reasonable rate on the mortgage debt irrespective of the various elements that may go to make up that debt. The interests should be calculated on the balances outstanding at successive harvests. (1947) 26 L L T 7.

——S. 7 (3) — Mortgagor in possession as tenant under mortgagee - Action by Collector under S. 7 (3) —Refusal by tenant thereafter to attorn to mortgagee.

Where the mortgagor is in possession of the mortgaged land as tenant of the mortgagee, the unilateral act of the tenant after the Collector's order that action should be taken under S. 7 (3) in refusing to attorn to the mortgagee cannot change the character of his possession as tenant of the mortgagee who is, therefore, entitled to maintain a suit for declaration that he is mortgagee with possession.

A point not raised in the Courts below cannot be raised for the first time in second appeal if it would require further evidence to be taken. AIR (Vol 30) 1943 Pesh 24 : 206 Ind Cas 137 (DB).

——S. 8

——S. 8—Simple mortgage providing for possession in case of default—Mortgage in contravention of the Act—Mutation refused—Mortgagee bringing suit for recovery of principal and interest and giving up his security—Contentions that the contract of mortgage was void and the suit was maintainable :

Held, that the whole mortgage could not be treated as void in view of S. 8 (2). AIR (Vol 19) 1932 Lah 630 : 13 L 508 : 33 P L R 815: 140 Ind Cas 863 (DB).

——S. 9

——S. 9 — Mortgage — Expiry of year of grace—Agricultural tribes—Declaration—Effect of.

When after the year of grace, a mortgagor who was served with notice of foreclosure, was declared to belong to an agricultural tribe, a suit by the mortgagee after that year is one for possession and not on the mortgage. The Civil Court is not bound to make a reference under S. 9 (3) of the Act and the Deputy Commissioner is precluded from exercising powers of interference. 109 P W R 1912 : 14 Ind Cas 332.

——S. 9 (2) and (3) —Mortgage by conditional sale —Discharge—Plea of—Enquiry into.

Where a mortgagee by conditional sale applies direct or is referred by a Civil Court to the Deputy Commissioner under S. 9 (2) or (3) of the Punjab Land Alienation Act and the mortgagor denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred upon him by S. 9 (2) of the Act. 2 P R 1915 Rev : 3 P W R 1915 Rev : 29 Ind Cas 502.

——S. 9 (2) — A mortgage by conditional sale — Default—Right to possession.

A mortgagee of revenue paying land with conditional sale cannot get its possession in case of mortgagor's dafault. The only remedy for him is the one provided under S. 9 (2) ; the last proviso of S. 68 of the T. P. Act does not help him at all. 137 P W R 1910 : 8 Ind Cas 576 (DB).

——S. 9 (2) — Mortgage by conditional sale—Rights of mortgagee.

The Act extinguishes the mortgagee's remedy by conditional sale and the remedy in S. 9 (2) is substituted. Civil Courts have no power to interfere with the terms offered to the mortgagee by the Deputy Commissioner. 22 P R 1910 : 29 P W R 1910 : 208 P L R 1910 : 5 Ind Cas 902 (DB).

——S. 9 (2) and (3)—Mortgage by conditional sale before the Act came into force—Conversion into another kind under S. 9 (2).

A Civil Court is not competent to interfere suo motu with a mortgage by conditional sale executed before the Act came into force in such a way as to usurp the powers given by the Legislature to Revenue Courts. 88 P R 1909 : 137 P W R 1909: 67 P L R 1909 : 3 Ind Cas 619.

——S. 9 (3)—Applicability — Suit to enforce a mortgage.

Section 9 of the Act is inapplicable to a suit to enforce registration of a deed under S. 77 of the Registration Act as the expression in that sub-section that if a suit is instituted in any Civil Court on a mortgage to which sub-section (1) or sub-section (2) applies the Courts shall refer the case to the Deputy Commissioner with a view to the exercise of the power conferred by the sub-section applying thereto, means a suit instituted to enforce some of the terms of a mortgage. AIR (Vol 6) 1919 Lah 438 : 1 Lah L J 212 (DB).

——S. 9 (3) — Mortgage by conditional sale—Reference by Civil Court to Dy. Commissioner — Offer of Commission rejected—Jurisdiction of Civil Court to proceed with the case.

A Civil Court made a reference in regard to a mortgage by conditional sale to a Dy. Commissioner. The latter made an offer to the mortgagees but the offer was rejected : held, that a Civil Court had no jurisdiction to proceed any further with the case. AIR (Vol 3) 1916 Lah 361 : 55 P R 1916 : 157 P L R 1916 : 155 P W R 1916 : 35 Ind Cas 532 (DB).

——S. 9 (3) — Foreclosure proceedings consigned — Year of grace unexpired — No pending proceedings.

Where foreclosure proceedings have been consigned to the record room before the expiry of the year of grace and after the consignment but before the expiry of the year of grace the new Act came into force.

Held, that there were no pending proceedings for enforcement of the conditional sale clause. 69 P W R 1912 : 121 P L R 1912 : 59 P R 1912 : 13 Ind Cas 621 (DB).

——S. 9 (3)—Foreclosure—Defective notice.

Proceedings under foreclosure notice are null and void if it is issued in respect of two mortgage-deeds only one of which is in the form of a conditional sale. An Appellate Court cannot make a reference under S. 9 (3) of Act XIII of 1900 and the Deputy Commissioner cannot proceed under sub-sec. (2) if the foreclosure notice is effectual, but if not the Appellate Court must act under S. 9 (3) and can only dismiss the suit if the mortgagee refuses to accept a mortgage in one of the authorised forms. 51 P W R 1910 : 6 Ind Cas 657.

——S. 10

——S. 10—Applicability—Conditional sale clause in decree of Court—Validity.

Section 10 of the Act must be strictly enforced regardless of consequences flowing therefrom. The terms of the section are very wide and they apply to a mortgage created by a decree based upon a compromise, and passed after the commencement of the Act, quite as much as to a mortgage created by private agreement between the parties. AIR (Vol 5) 1918 Lah 99 : 56 P R 1918 : 127 P W R 1918 : 46 Ind Cas 460 (DB).

——S. 10 — Mortgage — Conditional sale—'Agriculturist'.

Section 10 of the Act is wide enough to include every mortgage which contains a stipulation as to conditional sale, and it is absolutely immaterial whether the mortgagor is or is not member of an agriculturist tribe. AIR (Vol 5) 1918 Lah 88 : 31 P R 1918 : 54 P W R 1918 : 27 P L R 1918 : 45 Ind Cas 101.

——S. 11.

——S. 11 — Lease in execution of decree—Not prohibited.

There is no distinct provision in the Punjab Alienation of Land Act prohibiting the grant of a temporary lease of the land of a member of an agricultural tribe in execution of a decree for a period of over 20 years. AIR (Vol 17) 1930 Lah 841.

——S. 12.

——S. 12 — Extension of lease — Lease for 20 years — Option to hold over — If converted into a lease for longer period.

When the lease was in the first instance only for a period of 20 years the mere fact that option is given to the tenant to remain in occupation thereafter, if he chooses to do so, on certain conditions cannot ipso facto convert it into a lease for a longer period. AIR (Vol 15) 1928 Lah 554 : 9 Lah 576 : 29 P L R 730 : 109 Ind Cas 90.

——S. 13-A.

——S. 13A contravenes S. 298 (1), Government of India Act — Section is protected from being ultra vires regarding future transactions by S. 298 (2) (a) but is ultra vires so far as it operates retropectively — Test to determine if S. 298 (1) is contravened laid down.

Section 298 (1), Government of India Act, confers a personal right on every subject of His Majesty domiciled in India, and the general legislative powers conferred respectively on the Federal Legislature and the Provincial Legislature by S. 99 (1) are subject, inter alia, to the provisions of S. 298. In applying the terms of S. 298 (1) it is not necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. It is not a question of whether the impugned Act is based only on one or more of the grounds specified in S. 298 (1) but whether its operation may result in a prohibition only on these grounds.

The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-s. (1). In marked contrast to this, sub-s. (2) does take into consideration the object of the impugned Act, despite the contravention of the personal right conferred by sub-s. (1).

The avoidance of the benami transaction and the recovery of possession by alienor, which are enacted by S. 5, Punjab Alienation of Land (Second Amendment) Act (10 [X] of 1938) which purports to insert S. 13A in the Punjab Aliention of Land Act (Indian Act 13 [XIII] of 1900) involve a prohibition within the meaning of S. 298 (1).

Secondly, such prohibition is only on grounds of descent in some of the cases affected by the impugned Act, and if, for example, the beneficial vendee or mortgagee either ordinarily resides or holds land in the district, but is not a member of an agricultural tribe, he will be prohibited only on the ground of descent.

Thirdly, by the provisions of the impugned Act such person is prohibited "from acquiring, holding or disposing of property" within the meaning of S. 298 (1). Therefore the provisions of the new S. 13A involve a contravention of S. 298 (1). The impugned Act is, however, authorised and protected from being ultra vires as regards future transactions by S. 298 (2) (a), but the benefit of sub-s. (2) (a) cannot be claimed for the impugned Act so far as it purports to operate retrospectively.

The word "prohibit" can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction, and cannot include an attempt to reopen or set aside transactions already completed, or to vacate titles already acquired. Hence the impugned Act, so far as retrospective was beyond the legislative powers of the Provincial Legislature.

The retrospective element in the impugned Act is, however, easily severable and by the deletion of the words "either before or" from the early part of sub-s. (1) of the new S. 13A, the rest of the provisions of the impugned Act may be left to operate validly. AIR (Vol 33) 1946 P C 66 : 73 Ind App 59 : 1946 M W N 166 : 50 C W N 429 : 1946-9 F L J 41.

——S. 13-A — Whether ultra vises.

Per Gwyer, C. J. and Varadachariar, J., Beaumont, J., dissenting.

The Punjab Alienation of Land (Second Amend-

ment) Act X of 1938 contravenes sub-s. (1) of S. 298, Government of India Act, 1935, so far as it makes it impossible for persons who are not descended from members of a particular community to acquire or hold, on the ground of descent only, any interest in land of the kind included in the definition of the Punjab Alienation of Land Act, 1900 as beneficiaries under a benami transfer in favour of a qualified transferee, and is to that extent, inoperative.

The provision in the Amendment Act of 1938 which is numbered as S. 13A of the principal Act is clearly discriminatory, because it draws a distinction between transactions in which the beneficial interest belongs to an agriculturist and those in which it belongs to a non-agriculturist; and taken with the notification issued under the Act, makes a discrimination on the ground of descent only within the meaning of S. 298 (1) of the Government of India Act.

The prohibition against a person acquiring or holding property as a beneficiary offends S. 298 (1) quite as much as a prohibition against his obtaining a transfer of the legal title.

The Punjab Act X of 1938 was passed after the Constitution Act had come into force, and would be hit by S. 298 (1) even if it should be held that that sub-section had no retrospective operation. The mere fact that the Legislature directed the Act of 1938 to be treated as an amendment to the Act of 1900 or that in many respects it adopted the frame-work of the older Act, cannot place the later enactment, on the same footing as the earlier enactment.

Per Beaumont, J.—In applying the terms of S. 298 (1), it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. If the only basis of the Act is discrimination on one or more of the grounds specified in S. 298 (1), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination; the true object of the impugned Act is to avoid a method of evading the principal Act which itself is unobjectionable and although some of the rights avoided by the Act may be vested in persons whose only disqualification is lack of a particular descent, such lack of descent is not the only, or even the primary ground on which the rights are avoided. Hence S. 13-A is not ultra vires. AIR (Vol 29) 1942 F C 38 : 8 B R 749 : 46 C W N F C 46 : I L R (1942) Kar (F C) 86 Sup : I L R (1942) Lah 643 : 45 P L R 1 : 1943 M W N 362 : (1942) F C R 67 : 200 Ind Cas 563.

——S. 13-C.

——S. 13-C — Appeal preferred from Deputy Commissioner's order — Order passed by Commissioner on appeal — Financial Commissioner's powers of revision.

Having regard to S. 13 (c) of the Punjab Alienation of Land Act, the Financial Commissioner has no powers of revision in a case where an appeal has been preferred from the Deputy Commissioner's order, and the Commissioner has passed an order on appeal. (1947) 26 L L T 29.

——Ss. 13-C and 19—Orders under S. 4 (2)—Powers of revision.

The Financial Commissioner derives his powers of revision in cases of orders under S. 4 (2) of the Punjab Alienation of Land Act from S. 13-C and not from S. 19 of the Act. Section 13-C allows the Financial Commissioner to interfere only when the proceedings are pending before, or have been disposed of by, the Deputy Commissioner.

Where an appeal has been preferred from the Deputy Commissioner's Order, and the Commissioner's Order, and the Commissioner has passed an order on appeal, the Financial Commissioner has no powers of revision. (1947) 26 L L T 12.

——S. 14.

—— S. 14—(Before amendment by Act 10 of 1938)—Sanction given by Deputy Commissioner under S. 3 —S. 14, if applies.

Per Monroe and Tek Chand JJ.—Section 14 takes effect only until the Deputy Commissioner's sanction is given under S. 3 or has been refused. Section 14 can, therefore, have no operation in a case in which the Deputy Commissioner's sanction under S. 3 has been given. AIR (Vol 29) 1942 Lah 194 : 44 P L R 353 : I L R (1942) Lah 758 : 202 Ind Cas 45 (FB).

——S. 14—Permanent alienation without sanction—Effect.

When permanent alienation, by an agriculturist of agricultural land in favour of a member of non-agricultural tribe is effected, it is not void. If sanction of the Deputy Commissioner has not been given in advance, it takes effect under the law as a usufructuary mortgage permitted under S. 6 (a).

If later the Deputy Commissioner sanctions the sale, it becomes an out and out sale. If he does not it continues as a usufructuary mortgage in the terms permitted by S. 6 (a), the longest period of possession for the automatic redemption of the mortgage being 20 years. If an alienee enters into such a transaction, he comes under the terms of the Act and is bound by it. His sale compulsorily becomes a usufructuary mortgage as permitted by S. 6 (a).

The seller cannot resile and the purchaser cannot claim refund of purchase money. AIR (Vol 25) 1938 Lah 820 : I L R (1939) Lah 30 : 40 P L R 772 : 179 Ind Cas 646 (DB).

——Ss. 14, 3 — Member of agricultural tribe selling land to non-member—No sanction under S. 3 — Subsequent application for sanction after vendee being in possession for 23 years refused :

Held, that the wording of S. 14 admits of no doubt that the sale took effect automatically as a usufructuary mortgage for the terms of twenty years, but it ceased to be a mortgage at the end of that period and the alienees became trespassers, and the vendee being then in possession only for three years after such period his claim by adverse possession could not succeed. AIR (Vol 24) 1937 Lah 408 : 38 P L R 391 : I L R (1938) Lah 183 : 173 Ind Cas 520.

——S. 14 — Section 14 has no application to a case where a permanent alienation of land in favour of non-agriculturist has been effected by a decree of Civil Court. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith. AIR (Vol 21) 1934 Lah 947 : 35 P L R 709 : 16 Lah 56 : 155 Ind Cas 615 (DB).

——Ss. 14, 6 — Sale void for want of sanction — Vendee's right of possession as usufructuary mortgagee.

Under S. 14, a sale which cannot operate as a sale for want of the Deputy Commissioner's sanction takes effect automatically as a usufructuary mortgage in Form (a) permitted by S. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers reasonable. Without the intervention of the Deputy Commissioner, the alienee is entitled to look upon himself as a usufructuary mortgagee subject to certain conditions. AIR (Vol 20) 1933 Lah 650 : 144 Ind Cas 13.

——S. 14—Widow succeeding after alienation— Sale by deceased member to non-agriculturist— Not void —Sale takes effect as temporary alienation— Suit by reversioner for declaration—Maintainable.

A, who was a member of agricultural tribe died after having effected a sale of his land in favour of B

who was not a member of agricultural tribe. The Deputy Commissioner refused to sanction the sale on the ground that the vendor had died. A's brother C brought a suit for declaration that the alienation was without consideration and necessity and should be held not to affect his reversionary rights upon the death or remarriage of A's widow.

Held, that the alienation in question was not void. Under S. 14, Punjab Alienation of Land Act, the sale became a usufructuary mortgage and took effect as a temporary alienation. As A's widow might die or remarry within the period of 20 years or period fixed by Deputy Commissioner it was to the interest of C that he should obtain the declaration asked for. AIR (Vol 17) 1930 Lah 912.

——S. 14—Decree affirming sale – Sale initially void — Deputy Commissioner cannot convert it into mortgage.

Whether a sale is initially void or not, if a decree has been once passed by a Civil Court affirming it, the Deputy Commissioner has no jurisdiction to convert it into a mortgage under S. 14 and the proper procedure is to take action under S. 21 (a). AIR (Vol 17) 1930 Lah 71 : 120 Ind Cas 481.

—S. 15.

——S. 15—Vendor wanting to sell other area in lieu of original area.

The sanction given by the Deputy Commissioner must be confined to the area which was originally sold and if the vendor wants to sell some other area in lieu of the original area, a fresh sanction would be necessary. Sanction is presumably given after considering all the circumstances of the proposed sale, including the particular area which is to be sold and it cannot be assumed that the Deputy Commissioner would sanction sale of the area which is claimed in lieu of the land included in original sale. AIR (Vol 26) 1939 Lah 141 : 184 Ind Cas 449.

——S. 15 — Sale of trees — Sale of standing trees — Stipulation that purchaser may cut at any time within 10 years—Section does not apply.

The section would apply to a case where an agriculturist sold all the trees which might be produced in his land for a period of more than one year but cannot apply to an agreement whereby standing trees are sold with a stipulation that the purchaser may cut them at any time within ten years. AIR (Vol 12) 1925 Lah 29 : 84 Ind Cas 89 : 5 Lah 385 (DB).

—S. 16.

1. Clause (1).
2. Clause (2).
3. Clause (2-A).
4. Clause (4).
5. Insolvency.
6. Interpretation.
7. Scope.

1. Clause (1).

——S. 16—The statutory prohibition in S. 16 (1) does not apply in the case of date trees because trees are not land within the meaning of S. 2 (3). AIR (Vol 20) 1933 Lah 589 : 34 PLR 780 : 144 Ind Cas 690.

——S. 16 (1)— Scope — Agricultural land — Attachment in execution.

Section 16 (1) does not prohibit the attachment of the land belonging to an agriculturist in execution of a decree against him and a decree-holder is entitled to claim a declaration that the land of his agriculturist debtor is liable to attachment and to be thereafter dealt with as provided in S. 72, Civil P. C. AIR (Vol 17) 1930 Lah 1034: 31 PLR 842 (DB).

——S. 16 (1)—Land belonging to agricultural tribe—Sale in execution.

A sale in execution of a decree of land belonging to a member of an agricultural tribe is illegal under S. 16 (1) of the Punjab Alienation of Land Act, and S. 72 of the Civil P. C. clearly postulates and implies that the Collector's representation is to be made with reference to and in view of a proposal to sell attached land. No temporary alienation of the land of such member can be made by the Collector under the authority of the latter section.

The executing Court, though it can attach the land can take no further action towards satisfying the decree by selling or otherwise dealing with that land. 8 P R Rev 1917 : 7 P W R Rev 1917: 43 Ind Cas 356.

——S. 16 (1)—Power of Court.

A mortgage decree declared that in default of payment the property was to be sold. Held that the Court has no power to direct sale of the land of plaintiff who is a member of an agriculturnl tribe. 235 PLR 1913: 146 PWR 1913 : 19 Ind Cas 856 (DB).

2. Clause (2).

——S. 16 (2), (3) — Land belonging to member of notified tribe cannot be sold even if mortgage decree has been previously passed against him. AIR (Vol 27) 1940 Lah 126 : 189 Ind Cas 782.

——Ss. 16 (2), 12—S. 16 (2), scope of—Whether independent of S. 12—Civil Court—Extent of power.

A Civil Court is empowered to pass an order leasing the land of a member of an agricultural tribe for a full period of twenty years irrespective of the encumbrances created thereon by the owner himself, although the effect of the order is to extend the combined period of the temporary alienations beyond twenty years.

Section 16 (2) is independent of S. 12, and a Civil Court can exercise its power under that section to the fullest extent, no matter what the owner may have done. To hold otherwise, would open the door to abuses of the worst kind. An owner in those circumstances would be clothed with the authority of debarring a Civil Court permanently from exercising its power under S. 16 (2) and would thus be enabled to deprive successfully all his creditors of the only remedy left open to them to realize their decrees. AIR (Vol 24) 1937 Lah 38 : 39 PLR 112 : ILR (1937) Lah 1 : 166 Ind Cas 997 (FB).

——S. 16 (2)—Scope of — Lease of land by executing Court — Length of period for which land can be leased.

Section 16 (2) means that the Civil or Revenue Courts also cannot farm out the land of a member of an agricultural tribe for a period exceeding twenty years in the aggregate, however many farms or leases there may be. AIR (Vol 23) 1936 Lah 545 : 38 PLR 957 : 160 Ind Cas 947 (DB).

——S. 16(2)—Execution of decree—Lease of two wells for 16 years—Another decree by same decree-holder against same judgment-debtor—Lease of same wells for further period of 20 years commencing after the expiry of the first lease :

Held, that the second lease was in contravention of S. 16 (2). AIR (Vol 22) 1935 Lah 56: 157 Ind Cas 1028.

——S. 16 (2) (as amended by Act 1 of 1931) — Court ordering mortgage to be effected without Collector's advice—Provision not made for maintenance of judgment-debtor and his family :

Held, that the mortgage was not valid. A I R (Vol 20) 1933 Lah 813 : 34 P L R 986 : 146 Ind Cas 630 (2).

——S. 16 (2) (as amended by Act 1 of 1931) — Whether has retrospective effect — Leases or mortgages for more than 20 years before enactment of 1931—Whether invalidated.

Sub-section (2) of S. 16 is only meant to invalidate all such mortgages or leases sanctioned after the passing of the Act whether the decree or order under execution was passed before or after its enactment. The sub-section has no retrospective effect. The whole frame of the new section shows that it is intended to operate in the future, that is to say, after the passing of the Act.

The words "whether made before or after the enactment of this sub-section" deprive the decree-holder who had not taken any steps in execution before the passing of the Act of having a lease or mortgage which would last for more than 20 years, but do nothing more. A I R (Vol 20) 1933 Lah 492 : 34 P L R 277 : 14 Lah 389 : 144 Ind Cas 965 (DB).

3. Clause (2-A).

——S. 16 (2-A)—Retrospective effect.

Sub-s. (2-A) which has been added to S. 16 of the Punjab Alienation of Land Act by Act 8 of 1940 is not retrospective and only applies to leases made after the passing of that amending Act. AIR (Vol 34) 1947 Lah 273 : 49 P L R 1 (DB).

——Ss. 16 (2-A), 16 (2-F), 13-B and 13-C—Appellate order of Commissioner—Appeal—Revision.

There is no provision in the Punjab Alienation of Land Act for an appeal from an appellate order passed by the Commissioner on an application under S. 16 (2-A) of the Act. Nor can the powers of revision under S. 13-C be invoked. (1947) 26 L L T 33.

——S. 16 (2-A)—Retrospective operation.

Sub-s. 2-A of S. 16 of the Punjab Alienation of Land Act, which was added by the Amending Act 8 of 1940, is not retrospective in its operation and does not, therefore, apply to leases made before the passing of the Amending Act. (1947) 26 L L T 29.

4. Clause (4).

——Ss. 16, 4 (1) and 4, Proviso (as amended by Act 10 of 1938) — Mortgage decree passed — Mortgagor subsequently declared agriculturist under S. 4 (1) — Decree, if can be executed.

A mortgage decree can be executed against the mortgagor even if after the passing of the decree, he is declared to be an agriculturist under S. 4 (1), because, at the time of his becoming a notified agriculturist, he could not be said to be the absolute owner of the land within the meaning of S. 16, his estate in it being limited by the charge which had already been lawfully created and the mere fact that his own personal status was subsequently altered cannot attract the provisions of S 16 to that land and also because the proviso to S. 4 expressly saves the mortgage decree from the operation of notification under S. 4 (1).

The proviso to S. 4 cannot be construed as a proviso to the two new sub-sections viz., (1) and (2) to S. 4 and as saving only those decrees which declared a person to be an agriculturist or a non-agriculturist. AIR (Vol 29) 1942 Lah 14: 43 P L R 646 : ILR (1942) Lah 464 : 198 Ind Cas 28 (DB).

5. Insolvency.

——S. 16—Land belonging to a member of a notified agricultural tribe is liable to attachment in execution of a decree passed against him and, in the event of his being adjudicated insolvent, such land vests in the Receiver who has the power to effect temporary alienation. AIR 1925 All 467, Dissented from. A I R (Vol 17) 1930 Lah 1034 (DB).

——S. 16—Receiver in insolvency in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. AIR 1928 Lah 734 and 119 Ind Cas 730, Diss. from. AIR (Vol 17) 1930 Lah 1034 (DB).

——S. 16—Insolvent agriculturist—Sale by Receiver to agriculturist.

The land of an insolvent agriculturist vests in the Receiver and he can sell it to an agriculturist. (1929) 119 Ind Cas 730 (Lah).

——S. 16—Sale by Receiver to agriculturist:

Under S. 16, the property of an insolvent agriculturist is not liable to sale, but nothing is said about its being not liable to attachment and, therefore, his property does vest in the Receiver and the Receiver would be entitled to sell the property to an agriculturist. AIR (Vol 15) 1928 Lah 734 : 115 Ind Cas 475.

——S. 16—Temporary alienation effected by Court.

It is competent to the Insolvency Court to effect a temporary alienation by way of mortgage of the lands of a member of an agricultural tribe who has become an insolvent. A I R (Vol 8) 1921 Lah 44 : 61 Ind Cas 664 : 2 Lah 78 : 71 P L R 192 (DB).

——S. 16 — Execution of decree—Temporary alienation of land—Power to order.

A Civil Court can in execution of a decree order a temporary alienation of the land of a judgment-debtor who is a member of an agricultural tribe. S. 16 of the Punjab Alienation of Land Act prohibits only a sale and not a temporay alienation of such land. A I R (Vol 7) 1920 Lah 456 : 1 Lah 192 : 58 Ind Cas 603 (F B).

[On appeal from A I R (Vol 7) 1920 Lah 443 : 52 Ind Cas 356.]

6. Interpretation.

——S. 16 — "In execution of any decree or order", meaning of.

The words "in execution of any decree or order" in S. 16 are significant and indicate that the question whether the land belonging to any particular judgment-debtor should be sold or not would arise at the execution stage and not necessarily during the suit which precedes it : A I R (Vol 30) 1943 Pesh 52 : 209 Ind Cas 424 (D B).

——S. 16 — Where the taurs within abadi have not been separately numbered in the revenue record nor have they been shown to have ever been cultivated, they are not protected from attachment and sale in execution. A I R (Vol 26) 1939 Lah 316 : 42 P L R 398.

——S. 16 — Land of member of agricultural tribe cannot be sold in execution of decree even when decree itself has directed its sale—Section 16 allows executing Court to go behind the decree. A I R (Vol 24) 1937 Lah 194 : 38 P L R 926 : 164 Ind Cas 752 (D B).

——S. 16 — Execution — Mortgage decree.

The land of an agriculturist cannot be sold even if the mortgagee has obtained the mortgage-decree. A I R (Vol 23) 1936 Lah 845 : 38 P L R 1065 : I L R (1937) Lah 48 : 165 Ind Cas 243 (2) (D B).

——S. 16 — Person of agricultural tribe declared insolvent—Receiver selling his land with his consent and receiving consideration — Receiver is vendor and not insolvent. A I R (Vol 21) 1934 Lah 821 (D B).

——S. 16 — Decree for sale of land belonging to member of notified agricultural tribe—Execution.

Though the proposition that an executing Court is not ordinarily entitled to go behind the decree is well-established, where a decree for sale of land belonging to a member of a notified agricultural tribe is passed in contravention of the mandatory provisions of S. 16, an executing Court cannot sell it. A I R (Vol 21) 1934 Lah 609 : 35 P L R 400 : 151 Ind Cas 730.

——S. 16 — Plea — Whether can be raised for first time in execution.

Where a decree orders the sale of a certain property for the realisation of a debt, the objection that the judgment-debtor is an agriculturist and that the property cannot be sold in execution under S. 16 cannot be raised for the first time in execution proceedings. Nor is it open for the executing Court to go behind the decree on this question. A I R (Vol 19) 1932 Lah 529 : 33 P L R 632 : 138 Ind Cas 60.

——S. 16 — In execution — Not prohibited.

The Punjab Land Alienation Act does not prohibit the temporary alienation of land belonging to a member of an agricultural tribe (such as a temporary farm of a mortgage thereof) in execution of a decree. A I R (Vol 16) 1929 Lah 667 : 30 Cr L J 1006 : 1929 Cr C 212 : 119 Ind Cas 227.

——S. 16 — Fine in criminal case.

Fine imposed in a criminal case on an offender is

not recoverable as land revenue. A I R (Vol 16) 1929 Lah 667 : 30 Cr L J 1006 : 1929 Cr C 212 : 119 Ind Cas 227.

——S. 16 — Mortgage of mortgagee rights to non-agriculturist—Sanction required.

Mortgagee rights can be mortgaged if necessary to an agriculturist; and if no agriculturist is forthcoming then to a non-agriculturist with the sanction of the Collector. A I R (Vol 16) 1929 Lah 439 : 30 P L R 141 : 117 Ind Cas 662.

——S. 16 — Filing execution proceedings — Land attached — Collector suggesting lease in satisfaction of decree — Non-agriculturist decree-holder refusing to take lease — All lawful means of satisfaction not exhausted—Filing execution bad.

The decree-holder was a non-agriculturist. The judgment-debtor was an agriculturist under the provisions of the Punjab Alienation of Land Act. Land belonging to the judgment-debtor was attached and the case was sent to the Collector for making suggestions for the satisfaction of the decree. Collector suggested that half the land attached should be farmed out for 15 years. The decree-holder was not prepared to take a lease of the land. The executing Court thereupon filed the execution proceedings on the ground that the decree-holder was not prepared to take the land on lease.

Held, that the procedure was wrong and that the proceedings could only be filed if all lawful means for satisfying the decree had been tried and found to be impracticable. A I R (Vol 16) 1929 Lah. 195 : 112 Ind Cas 790.

——S. 16 — Sale of mortgage debt apart from the security — Execution of decree.

The sale of a mortgage debt in execution of a decree would carry with the security. As S. 16 of the Punjab Alienation of Land Act prevents the sale of the mortgagee's rights to the land, the sale of the debt is equally prevented in. A I R (Vol 5) 1918 Lah 325 : 16 P R 1918 : 16 P L R 1918 : 37 P W R 1918 : 44 Ind Cas 528 (D B).

7. Scope.

See also S. 2 (3).

——S. 16 — Scope and effect — Mortgage decree contravening Act — Power of executing Court to refuse to sell property.

The executing Court has no jurisdiction to refuse sale of the land belonging to a member of a notified agricultural tribe if the decree sought to be executed is a mortgage decree and contains a direction for the sale of agricultural land covered by the mortgage.

Section 16 of the Punjab Alienation of Land Act is not intended to empower the executing Court to question the validity of the decree during execution proceedings. If the decree contravenes the provisions of the Act the Legislature has provided ample remedies for that and this section is meant to have application to only those cases where the contravention of the Act is going to be committed for the first time by reason of an order of the execution Court or during the execution proceedings.

What the Legislature intended by enacting S. 16 was that wherever property had to be sold by the order of the executing Court and that can only happen in cases of money decrees, then the executing Court will not order sale of any land belonging to an agriculturist and will not actually sell it while in the case of mortgage-decrees the Legislature intended that the matter should be dealt with at the suit stage and any contravention of the Act by the Court passing the decree should be corrected by the remedies provided in the Act or in the general law. A I R 1933 Lah 397, A I R 1936 Lah 845 and A I R 1939 Lah 194, Overruled. A I R (Vol 36) 1949 East Punj 94 (F B).

——S. 16 — Decree directing sale of agricultural land—Executing Court whether can refuse to sell.

(Quaere) — Where the decree directs sale of agricultural land, can the executing Court refuse to sell such land on the ground that the sale is prohibited by S. 16, Punjab Alienation of Land Act. A I R (Vol 33) 1946 Lah 73 : 47 Pun L R 385.

——S. 16 — Applicability and scope of.

The words in S. 16 cannot be taken as connoting every and any kind of ownership. The Act suggests that the existing rights of agriculturists are to be protected and not necessarily rights which might subsequently accrue to them. Therefore, any land which has come to an agriculturist or been acquired by him, as distinct from any land which has always been his, must be subject to the same charges and encumbrances as it was before it came to him and, therefore, it can only be said to belong to him within the meaning of S. 16 subject to such charges and encumbrances and even in his hands it is liable to the extent of them but no more.

Where, therefore, a person who is not a member of an agricultural tribe has mortgaged his land to another person who is also a non-agriculturist by an equitable mortgage and later transfers his ownership of that land to a person who is a member of an agricultural tribe, the mortgagee is not deprived by S. 16 of his ordinary legal right of executing his decree by sale of the property. A I R (Vol 27) 1940 Lah 370 : 42 P L R 669 : I L R (1941) Lah 1 : 191 Ind Cas 10 (F B).

——S. 16 — Applicability.

Per Bhide J. — If the decree to be executed has already determined the liability of the property to sale, the executing Court cannot question the validity of the decree or refuse to carry it out. Section 16 was not intended to override this principle and give power to an executing Court to ignore and nullify the effect of a decree passed by a Court of law. Section 16 was meant to apply only to those cases where the liability of the land to be sold is not already determined by the decree itself, and the executing Court has to decide what property should be sold to satisfy the decree. In other words, the section is analogous to S. 60, Civil P. C., which lays down that certain properties shall not be liable to be attached and sold in execution. A I R (Vol 27) 1940 Lah 370 : I L R (1941) Lah 1 : 42 P L R 669 : 191 Ind Cas 10 (F B).

——S. 16 — Exemption under — Insolvency.

Section 16 makes the land of an agriculturist exempt from attachment and sale, and Cl. (5), S. 28, Insol. Act, therefore, takes it out of the category of the property which vests in the Receiver. Consequently, the land of an agriculturist does not vest in the Receiver on his becoming insolvent and the Receiver cannot sell or lease his landed property. AIR (Vol 24) 1937 Pesh 57 : 169 Ind Cas 14 (D B).

——S. 16—Scope of.

The general principle that an executing Court cannot go behind the decree was deliberately departed from in enacting S. 16. A I R (Vol 23) 1936 Lah. 845: 38 PLR 1065 : ILR (1937) Lah 48 : 165 Ind Cas 243 (2) (DB).

——S. 16— Section 16 creates a restriction on the ordinary method of executing decrees and as such, has to be applied to the enforcement of order of adjudication under the terms of cl. 2, S. 60, Prov. Insol. Act. AIR (Vol 23) 1936 Pesh 109 (DB).

——Ss. 16, 2 (3)—Fruit trees.

Trees whether fruit trees or otherwise cannot be considered to be "land" within the meaning of S. 2 (3). The term "land" must be confined to the ordinary meaning of the word, especially as there is a distinction drawn in the Act itself between land and products of the earth or land. AIR 1933 Lah 880 and AIR 1920 Lah 351, Overruled. AIR (Vol 22) 1935 Lah 202: 155 Ind Cas 659 (FB).

See also A I R 1933 Lah 589.

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——S. 16—If there is a contravention of S. 16 by the decree. the proper course is to attack the decree itself and not a subsidiary order passed in execution. AIR (Vol 22) 1935 Lah 443.

——S. 16—Section 16 prohibits sale in execution of a decree of land belonging to an agriculturist. It does not prohibit its temporary alienation. AIR (Vol 22) 1935 Pesh 113 : 157 Ind Cas 953.

——S. 16 — Fruit trees are included in definition of "land" in S. 2 (3) and are not liable to attachment and sale in execution of a decree against the owner who is a member of an agricultural tribe. A sale is prohibited, not only by S. 15 but by S. 3 and comes within S. 16. AIR (Vol 20) 1933 Lah 880 : 34 PLR 786: 144 Ind Cas 691 (1) ; AIR 1920 Lah 351: 53 Ind Cas 638 : 108 P. R. 1919.

Overruled in A I R (Vol 22) 1935 Lah 202 : 155 Ind Cas 659 (FB).

——S. 16—Decree on mortgage for sale of land of agriculturist—Power of executing Court.

Under S. 16, land belonging to a member of an agricultural tribe cannot be sold in execution even though a decree has been obtained by the mortgagee for sale of such land.

It is the duty of the Court to administer the Act in a general and liberal spirit and to see that its useful and beneficial provisions are not whittled down by any legal quibbles. AIR (Vol 20) 1933 Lah 397 : 34 PLR 523 : 141 Ind Cas 634 (DB).

——S. 16—Land of member of agricultural tribe — Sale by Official Receiver to another agriculturist.

A Receiver in insolvency, in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. A. I. R. 1928 Lah. 734 and 119 Ind. Cas. 730, Diss. from. AIR (Vol 17) 1930 Lah 1034 : 31 PLR 842 (DB).

——S. 16—Provisions of Provincial Insolvency Act modified.

Section 16 of the Punjab Alienation of Land Act overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in "enforcement at the order of adjudication." AIR (Vol 17) 1930 Lah 1034 : 31 Pun L R 842 (DB).

——S. 16—Temporary alienation— Sale in execution prohibited—Temporary alienation by Court—It limited to 20 years—Practice.

Section 16 merely prohibits the sale of agricultural land in execution of decrees. It does not limit the time for temporary alienations made by the Courts. Therefore a mortgage by Court without limit of time of judgment-debtor's land is permissible in law.

At the same time the Courts should ordinarily follow the well-recognized practice in the province of not mortgaging the land, as far as possible, for a term exceeding twenty years and allowing it to be automatically redeemed by profit, though the rule may be departed from in a suitable case. AIR (Vol 17) 1930 Lah 573.

——S. 16—Warrant under Cr. P. Code, S. 386—Land of agriculturist —Not saleable in pursuance of warrant.

The combined effect of S. 386, Cr. P. Code, and S. 16, Punjab Land Alienation Act, is that the land belonging to a member of an agricultural tribe cannot be sold in pursuance of a warrant issued by a Magistrate to the Collector and sent to the nearest Civil Court for execution. AIR (Vol 16) 1929 Lah 667 : 119 Ind Cas 227 : 30 Cr L J 1006 : 1929 Cr C 212.

——S. 16—Attachment—Not prohibited.

Section 16 does not prohibit the attachment of land of a member of an agricultural tribe although it prohibits its sale in execution of a decree. AIR (Vol 16) 1929 Lah 667 : 119 Ind Cas 227 : 30 Cr L J 1006 : 1929 Cr C 212.

——S. 17.

——S. 17—Rules under—Rule 4, if ultra vires.

If the object of the Punjab Government in framing rule 4 under S. 17 was to control the operation of S. 72, Regis. Act, the rule is ultra vires. When there is a refusal by the Sub-Registrar to register under S. 17, an appeal is competent to the Registrar under S. 72, Registration Act.

It is doubtful if the rules under S. 17 are binding on the Sub-Registrar. AIR (Vol 31) 1944 Lah 349 : 46 PLR 182 : 216 Ind Cas 180.

——S. 17—Effect—Provision as to registration of document —Not retrospective.

The provisions of S. 17, Land Alienation Act, forbidding the registration of a document which records a transaction which requires the sanction of the Deputy Commissioner unless a certified copy of his sanctioning order is produced, only apply to instruments executed after 8th June 1901, on which date it came into force. AIR (Vol 16) 1929 Lah 409 : 116 Ind Cas 317 : 30 PLR 306 : 11 LLJ 251 (DB).

——S. 17—Further advance on old security—Further advance an old security not a new mortgage.

Where a mortgage has been effected before the 8th of June, 1901, and a further advance is made after that date on the old security, then the further advance is not a new mortgage provided that no changes are made in the terms of the original transaction. AIR (Vol 8) 1921 Lah 136 : 62 Ind Cas 789 : 2 Lah 202 : 88 PLR 1921 (DB).

——Ss. 17 (2) and 2 (2)—Sale of land to member of an agricultural tribe—Sanction of Dy. Commissioner —Want of—Effect.

Where a person is not resident of Lyalpur District nor holds land therein, he must obtain sanction to purchase land if he does not belong to the agricultural tribe. Under S. 17 (2) sale deed could not be registered unless a certified copy of sanction was given to the registering officer. Where sanction was not procured till the agreed date a subsequent obtaining of sanction will not preclude the deft. from resiling from the agreement to sell to the plff. AIR (Vol 4) 1917 Lah 25 : 120 PR 1916 : 38 Ind Cas 15 (DB).

——S. 19.

——Ss. 19 and 20—Legal practitioner holding special power of attorney—Whether may be permitted to appear as recognised agent.

In the absence of any special reasons, to allow a person, who is a legal practitioner, to appear as a recognized agent in proceedings under the Punjab Alienation of Land Act on the ground that he holds a special power of attorney will be tantamount to permitting an evasion of S. 20 of the Act. (1947) 26 LLT 28.

——S. 19—Mortgagee's statement before Naib Tahsildar—Falsification of evidence—Prosecution—Legality.

A mortgagee having produced a copy of the mortgage-deed before the Deputy Commissioner that officer referred it to the Tahsildar for investigation and report. The Tahsildar did not make any inquiry. Before the Naib Tahsildar, the mortgagee stated that no payments were made by the mortgagor to him. On inquiry payments were found to have been made and were endorsed on the back of the original mortgage deed and the document was withheld for that reason. The Deputy Commissioner sanctioned prosecution of the mortgagee for falsification of evidence by fraudulently producing the copy of the mortgage-deed and making a false statement before the Naib-Tahsildar :

Held, that the prosecution was illegal for (1) the mere production of the copy did not amount to falsification of evidence and (2) the proceedings before the Naib Tahsildar were ultra vires. 80 PLR 1910 : 11 CrLJ 601 : 8 Ind Cas 243 (DB).

—S. 21.

——Ss. 21 and 9 (1), (as applied to N.-W. F. P.)—Application by mortgagor to revise mortgage — Order by Deputy Commissioner to alter mortgage in name of real mortgagee in place of nominal mortgagee — Suit for possession by son of nominal mortgagee— Deputy Commissioner held had no authority to pass order and S. 21 did not oust jurisdiction of civil Court to entertain suit.—Civil P. C. (1908), S. 9.

A mortgage was executed in favour of A of some properties situated in Bannu District. After death of A some of the mortgagors applied to the Deputy Commissioner to revise the mortgage on the ground that A was only a nominal mortgagee and that B, a non-agriculturist, was the real mortgagee. The Deputy Commissioner ordered the mortgage to be converted in favour of B for a period of 20 years in the form prescribed in S. 6 (1) (a), Punjab Alienation of Land Act, as applied to N.-W.F. Province. The mortgage was mutated in the name of B. A's son then brought a suit for possession as mortgagee. It was contended by B and the mortgagors that the civil Courts had no jurisdiction to challenge the correctness of the order of the Deputy Commissioner :

Held, that the civil Courts had plenary jurisdiction in all matters mentioned in S. 9, Civil P. C., and their jurisdiction in any particular matter could not be regarded as ousted unless the Legislature had in unmistakable language taken away that jurisdiction. Section 9 (1) of the Punjab Act (XIII of 1900), did not specifically give the Deputy Commissioner authority to revise and alter the terms of the mortgage where both the mortgagor and the ostensible mortgagee were members of an agricultural tribe. Hence under S. 9 (1) of the Act, as applied to N.-W.F. Province, the Deputy Commissioner had no authority to pass the order and S. 21 of the Act did not oust the jurisdiction of the civil Courts to entertain the suit. AIR (Vol 33) 1946 Pesh 1 (DB).

——S. 21 — When, by previous notification, the Government decided that Rajputs were members of of agricultural tribe and by subsequent notification determined that Bhatias were not Rajputs, the civil Courts' jurisdiction to entertain a suit for declaration that Bhatias are Rajputs is barred by S. 21. AIR (Vol 30) 1943 Lah 305 : 45 P L R 228 : I L R (1943) Lah 538 : 210 Ind Cas 272.

——S. 21—Civil Court can decide whether particular person is member of agricultural tribe or not. A I R 1942 Pesh 81 : 203 Ind Cas 203

——S. 21 — A sale to a person who is not a member of an agricultural tribe without the Deputy Commissioner's sanction is not entirely void. A I R (Vol 29) 1942 Pesh 81 : 203 Ind Cas 203.

——Ss. 21 and 6—Jurisdiction of civil Court— Mortgage of land with possession before passing of Act— Loan by mortgagor from mortgagee after passing of Act, whether new mortgage.

It is clear from S. 21 that the jurisdiction of civil Courts is only barred in such cases in which the revenue officer is specifically empowered to deal with under the Act. Where a mortgagor having already mortgaged his lands with possession to the mortgagee before the passing of the Act, takes a further advance from him after the passing of the Act on the security of the land already mortgaged to him on the same conditions as the original mortgage, such a transaction does not amount to a fresh alienation of an interest in the land and consequently, the provisions of the Act are not attracted and a civil suit would therefore, lie.

But if the new transaction purports to cancel the earlier one or contains conditions substantially different from those contained in the original mortgage or an additional area of land is included in the security the old mortgage is at an end and a new and wholly different relationship between the parties is created to which ex necessitate rei the provisions of the Act will be attracted.

[Prior mortgage, held not extinguished by subsequent loan.] AIR (Vol 29) 1942 Pesh 83 : 201 Ind Cas 722 (DB).

——S. 21 — Section 3 debars the jurisdiction of the Deputy Commissioner to consider the question of sanction in the case of a gift made in good faith for a religious or charitable purpose. Therefore, S. 21 does not oust the jurisdiction of the civil Courts to decide whether the gift is made in good faith for religious or charitable purpose. A I R (Vol 23) 1936 Lah 129 : 161 Ind Cas 672.

——S. 21—Where the Court finds that the transferee is not a member of an agricultural tribe, it should not declare the transaction void but should send a copy of its decree or order under S. 21 (a) to the Deputy Commissioner for sanction. AIR (Vol 20) 1933 Pesh 1 : 141 Ind Cas 268 (DB).

——S. 21—Object of — Declaratory decree whether can be contrary to Act — Application by Deputy Commissioner—Procedure—Power of Chief Court.

The object of S. 21 (a) was merely to enable the correction of decree which on the face of the record infringe the provisions of the Act. A decree, even though it be only declaratory which has the effect of conferring a legal title where no such title would otherwise exist may well be contrary to the provisions of the Act. Where the evidence on the record is not sufficient for the disposal of an application made by a Deputy Commissioner under S. 21 (a) of the Act, the Chief Court has power to order a remand for further inquiry. AIR (Vol 3) 1916 Lah 1 : 52 P R 1916: 72 P W R 1916: 35 P L R 1917 : 32 Ind Cas 443 (FB).

——S. 21—Reference to Civil Court— Duty of Court —Sale of mortgagee— Rights in execution contrary to Act—Effect.

When under S. 21 a reference is made by a Deputy Commissioner to a Civil Court the latter is bound to adjudicate on the matter. If it refuses the reference it may on a representation reconsider its order and pass a fresh order according to law.

When mortgagee-rights are sold in execution of a decree; in contravention of the Act, the sale may be set aside upon a reference made by the Deputy Commissioner of the district under S. 21 of the Act. 12 P R 1911 : 6 P L R 1911 : 23 P W R 1911 : 9 Ind Cas 396 (DB).

——S. 21 (2) — Civil Court not to take cognizance of Deputy Commissioner's manner of exercising his powers.

The Deputy Commissioner's manner of exercising his powers under the Act cannot be taken cognizance of by a Civil Court as S. 21 (2) debars such a procedure. AIR (Vol 4) 1917 Lah 361 : 124 P R 1916: 37 Ind Cas 763 (DB).

——Ss. 21-A, 4 (2) and (3) (as amended by Act (10 of 1938)—Scope—Civil Appellate Court or High Court, powers of—Remand.

Sub sections (2) and (3) of S. 4 are intended to do away with the former provisions of the law under which decrees of civil Courts, passed in suits brought by individuals to have it declared that they do or do not belong to a particular tribe, were binding on Revenue Officers and executive authorities.

There is in the amending Act nothing to indicate that sub-ss. (2) and (3) of S. 4 were intended to, or did, in fact, cut down or otherwise affect the jurisdiction of the Civil Appellate Court or the High Court in dealing with cases which are brought before these Courts by the Deputy Commissioner himself under the special procedure provided for in S. 21-A.

The Civil Appellate Court or High Court has power

to come to a finding on the question raised by the Deputy Commissioner in his revision petition under S. 21-A as to whether one or other of the parties to the impugned decree or order belonged or did not belong to a notified agricultural tribe, and if a remand is necessary for the purpose of coming to that finding, it must be made to the Subordinate Court, whose decree is subject to be revised in the manner provided for by the Civil P. C. and not to the Deputy Commissioner. AIR (Vol 30) 1943 Lah 10 : 44 P L R 533 : 1LR (1943) Lah 731 : 204 Ind Cas 148 (DB).

——S. 21-A— Scope — Order of Appellate Court accepting Deputy Commissioner's revision petition under S. 21-A, if open to revision under S. 115, Civil P. C.

The Court which deals with a revision petition under S. 21-A, acts judicially and is "a Court subordinate to the High Court" and any order passed by such Court is open to revision by the High Court. Hence, where the Appellate Court accepts a revision petition by Deputy Commissioner under S. 21-A, the order accepting the revision petition is open to revision by High Court under S. 115, Civil P. C. Section 21-A while it confers upon the Deputy Commissioner, a special right of applying to the High Court on the revision side does not take away the right of the aggrieved party of invoking the revisional jurisdiction of the High Court under the general law of the land. AIR (Vol 24) 1937 Lah 637 : 169 Ind Cas 430, Overruled. AIR (Vol 29) 1942 Lah 228 : 44 P L R 420 : I L R (1943) Lah 1 : 202 Ind Cas 437 (FB).

——S. 21-A— Scope of — Facts not apparent on face of record—Duty of Court.

Section 21-A requires the Court "to find" whether by the decree or order, which the Deputy Commissioner impugns, the provisions of the Punjab Alienation of Land Act had been infringed and if, in order to determine this question, it is necessary to go into the facts which are not apparent on the face of the record, it is not only competent to a Court of revision, but it is its duty, to frame an issue, institute an enquiry and come to a decision on it. A I R (Vol 29) 1942 Lah 228 : 44 P L R 420 : I L R (1943) Lah 1 : 202 Ind Cas 437 (FB).

——S. 21-A — Court's under to remand case under S. 21-A 5).

In cases under S. 21-A, remand is necessary and desirable and the law provides for it in S. 21-A (5). AIR (Vol 27) 1940 Lah 336 : 190 Ind Cas 466.

——S. 21-A—Order under—Revision, if lies.

Revision lies from an order made upon an application under S. 21-A. AIR (Vol 27) 1940 Lah 336 : 190 Ind Cas 466.

——S. 21-A— Order of sale in contravention of Act— Act itself providing remedy by way of an application by the Deputy Commissioner to set aside any order passed in contravention of the Act by a civil Court. Consequently, the executing Court is not justified in resorting to S. 151, Civil P. C., to set aside a sale which has been confirmed. A I R (Vol 24) 1937 Lah 416 : 39 P L R 710 : 175 Ind Cas 319.

——S. 21-A — High Court, if can extend time prescribed in S. 21-A.

The provisions of S. 21-A are mandatory and do not confer any power on the High Court to extend the time prescribed therein for making the application. AIR (Vol 23) 1936 Lah 857 : 167 Ind Cas 501.

——S. 21-A—Scope of.

Section 21-A was enacted merely to enable the Court to correct a decree which infringed the law on the face of the record.

Where the mortgaged property is a house and not agricultural land and after carefully going through the material on record, the Court comes to the conclusion that it was not "land" at the time of the mortgage, there is no ground for revision. A I R (Vol 22) 1935 Lah 901 : 160 Ind Cas 540.

——S. 21-A—Application under S. 21-A filed within time but legal representative of one of parties not brought on record — Provisions of Civil P. C., apply and time can be extended under Limitation Act, S. 5. AIR (Vol 22) 1935 Lah 443.

——Ss. 21-A and 16 — Decree ordering sale of property of agriculturist judgment-debtor — Proper course.

Where a decree ordered sale of certain property for the realization of a debt, the objection that the judgment-debtor is an agriculturist and that the property cannot be sold cannot be raised for the first time in execution proceedings.

A Court executing a decree cannot go behind that decree in execution proceedings. If there is a contravention of S. 16 by the decree, the proper course is to attack the decree itself and not a subsidiary order passed in execution. A I R (Vol 22) 1935 Lah 443.

——S. 21-A — Trust is not member of agricultural tribe unless it is notified. AIR (Vol 22) 1935 Lah 274.

——S. 21-A—Where a decree is passed by a civil Court and the decree offends the provisions of S. 3 (2) which fact is brought to the notice of the Deputy Commissioner, the only course open to the Deputy Commissioner is that under S. 21-A (2) which authorises him to move the higher civil Court for revision in accordance with the Act. AIR (Vol 21) 1934 Lah 947 : 35 P L R 709 : 16 Lah 56 : 155 Ind Cas 615 (DB).

——S. 21-A—House in abadi, whether land.

A house in a village abadi is not 'land' within the meaning of the Punjab Alienation of Land Act and S. 21-A of the Act does not apply to the sale of such property. AIR (Vol 20) 1933 Lah 125 : 34 PLR 399 : 142 Ind Cas 652.

——S. 21-A — Reference under — Interference with finding of fact.

It is not open to the High Court to interfere with the Subordinate Judge's findings of fact on a reference under S. 21-A. AIR (Vol 17) 1930 Lah 775 (DB).

——S. 21-A—Revision petition — C. P. Code, O. 22. R. 11, does not apply.

Order 22, Rule 11 does not apply to application under S. 21-A, Punjab Alienation of Land Act, for revision of an order of the District Judge. AIR (Vol 17) 1930 Lah 775 (DB).

——S. 21-A—Genuine dispute—Genuine dispute between the parties—Section dees not apply.

The object of S. 21-A is to enable correction of decrees which on the face of the record infringe the provisions of the Act, and the section would not apply to a case where there is a genuine dispute between the parties in the subject-matter of the suit. A I R (Vol 14) 1927 Lah 897 : 105 Ind Cas 632 : 26 P L R 175.

——S. 21-A — Limitation — Alienation by widow— Subsequent compromise decree in 1919—Revision by Deputy Commissioner — Barred — Act not contravened.

The widow of a Gaur Brahman had sold her occupancy rights in land to some Rors, and after her death her reversioners sued for possession of the land. The suit resulted in a compromise, and the decree of the Civil Court was passed in 1919, the Deputy Commissioner applied in revision on 12th April, 1922.

Held, the application is time-barred. Moreover it fails on the merits, as, even if the alienation by the widow contravened the provisions of the Land Alienation Act it is not explained in what way they are contravened by the subsequent decree of Court. AIR (Vol 10) 1923 Lah 218 : 85 Ind Cas 998.

——S. 21-A—Nature of—Limitation.

S. 21-A of the Punjab Alienation of Land Act is retrospective and a Deputy Commissioner can apply for revision of a decree passed before or after the section came into force but he must do it within 2 months of notice of the decree or order. 235 P W R 1912 : 14 Ind Cas 330 (DB).

——S. 21-A—Application under—Limitation—Time spent in prosecuting application in wrong Court — Limitation Act, S. 14.

The period of limitation for an application under Section 21-A by a Deputy Commissioner against a decree in contravention of Act XIII of 1900 is two months from the date when the Deputy Commissioner is informed of a such a decree. S. 21-A of Act (XIII of 1900) provides only for applications to a Court competent to interfere with the first Court's decree in appeal or reversion and time spent in prosecuting such an application in a wrong Court cannot therefore be excluded.; the period of 2 months, is not subject to the provisions of Ss. 4 to 25 of the Limitation Act. 200 P L R 1911 : 158 P W R 1911 : 11 Ind Cas 34.

——S. 21-A (1)—It is the duty of the Court to send the Deputy Commissioner as such a copy of his decree or order.

Where a warrant for possession of the property in execution of the decree was sent to the Collector in the usual course and a subordinate in his office endorsed it to the Tahsildar :

Held, that this was not an information which came to the knowledge of the Deputy Commissioner. AIR (Vol 22) 1935 Lah 274.

——S. 21-A (2)—M, a member of notified agricultural tribe selling in 1922, 28 marlas of land to G, a non-agriculturist without sanction of Deputy Commissioner — Consideration paid and possession delivered —In 1935, Deputy Commissioner declaring sale to be in contravention of Act and declaring alienation to take effect as usufructuary mortgage for 20 years from date of alienation—G's suit in 1937 against M for declaration that he acquired title by adverse possession and that he was not mortgagee—Suit compromised—G admitted to be owner of 7 kanals—Decree incorporating compromise passed— At date of decree, land in dispute not "land" within the meaning of Act :

Held, that the compromise decree was nothing but alienation which was not contrary to Act. AIR (Vol 28) 1941 Lah 369 : 43 P L R 464 : : 197 Ind Cas 65.

——S. 21-A (2)—Revision, when lies.

An application for revision is entertainable only if the order passed is contrary to any provisions of the Act. AIR (Vol 24) 1937 Lah 112 : 171 Ind Cas 926.

——S. 21-A (2)—Revision under S. 21-A (2)—Limitation, when commences.

An application for revision under S. 21-A (2) can be made within two months of the date on which the Deputy Commissioner is informed of the order which is alleged to be contrary to any provisions of the Act. It is not from the date on which the Deputy Commissioner makes up his mind that the order is illegal that the time is to count but from the date on which the order is brought to his notice. A I R (Vol 24) 1937 Lah 112 : 171 Ind Cas 926.

——S. 21-A (2)—Consent decree by civil Court in contravention of Act—Appeal, if lies.

No appeal lies from a consent decree passed by Civil Court in contravention of the Act but revision lies. Where, however, the Deputy Commissioner, after being informed, does not move the High Court under S. 21-A, sub-s. (2) within two months of such information, the High Court can pass an order suo motu. AIR (Vol 24) 1937 Lah 33 : 17 Lah 783 : 39 P L R 60 (1) & 135 : 166 Ind Cas 956 (1).

——S. 21-A (2) — Collector's knowledge of decree—Need not be acquired in any particular way.

When the Collector has knowledge of the decree otherwise, it is not necessary for him to have actually seen it before taking action under S. 21-A (2). The knowledge in such cases need not be acquired in any particular way, e.g., by seeing the original decree. 121 Ind Cas 729 : 30 P L R 497 : A I R (Vol 17) 1930 Lah 362.

——S. 21-A (2)—Effect on civil proceedings—Decision of revenue authorities—Not binding.

The Civil Courts are in no way bound by the decisions of the Revenue authorities in such a matter as the question where a particular person is a Koreshi or not. 3 L L J 489 : A I R (Vol 8) 1921 Lah 251.

——S. 21-A (2)—Time prescribed for an application under—Whether Chief Court can extend.

The Chief Court cannot extend the time prescribed for an application under S. 21-A (2) of the Act. Obiter. It is doubtful whether a decree under S. 9 of the Sp. Rel. Act which does not settle any question of title can be revised under S. 21-A Cl. (2) of the Punjab Alienation of Land Act. A I R (Vol 1) 1914 Lah 87 : 7 P R 1914 : 135 and 153 P L R 1914 : 23 Ind Cas 299.

——S. 21-A (2) — Consent decree — Alienation — Alteration of decree—Forum.

An agriculturist sold his land to a non-agriculturist in 1879 but in the Revenue Records the transaction was described as a mortgage. The parties compromised the litigation and the Court passed a declaratory decree whereby three-fourth of the land was treated as permanently alienated to the vendee, while the remanining one-fourth was released absolutely to the vendor :

Held, the compromise decree merely construed the sale deed of 1879 in accordance with the wishes of the parties and the compromise and the decree based thereon did not amount to an alienation by an agriculturist to a non-agriculturist in opposition to the Alienation of Land Act. The proper Court for the Deputy Commissioner under S. 21-A (2) of the Act, to apply to in the case of a consent decree, is the Chief Court.

Quaere : It is doubtful whether the power to "Alter" a decree under S. 21-A (2) of the Act, also implies the power to set it aside especially when the decree is a consent decree and is not appealable under S. 96 (3), C. P. Code. 8 P R 1913 : 9 P L R 1913 : 280 P W R 1912 : 16 Ind Cas 957 (DB).

——S. 21-A (2)—Sale under, recognised by Deputy Commissioner if can be interfered with by successor.

A sale under S. 21-A (2) once recognised by a Deputy Commissioner cannot be interfered with by his successors in office except on proof that the former had not full knowledge of the facts or was mislaid.

A knowledge of such sale by one Deputy Commissioner is knowledge of his successor in office. 132 P W R 1911: 215 P L R 1911 : 11 Ind Cas 273.

——S. 23.

—S. 23—Whether refers to appeal or revision.

Section 23 does not refer to only appeal or revision and presumably the section is intended merely to confer concurrent jurisdiction on higher Revenue Officers to grant or withhold sanction. AIR (Vol 26) 1939 Lah 526 : 41 P L R 467 : 186 Ind Cas 332.

——Ss. 23, 19—Sanction granted by Deputy Commissioner under S. 3, if can be cancelled by Financial Commissioner.

Reading together the provisions of Ss. 19 and 23, along with those of S. 6 it is clear enough that the Deputy Commissioner and the higher officers, who have been empowered to act under the Act must be

looked upon as 'Revenue officers', within the meaning of S. 6. His proceedings, there ore, will be subject to the provisions in Chap. II relating to appeal or revision by higher Revenue Officers.

Consequently, where the Deputy Commissioner grants sanction under S. 3 the order cannot be deemed to be final merely because revocation of the sanction by higher authorities would involve upsetting of titles and consequent inconvenience and uncertainty. The Financial Commissioner or any other authority has power to set it aside. A I R (Vol 26) 1939 Lah 528 : 41 P L R 467 : 186 Ind Cas 332.

——S. 25.

——S. 25—Revenue Court Circular No. 39 issued by Revenue Commissioner has no force of law and does not bind Civil Courts. AIR (Vol 30) 1943 Pesh 24 : 206 Ind Cas 137 (DB).

——S. 60.

— . 60—Scope of—Punjab Alienation of Land Act (13 of 1900) overrides S. 60 of the Provincial Insolvency Act.

An act done by the Receiver in pursuance of the authority which he derives from the order of adjudication, is nothing but an enforcement of the order of adjudication and sale of land belonging to a member of a notified agriculturist tribe is subject to provisions of S. 16, Punjab Alienation of Land Act. A I R (Vol 17) 1930 Lah 1034 (DB).

——S. 60—A Receiver in insolvency in whom the property of a member of a notified agriculturist tribe has become vested, does not posess power to sell his land to another agriculturist. AIR 1928 Lah 734 and 119 Ind Cas 730, Diss. from. A I R (Vol 17) 1930 Lah 1034 (DB).

PUNJAB ALIENATIQN OF LAND (SECOND AMENDMENT) ACT (10 of 19 8)

——Act which is ultra vires so far as retrospective does not admit of classification of particular cases on which Act may happen to operate.

The Punjab Alienation of Land (Second Amendment) Act, 10 [X of 1938, which is ultra vires so far as it operates retrospectively but valid as regards future transactions does not admit of severability by a classification of the particular cases on which the Act may happen to operate, involving an inquiry into the circumstances of each individual case. There are no words in the Act capable of being so construed and such a course would in effect involve an amendment of the Act by the Court, a course which is beyond the competency of the Court. A I R (Vol 29) 1942 F C 38 : I L R (1942) Lah 643, Reversed; A I R (Vol 33) 1946 P C 66 : 73 Ind App 59 : 1946 Mad W N 166 : 50 Cal W N 429 : (1946) 9 F L Jour 41.

——Government of India Act, 1935, Ss. 292, 293, 298 — Punjab Act X of 1938, if ultra vires under S. 292.

The Punjab Alienation of Land (Second Amendment) Act is not ultra vires of the Punjab Legislature on the ground that it offends against S. 292, Government ot India Act. A I R (Vol 28) 1941 Lah 182 : 43 P L R 198 : 195 Ind Cas 17 (FB).

PUNJAB ARBITRATION AMENDMENT ACT (1 of 1911).

——The Arbitration Act, IX of 1899, which has been made applicable at Lahore also, is subject to the provisions of the Punjab Act, I of 1911. A I R (Vol 21) 1934 Lah 652 : 45 P L R 482 : 152 Ind Cas 135 (2) (DB).

——S. 2.

——S. 2 — As result of Amending Act (1 of 1911), Arbitration Act (9 of 1899), is not in force in proprio vigore in local areas in Punjab to which it is extended by notification. In such areas, Arbitration Act (IX of 1899), governs only those agreements which make express provision that it shall apply. Parties cannot nullify Amending Act by resorting to S. 2 of Act of 1899. A I R (Vol 28) 1941 Lah 279 : 43 P L R 344 : I L R (1942) Lah 386 : 198 Ind Cas 744 (DB).

——S. 2 — For the applicability of the Arbitration Act in the Punjab, it is necessary under S. 2 that a specific mention should be made of it in the agreement. A I R (Vol 20) 1933 Lah 173 : 145 Ind Cas 129 (DB).

PUNJAB BORSTAL ACT (11 of 1926).

——Minor associating with habitual offenders — If benefit denied.

A minor boy cannot be denied the benefit of the provisions of the Punjab Borstal Act simply because he associated with habitual criminals. A I R (Vol 15) 1928 Lah 498 : 29 Cri L J 350 : 10 A I Cr R 16 : 108 Ind Cas 169.

PUNJAB CANAL AND DRAINAGE ACT (8 of 1873).

—S. 10.

——S 10 (4)—"Authorised distribution" — Whether it includes internal distribution.

"Internal distribution" in a village by the village community is not an authorised distribution within S. 70 (4) as it is not formally approved or sanctioned by any canal authority where they have merely accepted the distribution made by the villagers and disturbing the arrangement of the village community does not justify conviction. A I R (Vol 7) 1920 Lah 317 : 1 Lah 604 : 60 Ind Cas 59 (DB).

—S. 20.

——Ss. 20 and 23—Permanent right of irrigation.

Canal authorities cannot confer permanent right of irrigation on a person without proceeding either under S. 20 or 23 of the Act. A I R (Vol 6) 1919 Lah 119 : 177 P W R 1918 : 50 Ind Cas 299.

—S. 32.

——S. 32-(e) — Use of water couse for irrigation—Agreement to pay compensation to owner — Effect and validity

An agreement to pay compensation to the owners of a water course for the use of the same for irrigation amounts to a sale of canal water and is not permissible without the consent of the Superintending Engineer, except in the circumstances contemplated in S. 32 (e) of Act VIII of 1873; such an agreement is contrary to public policy and cannot be enforced by the Court. 8 P R 1913 Rev : 216 P L R 1915 : 22 Ind Cas 398.

—S. 47.

——S. 47—Payment of dues by Lambarder—Interest.

A lambarder paying canal dues from his pocket is entitled to collect the same with interest from subordinate Zamindars including muafidar. A I R (Vol 3) 1916 All 223 : 32 Ind Cas 556.

—S. 70.

——S. 70 (4)—"Authorised distribution"— Meaning of—Private arrangement—Civil remedy.

The "authorised distribution" in S. 70 (4) means distribution expre sly made by the canal authorities; and any further distribution between a landlord and his tenant is a matter of private contract which only entitles a tenant to bring a civil action. 217 P L R 1913 : 14 Cri L J 281 : 21 P W R 1913 Cr : 19 P R 1913 Cr : 19 Ind Cas 713 (DB).

PUNJAB CANAL COLONY.

See Grant—Crown Grant.

PUNJAB CHIEF COURT CIRCULARS.

——Circular No. 849-G of 15-2-1900—Ultra vires.

The Chief Court Circular No. 849-G of 15-2-1900 is ultra vires as it is opposed to the Civil P. C. The circular should be adopted in cases of criminal accusations against public servants. 4 P W R 1910 Cr : 11 Cri L J 205 : 5 Ind Cas 714 (DB).

PUNJAB CHIEF COURT CIRCULARS, RULES AND ORDERS.

—Vol. 1, Page 99.

——Vol. 1, Page 99—Condition for reducing interest —Undue influence.

Before any reduction can be allowed on the rate of interest under the Punjab Chief Court Circulars, Vol. 1, page 99, undue influence must be proved to have been exercised. A I R (Vol 14) 1927 Lah 536 : 102 Ind Cas 707 (DB).

—Vol. 3, Ch. 1.

——Vol. 3, Ch 1, Rr. 4 (ii) and 4 (iv)—Time required for copies — Copying agent — Not agent of Court— Time taken not allowed for limitation purpose.

The Copying Agency cannot be regarded as other than an agent of the applicant and is not an agent of the Court. Time spent by the Copying Agency in getting the estimate and putting in the application should not be allowed to the applicant. A I R (Vol 15) 1928 Lah 16 : 28 P L R 605 : 104 Ind Cas 586.

PUNJAB CHIEF COURT RULES

— Rules and Orders, O. 57, R. 2 (1).

The security under R. 2 (1) is for the performance of the order which is sought to be revised within a reasonable time, it should be limited to the security demandable under the rules of the Court, no matter in what terms the security is worded. The liability of the surety is not more extensive then that of the judgment-debtor and it does not arise until the decree-holder fails to satisfy the decree by sale of the property. 66 P R 1909: 99 P W R 1909:134 P L R 1909 : 2 Ind Cas 959 (DB).

—R. 30.

——Rr. 30 (3) and (4)—Pre-emption suit.— Pleader's fee – Method of calculation.

Pleader's fees in a suit for pre-emption should be calculated under Cl. (4) and not under Cl. (3) of R. 30 i. e., with reference either to amount decreed or according to the valuation of the suit, or according to such sum not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute. 149 P L R 1911 : 192 P W R 1911 : 10 Ind Cas 38.

—Vol. I, Chap. 20, R. 35.

——Vol. I, Chap. 20, R. 35 — Petition-writer convicted as tout is unfit to act as petition-writer.

If a man who is a petition-writer is convicted of being a tout, he is, by reason of improper conduct in the discharge of his duties as a petition-writer, unfit to practise as such as contemplated by R. 35, Petition Writers' Rules. A I R (Vol 30) 1943 Pesh 54 : 44 Cri L J 582 : 207 Ind Cas 135.

—Vol. 3, P. 81, R. 3.

— (Vol. 3, P. 81) Rr. 3 and 4 — Pleader's fees — Injunction, suit for.

The Pleader's fee in a suit for an injunction is not left to the pleasure of the Court but should be calculated according to the valuation of the suit or according to such a sum not exceeding the valuation as the Court shall think reasonable under the rules. A I R (Vol 7) 1920 Lah 398 : 165 P R 1919 : 54 Ind Cas 905.

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (5 of 1912)

——Grant of proprietary rights to tenant — Condition against alienation — Validity — Crown Grants Act S. 3.

The executive authority cannot lawfully super-impose upon the grant of proprietary rights to a tenant a condition that the land should not be alienated during the tenure of the grantee "without the concurrence of the reversioners". It is not competent for the executive authority under the form of granting proprietary rights to grant something very different and to create an estate of a kind unknown to the law.

For the result of a grant with such a condition is to deprive the grantee of proprietary rights of an essential right of property, viz., the free power of disposition, and moreover to fetter it not by an absolute bar against alienation nor by such a bar except with the consent of a particular person, but by a bar against alienation "except with the concurrence of the reversioners", a body of person presumably altering from time to time and perhaps at no time easily ascertainable.

There is no justification for such a condition in the Colonisation of Government Lands Act or any Rules made thereunder. Nor is such a condition justified by S. 3 of the Crown Grants Act. A I R (Vol 35) 1948 P C 33 : 74 I A 319 : I L R (1947) Lah 741 : 61 L W 148 : 1943 M W N 124 : 50 P L R 25 : (1948) 1 M L J 206.

—S. 10.

——S. 10—Scope — Conditions of valid tenancy — Absence of statement of conditions in writing and allotment— No possession given — Effect — Default by tenderer – Detention under S. 69, Land Revenue Act—Legality.

Under S. 10 of the Punjab Colonization of Government Lands Act, a statement of conditions is necessary to be issued by the Provincial Government if any land in a colony is to be granted to tenants, and it is only after such statement has been issued that the Collector is authorised to allot land to any person and to declare by an order in writing the conditions governing the allotment.

So long as this is not done and possession of the land is not transferred with the permission of the Collector, a person cannot be deemed to be a tenant at all, within the meaning of the Act, although such a person has made a tender. In case of default of payment by the tenderer under such circumstances, the provisions of S. 69 of the Land Revenue Act cannot be invoked under S. 28 of the Colonisation of Government Lands Act.

Even if recourse is to be had to S. 69 of the Land Revenue Act, the Collector has first to lease out the lands once more and then recover the deficiency in rent, if any, and to impose any penalty. Then if there is default, in payment, the defaulter may be detained under S. 69 of the Land Revenue Act. But when those steps are not taken, detention under that section is altogether illegal. (1947) 231 Ind Cas 352 : 48 Cri L J 772 (DB).

——S. 10 — Original allottee before acquisition of occupancy rights and his successors are tenants. A I R (Vol 17) 1930 Lah 474 : 11 Lah 282 : 127 Ind Cas 566, Overruled. AIR (Vol 26) 1939 Lah 419 : ILR (1939) Lah 385: 42 P L R 358 : 184 Ind Cas 286 (FB).

——S. 10 Grant of land — Death of grantee before payment of instalments – Payment by widow — Ownership — Accretion to estate or self-acquired property of widow.

A obtained a grant of land as a tenant under the Act. His son B completed the five years term of tenancy required to get the right to purchase the land and paid the first instalment in 1907. B died in 1908, and mutation was effected in favour of his widows with the remark that they had only a life estate.

The widows paid the subsequent instalments and an order was made in 1917 when the last instalment was paid stating that full proprietary rights were granted. One of the widows subsequently alienated a portion of the land and the daughters of the co-widows instituted a suit for a declaration that the sale was not binding on them :

Held, that the proprietary rights whether acquired by the widows or by B or by them jointly, were an

accretion to the estate left by B; the widows had only a life-estate in the same and the plaintiffs had, therefore, a locus standi to maintain the suit. A I R (Vol 19 1932 Lah 144 : 134 Ind Cas 1117 (DB).

——Ss. 10, 36—Grant of land—Power of Government—Jurisdiction of Civil Courts.

Under S. 10, the Local Government has power to allot Government lands to any person on any conditions it may think fit and under S. 36 of the said Act, Civil Courts have no jurisdiction to take cognizance of the manner in which the Local Government exercises such power. A I R (Vol 18) 1931 Lah 270 : 32 P L R 206 : 12 Lah 5 : 134 Ind Cas 291 (DB).

—S. 15.

——S. 15—Presumption by Collector.

A purchaser under the Punjab Colonization of Government Lands Act becomes a full owner. If there is breach of the conditions of sale, the Collector should file a suit in a Civil Court. The resumption by the Collector is illegal. (1940) 42 P L R 529.

——S. 15—Suit for declaration of title as co-purchaser and for entry as such in Government records.

Though a subsequent transfer by a person who has purchased land auctioned by the Government under the Punjab Colonization of Government Lands Act would be void, a suit by another person for declaration of title on the basis of a prior agreement can be maintained but a declaration to the effect that the plaintiff is entitled to get his name also entered in the records along with the defendant cannot be granted where the Government is not a party inasmuch as the entering of the name of the plaintiff as a co-purchaser is a matter for the Government to decide. (1932) 138 Ind Cas 268 (Lah).

—S. 17.

——S. 17 — Order of Collector giving chiragah land in exchange — Appeal — Locus standi of settlers of chak.

Where by an order of the Collector chiragah land of a chak has been given in exchange, all the settlers in the chak have locus standi to appeal against that order. (1947) 26 L L T 36.

—S. 18.

——S. 18—Where the interest in the land cannot be attached and sold under S. 18, a Receiver can be appointed under S. 51, Civil P. C., to liquidate a decree from the profits of the land by granting a lease. A I R (Vol 29) 1942 Lah 126 : 44 P L R 74 : ILR (1943) Lah 179 : 201 Ind Cas 87 (DB).

——S. 18—Appointment of Receiver.

The words used in S. 60, Civil P. C. are the same as those used in S. 18. It follows that if a Receiver can be appointed under S. 51, Civil P. C., although the property is not liable to attachment or sale by reason of S. 60 of the same Code, similarly a Receiver can be appointed in a fit and proper case to liquidate decree, although the lands or rather the interest in the lands cannot be attached or sold by reason of S. 18. A I R (Vol 25) 1938 Lah 458 : 40 P L R 303 : 177 Ind Cas 410.

——S. 18 — In execution of money decree to recover rents of an occupancy holding to which S. 18 prohibiting attachment and sale applies, a Receiver can be appointed under S 51 (d) for a period of seven years which is a period for which the property can be leased. AIR (Vol 24) 1937 Lah 738 : 39 P L R 649 : 175 Ind Cas 601.

——S. 18 — Obiter — The crops growing on the land cannot be included in the expression "rights or interests vested in a tenant" in S. 18. AIR (Vol 24) 1937 Lah 393 : 39 P L R 718 : 173 Ind Cas 218.

——S. 18—Order for attachment and sale of crops of judgment-debtor—Objection under S. 18—Held that the order of attachment cannot be revised. AIR (Vol 24) 1937 Lah 393 : 39 P L R 718 : 173 Ind Cas 218.

——S. 18 — Protection from attachment and sale — Transfer of colony land—Whether act of insolvency.

Section 18 protects an interest in colony land from attachment and sale by a Civil Court or in insolvency proceedings. Where the transfer of interest in certain colony land took place within three months of a petition to adjudicate the transferor as insolvent and the transfer was effected by him for not being required by the colonization authorities to take up his residence in the colony, the transfer cannot be said to be with intent to defeat or delay his creditors. On the basis of such transfer, no act of insolvency can be said to be committed as required by S. 9 (1) (c), Provincial Insolvency Act. AIR (Vol 21) 1934 Lah 507 : 148 Ind Cas 832.

—S. 19.

1. Delegation of authority.
2. Agreement between parties.
3. Scope and applicability.
4. Transferred or charged.
5. Without consent.

1. Delegation of authority.

——Ss. 19, 3 — When the Commissioner by letter, empowers "the Collector of a District" to sanction sale under S. 19, "the Collector" does not include the Settlement Officer with powers of a Collector. AIR (Vol 25) 1938 Lah 244 : 181 Ind Cas 624 (DB).

——S. 19—Sanction for sale of land.

Where the Commissioner, by a letter, authorises the "Collector of the District" to give sanction for sale of land under S. 19, the letter of the Commissioner can only be taken to authorise the Deputy Commissioner of the District to sanction sales under S. 19 of the aforesaid Act. A I R (Vol 24) 1937 Lah 146 : 39 P L R 287 : 162 Ind Cas 557 (2).

2. Agreement between parties.

——Ss. 19 and 36 — After death of widow, her land mutated by Collector in favour of collaterals—Suit by daughters of widows for declaration that mutation was wrong — Compromise among parties dividing land without consent of Collector :

Held, that compromise was void under S. 19 and Civil Court's jurisdiction to pass decree on basis of compromise was barred under S. 36. AIR (Vol 26) 1939 Lah 365 : 41 P L R 889.

——S. 19 — Agreement to mutation of proprietary rights—Validity.

A mere agreement to have mutation effected in respect of the proprietary rights does not make the agreement void under S. 19 :

Held, that the agreement was merely a recital of existing facts and it did not by itself declare any rights which did not previously exist and also that it was an agreement to enter mutation of the proprietary rights when they have been acquired and that such an agreement did not require registration. AIR (Vol 23) 1936 Lah 576 : 165 Ind Cas 156.

——Ss. 19, 21 (a) — Widow allowed to succeed as occupancy tenant—Her powers of alienation.

A who had been granted occupancy rights in a square of land by Government died in 1897 and was succeeded by his son B who died in 1898, Government allowed A's widow to succeed to the occupancy rights :

Held, that the act of the Government in allowing her to become an occupancy tenant amounted to allotting to her the occupancy tenancy. In these circumstances, she must be treated as a person to whom the tenancy was first allotted by Government succession to whom would now be governed by S. 21 (a) of Act V of 1912, and her right of alienation is thus restricted only by the provisions of S. 19 of

the Act, that is, the sanction of the Commissiouer is necessary to validate a gift made by her. Where this has been given, the reversioners of her husband have no locus standi to contest it. AIR (Vol 23) 1936 Lah 349 : 37 PLR 797 : 16 Lah 252 : 161 Ind Cas 974 (1) (DB).

——S. 19 — Personal grant for rendering military service.

Where the grant made is purely personal and for rendering military service to the Crown, the grantee cannot introduce strangers with himself to share the grant and any agreement admitting rights of others to share the grant is illegal. AIR (Vol 22) 1935 Lah 739 : 17 Lah 38 : 38 PLR 292: 161 Ind Cas 201 (DB).

——S. 19—Applicability and scope.

With Collector's sanction, G buying in 1917 tenancy on horse-breeding terms. Prior to purchase, G making oral agreement with T and Q that they would advance half purchase-money of Rs. 10,000, pay half the outgoings and have possession of one-half of the land and receive one-half of the profits—Agreement void under S. 19 but parties legally observing it for several years and in 1922 G executing formal written document in which, after reciting the earlier transaction of 1917, expressly making agreement to the effect that the enjoyment of the lands should continue as before but in case of a breach, it was provided that he and after his death, his children should pay the sum of Rs. 10,000 to other parties to the agreement — G's son obtaining order ejecting T's sons — Latter suing to recover Rs. 10,000 :

Held, that agreement of 1922 was not illegal even if by provisions of S. 19, it was void. Hence, even apart from express provision to pay Rs. 10,000 the sum originally advanced, viz., Rs. 5000 would be recoverable.

Held further that the profits received could not be set off against the sum advanced. AIR (Vol 20) 1933 Lah 291 : 145 Ind Cas 163.

——S. 19 —Auction of Government land—Agreement to purchase iointly without bidding against each other — Validity — Breach of agreement — Right to recover money contributed — Contract Act, S. 23.

An agreement between several persons to purchase land jointly at an auction held under the Act without bidding against each other is not opposed either to the provisions of S. 19 of the said Act or to public policy, and a person who has paid money to the actual bidder in pursuance of such an agreement is, therefore, entitled to recover the amount paid by him if the latter refuses to perform his part of the agreement. AIR (Vol 19) 1932 Lah 32 : 32 PLR 879: 134 Ind Cas 101.

3. Scope and applicability.

——S. 19 — Agreement between parties prior to acquisition of colony land that they should be its joint owners—Validity.

Where prior to the acquisition of colony land it is agreed between the parties that they should be joint owners of that land, that land, though entered in the name of one of them, vests in all the parties to the agreement from the very beginning, and the agreement is not hit by S. 19 of the Colonization of Government Lands Act. AIR (Vol 37) 1950 Lah 54 : Pak L R (1949) Lah 595.

——S. 19 — A and B agreeing that former should bid at Government auction for both and that land so purchased should be treated as joint — A obtaining land and recorded as tenant—B's suit to enforce title:

Held, that the objection under S. 19 was not maintainable—B became tenant when land was purchased. AIR (Vol 25) 1938 Lah 721 : 182 Ind Cas 220 (DB).

——S. 19—Transfer, what is.

Section 19 forbids the transfer of tenancy rights by a Government tenant in favour of a third party without the sanction of the Commissioner or other officer appointed by him. But the section has no application to an agreement to sell the land after the proprietary rights have been conferred by Government. In such a case, the transaction purports to be a sale not in praesenti of the tenancy rights but in future. AIR (Vol 22) 1935 Lah 181 : 37 PLR 58 : 153 Ind Cas 437 (DB).

——S. 19—Invalid transfer—Void as between parties also.

A transfer prohibited by S. 19 is void, not only as against Commissioner, but also as between the parties to the transaction. (Obiter.) AIR (Vol 17) 1930 Lah 835 (DB).

——S. 19 Agreement to transfer future proprietary rights—Valid.

A present agreement to transfer the proprietary rights as soon as acquired does not contravene the provisions of S. 19. AIR (Vol 11) 1924 Lah 357 : 72 Ind Cas 1032 : 6 LLJ 446 (DB).

——S. 19—Will of occupancy—Validity.

Where an occupancy tenant devised his occupancy land prior to the Act but acquired proprietary rights after the Act held, that the Will was not invalid under S. 19 of the Act. AIR (Vol 7) 1920 Lah 233 : 1 Lah 500 : 59 Ind Cas 513 (DB).

——Ss. 19, 14, 15 — Passing of proprietary rights to tenants on payment of the fitst instalment — Small balance due—No hindrance to possession.

If a tenant under the Government Tenants Act, paid the purchase money by instalments for the acquisition of proprietary rights under the terms of Cl. 17 of the statement of conditions applicable, he gets proprietary rights on the payment of the first instalment. Section 14 of the Colonization Act, 1912 prevents S. 15 of that Act from operating with retrospective effect and the latter section does not deprive the instalment purchaser of a right of property already acquired because there was a small balance of interest still due from the tenant to Government. 2 PWR 1916 Rev : 32 PLR 1917 : 36 Ind Cas 125.

4. "Transferred or charged."

——S. 19 — Charge not creating any interest in land —If falls within prohibition.

The word "charge" appears to have been used in S. 19 of the Punjab Colonization of Government Lands Act to denote an encumbrance in the general sense of the term, but it is not every encumbrance which falls within the prohibition but only such encumbrance as can be brought within the meaning of the expression "other private contract" construed ejusdem generis with "sale, exchange, gift, will, mortgage" and "sub-lease."

A mere charge which does not create any interest in the land charged, does not satisfy the necessary condition for falling within the prohibition, and is, therefore, not void under the section. AIR (Vol 37) 1950 Lah 54 : Pak L R (1949) Lah 595.

——S. 19—Transfer, what is.

Where a bona fide dispute had arisen between the parties on the death of an occupancy tenant and a family arrangement was arrived at whereby the entire lands were taken by the brother of the deceased and the widow was given maintenance allowance:

Held, that there was really no transfer within the meaning of S. 19. AIR (Vol 22) 1935 Lah 638 : 160 Ind Cas 21 (DB).

——S. 19 — Government tenant agreeing to wipe off indebtedness by giving possession of part of land to plaintiff.

The essential part of an agreement between the parties was that the defendant admitted that he was indebted to the plaintiffs and agreed to wipe off that

indebtedness by giving possession of a part of the land, the tenancy of which had heen granted to him by the Government and the income of that land was fixed at Rs. 300. On failure of the plaintiffs to realize the income of the land due to the action of defendant, the latter agreed to pay him Rs. 300 a year :

Held, that according to the recitals in the agreement, the relationship between the parties was that of a creditor and a debtor and not of a landlord and a tenant, and the agreement could not be deemed to be void under S. 19. AIR (Vol 21) 1934 Lah 857 : 35 PLR 575 : 153 Ind Cas 388.

—— S. 19 — Transfer contemplated, what is not — Agreement that one should bid at Government auction for all—Tenancy in name of bidder — Rights of others—If result of transfer.

Defendant entered into a contract with the plaintiffs whereby he was to bid at an auction held by the Government for the sale of certain land, and the land if purchased was to be treated as the property of all the parties. Accordingly the land was purchased, and as the price was settled to be paid by instalments, the defendant was recorded as the tenant of the land. Plaintiffs brought a suit to enforce their right to the land which was resisted on the ground that the interest of a tenant was not transferable under S. 19, without the consent of the Commissioner.

Held, that the transaction under consideration cannot be regarded as a transfer as contemplated in S 19 of the rights of a tenant so as to require Commissioner's permission. A I R (Vol 17) 1930 Lah 835 (DB).

—— S 19—Promise to pay half produce or money — No transfer of tenancy rights.

When all that the tenant executant of agreement did was to agree, for consideration received, to pay half of the produce of certain lands, and if he failed to pay the produce to pay a sum of money annually,

Held, the agreement did not transfer any of the tenancy rights nor can they be said to create a charge thereon. AIR (Vol 11) 1924 Lah 149 : 72 Ind Cas 480: 5 L L J 366 (DB).

5. Without consent.

——S. 19—Sale without sanction—Legality—Refund of consideration.

Section 19 clearly lays down that any sale effected without the necessary sanction will be void and the transferee is entitled to refund of consideration. AIR (Vol 24) 1937 Lah 146 : 39 PLR 287 : 162 Ind Cas 557 (2).

——S. 19—Defendant who was a tenant of Government mortgaging land without previous sanction of the Government — Mortgagee who was in possession ejected by Government — Suit by mortgagee for the consideration paid to the tenant :

Held, that the parties knew that the sanction was necessary but they did not know that the contract was void. The parties, however, discovered the fact at a later stage and hence, S. 65, Contract Act was applicable. AIR (Vol 22) 1935 Lah 401 DB).

——S. 19 — Agreement to share with brother — Without consent—Void.

An agreement by a Government tenant admitting his brother to a share in his tenancy, without the previous consent in writing of the Commissioner under S. 19 is void AIR (Vol 13) 1926 Lah 14: 92 Ind Cas 268 : 6 Lah 536 : 7 L L J 548 : 26 PLR 722(DB).

——S. 20.

——S. 20 — Grant of land to B — B entered as non-occupancy tenant with right to acquire occupancy and proprietary rights — Unmarried daughter succeeding and acquiring occupancy rights — Suit by collaterals for possession on marriage of daughter — Daughter acquiring proprietary rights—Conferment of rights, legality of — Right of collaterals.

One B was granted certain land, and under the conditions of the grant, he was entered as a non-occupancy tenant of the land but had a right to acquire, first, the occupancy tenancy and, later, proprietary rights at stated periods in accordance with the conditions of the grant. On his death as a non-occupancy tenant, his heir, an unmarried daughter H, acquired occupancy rights in the land soon after her succession.

H married and thereupon B's collaterals applied to the revenue authorities for mutation. This was not granted on the ground that as collaterals they could not claim greater rights in the colony land than they enjoyed under the provisions of S. 59 in their home districts. H continued in possession as occupancy tenant. The collaterals then filed a suit for possession on the basis of inheritance. During pendency of the suit, H acquired proprietary rights in the land :

Held, that H could only succeed under S. 20, cl. (c) and her right under that clause extended only up to the time of her death, marriage or loss of the rights under the provisions of the Act H could not, therefore, after her marriage, continue to be an occupancy tenant of the land invested with the privilege of acquiring proprietary rights therein.

The statute put an end to her rights and the decision of the Financial Commissioner could not alter the position inasmuch as, it went clearly against the provisions of the Act. No revenue authority could keep the rights alive which once had been terminated by the statute.

Proprietary rights could be conferred only on a person who was legally enjoying the status of an occupancy tenant and, as H had been divested of this status on account of her marriage and was not in enjoyment thereof at the time when she was said to have acquired proprietary rights, the act of the revenue authorities in conferring proprietary rights on her was ultra vires, and she could not defeat the claim of the collaterals.

Held also, the plaintiffs, if successful, will obtain possession of the land, not as absolute owners, but as occupancy tenants, as the subsequent acquisition of the occupancy rights by H would enure to their benefit. In these circumstances, H would clearly be entitled to the refund of any sum or sums that she may have paid to the Government to acquire occupancy or proprietary rights in the land in suit.

If, on the other hand, the plaintiffs fail, the acquisition of proprietary rights by H will not be affected in any manner, and the vendee from her will acquire an absolute title in the land. AIR (Vol 24) 1937 Lah 329 : 39 P L R 3 : I L R (1937) Lah 220: 170 Ind Cas 178 (DB).

——S. 20—Will in favour of adopted son—Mutation based on — Will and adoption not proved — Declaratory suit by nephews—Maintainable.

Where mutation has been based on a will said to have been executed by a deceased occupancy tenant in favour of an alleged adopted boy, and it is found that neither the will nor the adoption have been proved, the nephews coming within the purview of S. 20 (d) are entitled to a declaration that the mutation sanctioned by the Revenue Officer will not affect their reversionary rights. AIR (Vol 17) 1930 Lah 43 : 123 Ind Cas 833 (DB)

——S. 20—Death before Act — Succession governed by custom and not by S. 20.

Succession to a tenant who has died before the Punjab Colonization of Government Act came into existence was governed by the custom prevalent among the parties and S. 20 of the above Act has no application in such a case as it provides for devolution of a tenancy where, after the commencement of the Act, any original tenant dies. AIR (Vol 15) 1928 Lah 305 : 107 Ind Cas 280 : 9 Lah 352 : 29 P L R 475 (DB).

—S. 21.

——S. 21—There is no distinction between tenancies which come into existence on allotment and those which subsequently ripen into occupancy tenancies. A I R (Vol 26) 1939 Lah 419 : I L R (1939) Lah 385 : 42 P L R 358 : 184 Ind Cas 286 (FB).

——S. 21 — Applicability — Tenancy acquired by female — Mutation in name of male agnate — If amounts to nomination—Remedy — Not suit in Civil Court.

Certain land was originally allotted to D who died before he had fulfilled the conditions of the grant. On his death the mutation was entered in the name of his widow K who later on acquired tenancy rights in the land. After her death mutation was sanctioned in the name of H who was brother of D. K's daughter J sued for declaration that she was entitled to the said land.

Held, that S. 21 (a) applied to the case and not S. 21 (b). The word used in the section was "tenancy" first allotted and not "land" first allotted. D was not the first tenant at all though he might have been the first allottee. The occupancy tenancy was first acquired by K alone and she was the person to whom tenancy was first allowed. K was a female and, therefore, S. 21 (a) applied and it was only for the Collector to nominate her successor. Mere mutation by Collector in favour of a person could not be regarded as nomination. J's remedy was before the Collector. AIR (Vol 17) 1930 Lah 474: 31 P L R 127: 122 Ind Cas 566 (DB).

——S. 21—Remedy of.

On the death of a female to whom tenancy was allotted, it is only for the Collector to nominate the successor, either out of her issue or from the male agnators of the person on account of whose services the tenancy was allotted to her. The legislature had expressly left it to him to nominate the successor of the deceased female tenant.

The remedy therefore is by representation before the Collector and not by a suit in a civil Court. AIR (Vol 17) 1930 Lah 474 : 31 P L R 127 : 122 Ind Cas 566 (DB).

——S. 21 — Daughter's rights — Daughter, after her mother, succeeds to self acquired property of her father—Might not forfeit by marriage.

Under S. 21 (b), daughter is entitled to retain the property obtained by her father from Government under occupancy rights, because to the self-acquired property of her father who was the original grantee, she is the heir next to her mother and her rights are not liable to forfeiture on her marriage. AIR (Vol 17) 1930 Lah 107 : 31 P L R 30 : 121 Ind Cas 182 (DB).

——S. 21—Scope—Rule of succession not laid down.

Section 21, cl. (b), does not purport to lay down any definite rule of succession but merely indicates that the property is to be treated as the self-acquired property of the original tenant. A I R (Vol 16) 1929 Lah 109 : 118 Ind Cas 641 (DB).

——S. 21—Widow getting proprietary rights — S. 21 does not apply to her estate.

Where a widow inheriting occupancy rights from her husband subsequently acquires proprietary rights in the land. Section 21 of the Punjab Act (V of 1912) ceases to apply to her estate. A I R (Vol 8) 1921 Lah 315 : 4 L L J 296 (DB).

——S. 21—Death of tenant before the Act came into force—Payment of sums to Government for proprietary rights—Effect of.

On the death of the tenant, the tenancy was mutated in the names of his son's widow and his son's son's widow, who paid necessary sums to Government for the acquisition of proprietary rights and the reversioners of the tenant sued for the property.

Held, that the section did not apply owing to the death of the tenant before the Act came into force, and that the payment of sums to Government made them owners of the land in their own right. A I R (Vol 1) 1914 Lah 509 : 8 P R 1915 : 195 P L R 1915 : 28 Ind Cas 441 (DB).

——Ss. 21 (a), 21 (b) — Succession.

——The original tenant meant the first allottee and S. 21 (a) is restricted to those class of cases where the original allottee was a woman. So, where land is allotted to a person subject to conditions issued under the Act and after his death his widow acquires occupancy rights, the succession to the tenancy after her death would be governed by S. 21 (b) and not by S. 21 (a) : A I R (Vol 18) 1931 Lah 271 : 134 Ind Cas 126 and A I R (Vol 17) 1930 Lah 474 : 11 Lah 282 : 127 Ind Cas 566, Overruled. AIR (Vol 26) 1939 Lah 419 : I L R (1939) Lah 385 : 42 P L R 358 : 184 Ind Cas 286 (FB).

——S. 21 (a) — B who had acquired occupancy tenancy succeeded by F— F dying without heirs prescribed by S. 59, Tenancy Act — M, mother of F, L grand mother of F, widow of B and K, step-mother of F, mutated as persons originally entitled to tenancy — M remarrying and her share mutated equally between K and L— Death of K — Collaterals of B claiming to be entitled to succeed to K's share Collector following decision of Commissioner purporting to sell proprietary rights to collaterals—Decision of Commissioner reversed — Proprietary rights acquired by L — Suit by collaterals that they were heirs of K :

Held, that S. 21 (a) did not apply — Invalid sale could not be ground for supporting collateral's claim to oust person in possession. A I R (Vol 25) 1938 Lah 877.

——S. 21 (a) — Land originally held by person as tahud khawahi tenant Occupancy rights conferred on his widow—Succession.

Where occupancy rights have been conferred upon a widow in land originally held by her husband as tahud khawahi tenant, she should be treated as person to whom the tenancy was first allotted and the succession to the occupancy rights held by her would be governed by S. 21 (a). It cannot be contended that tenancy was allotted to her on account of the services of either her husband or his father.

The fact of a person being the recipient of a lease and his continuance in possession as such is to render no service to the Crown. The word 'services' as used in S. 21 (a) evidently refers to some sort of signal service rendered either in the Military or the Civil Departments or in any other way which may deserve the recognition of the Government. Consequently, the Collector is not empowered under the law to make a nomination from among the male agnates of either her husband or his father.

His choice, in these circumstances, is confined under S 21 (a) to the issue of the female tenant to whom the tenancy is first allotted. He can make the choice of all the issues and is not enjoined to confine his choice to one only from among this group. A I R (Vol 25) 1938 Lah 842 : 182 Ind Cas 209 (DB).

——S. 21(a)—A, who had been granted occupancy rights in a square of land by Government died in 1897 and was succeeded by his son B, who died in 1898. Government allowed A's widow to succeed to the occupancy rights :

Held, that the succession was governed by S. 21(a). AIR (Vol 23) 1936 Lah 349 : 37 P L R 797 : 16 Lah 252 : 161 Ind Cas 974 (1).

——S. 21 (a)—Succession — Powers of Collector.

Where the Collector has made a fresh grant in favour of a woman other than an original tenant for life or till marriage, it is for the Collector to nominate her successor under S. 21, cl. (a) after her

marriage. AIR (Vol 21) 1034 Lah 321 : 36 PLR 213 : 150 Ind Cas 927 (1) (DB).

——S. 21 (a) and (b) - Applicability—Gogera Branch peasant grant—Succession.

In the case of Gogera Branch peasant grants, where the person to whom land is allotted on abadkari terms dies before the expiry of 5 years and his widow, in whose name the land is mutated, acquires occupancy-rights therein, she does not acquire it in her own right, but as the representative of her husband and the succession would be governed by S. 21(b) and not by S. 21 (a). Section 21 (a) only applies where the first tenant of the land, that is to say the grantee, was the woman to whom the grant was made on account of her husband's father's son's or brother's services he having presumably died in the performance of his duty.

Even if the succession were governed by S. 21 (a) in a case of this nature, the right to nominate the successor would rest with the Government. A I R (Vol 19) 1932 Lah 627 : 33 P L R 922 : 139 Ind Cas 705 (DB).

——S. 21 (a) (b) — Widow succeeding to original tenant—Succession.

Section 21 governs the succession to the tenancy of both tenants-at-will and occupancy tenants. A case where the widow has succeeded to the original tenant and grantee is governed by S. 21 (b). Consequently, in such a case, the succession goes to the person or persons who would succeed if the tenancy were agricultural land acquired by the original tenant, the definition of such tenant as given in S. 3 of the Act being confined strictly to male grantees.

But S. 21 (a) only applies where the first tenant of the land, that is to say, the grantee, was a woman to whom the grant was made on account of her husband, father, son or brother's services, he having presumably died in the performance of his duty.

The words 'first allotted' in S. 21 describe the creation of the tenancy. AIR (Vol 19) 1932 Lah 412 : 14 L 168 : 33 P L R 595 : 138 Ind Cas 306 (DB).

——S. 32.

——S. 32—Award not made rule of Court—Summary resumption under S. 32 cannot be made.

Section 32 cannot be invoked to make a summary resumption of the grant instead of waiting for the award to be made a rule of Court under the appropriate provision of the law then in force and so executable as a decree. AIR (Vol 31) 1944 Lah 149 : 46 P L R 50 : 216 Ind Cas 231 (DB).

——S. 32—Intention and Scope.

Section 32 is obviously intended to protect the rights of Government and embraces the cases of trespassers or squatters against Government. AIR (Vol 15) 1928 Lah 121 : 108 Ind Cas 748 : 9 Lah 504 : 29 P L R 396 (FB).

——S. 33.

——Ss. 33—Retrospective operation — Scope—Omission to do an act.

Section 33 is not retrospective and it cannot apply to punish a person for an act committed before the Act came into force.

An omission to do a certain act does not come within the purview of S. 33 of the Act and is not punishable. AIR (Vol 1) 1914 Lah 97 : 26 P R 1913 Cr : 91 P L R 1914 : 15 Cr L J 146 : 33 P W R 1914 Cr : 22 Ind Cas 722.

——S. 36.

——S. 36—Death of Widow — Her lands mutated in favour of her collaterals — Suit by widow's daughter for declaration that mutation was wrong — Compromise without the consent of the Collector :

Held, that Civil Court's jurisdiction to pass a decree on the basis of the compromise was barred under S. 36. AIR (Vol 26) 1939 Lah 365 : 41 P L R 889.

——S. 36—Collector granting proprietary rights — Civil Court, if can determine whether he has observed necessary rules duly or not — Acquisition of proprietary rights by widow.

Where the Collector grants the proprietary rights, it is not the function of the Civil Courts to determine whether in granting the proprietary rights the rules framed by the Financial Commissioner were or were not duly observed by the Collector. If the parties were prejudiced by any order of the Collector, it is open to them to seek relief in accordance with the provisions of the Act, if so advised.

If proprietary rights are acquired by a widow under the Colonization of Government Lands Act, even out of the income of the land, the widow must be regarded as the owner of the property wherein she has acquired the proprietary rights. AIR (Vol 24) 1937 Lah 78 : 39 P L R 378 : 169 Ind Cas 776 (DB).

——S. 36—Jurisdiction of Civil Court — Ouster.

M, an Arain from Tahsil Nakodar, was allotted one square of land in the Chenab Canal Colony on 22nd May 1899. On 10th June 1904, he acquired occupancy rights. He died in the year 1907 and, on 17th July 1907, mutation took place in favour of his widow. She died on 2nd February 1928, and on 19th February 1929, the Collector made an order sanctioning mutation in favour of M's nephews. On 7th January 1930, the daughter and daughter's sons of M brought the suit against nephews for possession of M's square alleging that after the land in suit had been mutated in favour of the nephews, they (nephews) had bought proprietary rights without the knowledge of the plaintiff :

Held, the jurisdiction of the Civil Court was not excluded by S. 36. AIR (Vol 22) 1935 Lah 613 : 37 PLR 163 : 156 Ind Cas 29 (DB).

— S. 36—Scope—Jurisdiction of Civil Court.

The widow of the original grantee of certain land who was in possession in accordance with S. 20 (b) gifted her rights to her married daughter B with sanction of Collector as required by S. 19. This sanction was withdrawn by the Commissioner. Subsequently, the Commissioner granted the widow permission to surrender her rights to her daughter and mutation of names in the land revenue records was effected accordingly. A reversioner then instituted a suit for declaration that the gift and the orders of the Commissioner would not affect his rights after the widow's death. It was held by the lower Court that by S. 36 of the Act, jurisdiction of the Civil Court was barred:

Held, (i) that S. 36 had no such wide effect; what is excluded from the jurisdiction of the Civil Court being any matter of which the Collector was empowered by the Act to dispose;

(ii) that for proper disposal of the case, one of the matters to be ascertained will be, what exactly is the effect of the mutation effected in B's favour, that is, whether the legal effect of the mutation was to create a new tenancy in B's favour. A I R (Vol 20) 1933 Lah 293: 150 Ind Cas 634.

——S. 36 — Under S. 36, Civil Courts have no jurisdiction to take cognizance of the manner in which the Local Government exercises such power. A I R (Vol 18) 1931 Lah 270: 12 Lah 5: 32 P L R 206: 134 Ind Cas 291 (DB).

——S. 36 — Private dispute — Jurisdiction of Civil Courts.

A, an occupancy tenant under Government of land in an area to which the Colonization of Government Lands (Punjab) Act, 1912, had been applied, issued a notice or ejectment through a revenue officer against B who was in possession of a portion of A's recorded tenancy. B sued successfully in a Revenue Court to set aside the notice of ejectment on the ground that he was not a tenant under A.

A then sued B in a Civil Court for possession as against a trespasser. B pleaded that he was a partner in A's tenancy by private arrangement between himself and A, and that by a subsequent private arrangement A had transferred to him all the occupancy tenant's rights in the particular land in suit. On a question being raised as to whether, in view of the provisions of the Colonization of Government Lands (Punjab) Act, 1912, particularly Ss. 32 and 36, a Civil Court had jurisdiction to hear the suit.

Held, that there was no provision in the Act warranting the contention that the Collector should intervene in a dispute between private persons and that the Civil Courts should be debarred from adjudicating upon it. AIR (Vol 15) 1928 Lah 121: 108 Ind Cas 748: 9 Lah 504: 29 P L R 396 (FB).

PUNJAB CONSOLIDATION OF HOLDINGS ACT (4 of 1936)

—S. 12.

——S. 12 — Effect of—Decree for possession of land —Procedure to obtain proper remedy.

According to S 12 of the Punjab Consolidation of Holdings Act, the right of a party in the holding or land allotted to him in pursuance of a scheme of consolidation is the same as he had in his original holding or tenancy.

Hence when a decree for possession of land is passed and there is a subsequent consolidation of the holdings, the decree-holder must ask the executing Court to deliver the land allotted in pursuance of the scheme. A I R (Vol 35) 1948 East Punj 70 : 50 P L R 99.

PUNJAB COURT-FEES (AMENDMENT) ACT (7 of 1922)

See Court fees Act, 1870.

PUNJAB COURT OF WARDS ACT (2 of 1903)

——Effect on Contract Act — Contract Act, S. 68 — Not excluded.

Section 68 is not excluded by the terms of the Court of Wards Act and therefore a suit based on a contract can be maintained in the alternative as a suit for necessaries supplied within the terms of S. 68. AIR (Vol 14) 1927 Lah 414: 101 Ind Cas 702.

—S. 3.

——S. 3 — Release from Court of wards — Ward — Joint proprietor—How effected.

A ward, no doubt, can escape from the jurisdiction of the Court of Wards on his own motion. A joint proprietor may escape from the management of the Court of Wards if he holds a decree authorising him to obtain possession by partition. A I R (Vol 17) 1930 Lah 333: 122 Ind Cas 569.

——S. 3—Ward—Joint proprietor not included.

A "ward" as defined in S. 3 (a) does not include a joint proprietor, the superintendance of whose property has been assumed by the Court of Wards under S. 8. AIR (Vol 17) 1930 Lah 333: 122 Ind Cas 569.

—S. 8.

——S. 8—Joint proprietor by decree—Decree in partition suit against Court of Wards — Can execute decree and separate off his share.

The Act nowhere says that a person who has become a joint proprietor by virtue of a decree in suit for possession by partition against the Court of Wards is prevented from executing his decree and separating off his share. The superintendence under S. 8 extends only to management of the share of the joint proprietor.

A ward, no doubt, can escape from the jurisdiction of the Court of Wards on his own motion. A joint proprietor may escape from the management of the Court o Wards if he holds a decree authorizing him to obtain possession by partition. A I R (Vol 17) 1930 Lah 333: 122 Ind Cas 569.

——S. 8 — Property not shared by minor —Assumption of superintendence over—Ultra vires.

If the Court of Wards purporting to act under Section 8 wrongly assumes superintendence of the property of other persons in which the minor has no share, its action is ultra vires and it cannot be said that it has assumed superintendence under the powers conferred upon it by the Act, though it may have purported to act in accordance therewith. AIR (Vol 8) 1921 Lah 240 : 63 Ind Cas 606 : 2 Lah 151 : 3 L L J 342: 81 P L R 1921.

—S. 9.

——S. 9 — Mere passing of an order which is not followed by a notification under S. 9 is not sufficient to invalidate a transfer by the ward of released property without sanction. A I R (Vol 19) 1932 Lah 62 : 32 P L R 672: 134 Ind Cas 823 (DB).

——Ss. 9, 11, 12, 20, 26 to 29, 31 (2) — Construction —Certificate.

Ss. 26, 27, and 31 (2) are imperative and must be strictly complied with by the claimant, and unless a certificate mentioned in S. 31 (2) is produced by him the suit cannot be proceeded with, and the consequences specified in S. 29 of the Act will follow. S. 31 (2) applies equally whether the suit has been instituted while the Deputy Commissioner is making enquiry under S. 12 or after the same has actually come under the superintendence of the Court of Wards under S. 9. 6 P R 1910: 142 P W R 1909: 160 P L R 1910: 4 Ind Cas 949 (DB).

—S. 11.

——Ss. 11, 12—Deputy Commissioner's Jurisdiction.

An order, by a Deputy Commissioner restraining alienation when person and the property are both outside the jurisdiction, is not valid. A I R (Vol 8) 1921 P C 105: 57 Ind Cas 329.

—S. 13.

——S. 13 — Joint proprietor, if can sue Court of Wards for partition of his share in joint property.

The Punjab Court of Wards Act does not expressly bar the right of a joint proprietor to bring a suit for partition of his share in joint property. It may be that the Court of Wards is entitled to take possession of the property of a joint proprietor along with a ward of the Court of Wards; it may be that they can execute leases of such property, but there is nothing in the Act which specifically bars the right of the co-proprietor to bring a suit for partition which is a statutory right conferred on him by the Partition Act and there is no reason either in law or in equity that the Court of Wards Act contemplated that the joint proprietor should not bring such a suit to partition his share and thereby avoid the need of superintendence of his property by the Court of Wards. A I R (Vol 28) 1941 Lah 88: 193 Ind Cas 829 (DB).

——S. 13 — Object and scope—Vesting—Only control and management taken away.

The vesting of property under S. 13 is merely for the purposes of superintendence and control. The property remains that of the ward, and all that is taken away from him is its control and management. A I R (Vol 17) 1930 Lah 798 (DB).

—S. 16.

——S. 16—Alienation.

The word "alienation" in S. 16 does not cover leases. A I R (Vol 30) 1943 Pesh 15 : 205 Ind Cas 497 (DB).

——S. 16 — Scope — Contracts for necessaries—Promissory note by Ward of Court for necessaries—Enforceability of—Contract Act, S. 68.

The prohibition contained in S. 16 (2), extends to all suits brought on promises made after the promisor has ceased to be a ward to pay any debt contracted by him during the period when he was a ward and includes also all subsequent ratifications of earlier

contracts even on receipt of fresh consideration. It is impossible to read into this sub-section any such words as would indicate that contracts contemplated by S. 68, Contract Act, have been left intact or are excluded from the operation of this sub-section.

So long as a ward is under the superintendence of the Court of Wards, it is the Court of Wards that is responsible for his maintenance and it will defeat the very object with which the superintendence is assumed if he is permitted to utilize other sources also for his subsistence. All persons dealing with a ward are themselves to blame if their money is lost. A I R (Vol 22) 1935 Lah 764 : 16 L 932 : 37 P L R 862 : 156 And Cas 710 (DB).

——S. 16—Applicability—Construction.

In S. 16, the words "an order made under sub-s. (2) of S. 5" were intended, and can only be read, to mean an order duly given effect to and completed by an official notification under S. 9. The mere passing of an order which is not followed by a notification under S. 9 is not, therefore, sufficient to invalidate a transfer by the ward of released property without sanction.

Section 16 must be applied strictly. A I R (Vol 19) 1932 Lah 62 : 32 P L R 672 : 134 Ind Cas 823 (DB).

——S. 16 (2)—"Any debt contracted," meaning of.

The words "any debt contracted" in S. 16 (2) are confined in its application to such debts as are contracted by the ward himself during disability; they do not apply to debt due by third person which the ward undertakes to discharge on his disability terminating. A I R (Vol 18) 1931 Lah 756 : 32 P L R 667 : 134 Ind Cas 819 (DB).

——S. 19.

——S. 19—Suit under S. 25-A, Sikh Gurdwaras Act (8 of 1925), against ward in respect of rights in property belonging to ward—Entire property under superintendence of Court of Wards—Notice under S. 19, is essential. A I R (Vol 28) 1941 Lah 161 : 43 P L R 55 : 194 Ind Cas 883 (DB).

—— 19—Suit against ward for declaration that plaintiff is entitled to muafidar rights in lands owned by ward—Rights neither vesting in ward nor under superintendence of Court of Wards—Notice under S. 19 is not necessary. A I R (Vol 23) 1941 Lah 161 : 43 P L R 55 : 194 Ind Cas 883 (DB).

——S. 19 - Object—Several plaintiffs having common right Notice by some alone—Legality.

The object of a notice under S. 19 is to give the public officer concerned an opportunity to re-consider his legal position and to settle the claim if as so advised without litigation and if the notice substantially fulfils this object, it must be held to be sufficient.

Where the fact that the plaintiff was claiming the rights in common with certain other persons or classes of persons was made clear in the notice, the fact that no notice had been given by certain persons who were joined as plaintiffs in the course of the suit cannot, in the circumstances, be treated as a material irregularity sufficient to invalidate the notice so far as these two plaintiffs are concerned. The mere fact that the names of all these persons were not mentioned is not of any consequence. AIR (Vol 20) 1933 Lah 370 : 144 Ind Cas 976.

——S. 20.

——S. 20—Scope - Defendant notified as ward pending suit—Section does not apply.

Sub-s. (2) refers to suits brought against a ward and does not govern suits pending at the time the defendant in those suits is notified as a Ward of Court. AIR (Vol 17) 1930 Lah 798 (DB).

——S. 20 — Death of owner of property — Suit on behalf of owner—Not necessary to bring legal representatives on record.

Section 20 of the Punjab Act (11 of 1903) expressly provides that in a suit brought on behalf of a person whose property is under the superintendence of the Court of Wards, the Court of Wards shall be named as the plaintiff.

Hence if the person on whose behalf the suit is brought dies, there is no necessity for bringing on record his legal representatives. AIR (Vol 8) 1921 Lah 295 (DB) : 4L L J 391.

——S. 26.

——S. 26 - Absence of certificate—Effect.

Where, in execution of a decree obtained against the Court of Wards, no certificate that the claim was notified under S. 26 was taken and filed in the execution Court :

Held, that the absence of certificate was not fatal to the maintenance of the execution application. AIR (Vol 24) 1937 Lah 277 : 174 Ind Cas 485.

——S. 26 — Subsequent application without certificate.

The executing court has every power to entertain a subsequent application without the Deputy Commissioner's certificate under S. 26 of the Act, if it has been once filed along with the application for execution of the decree or in proceedings relating thereto. AIR (Vol 7) 1920 Lah 305 : 3 P R 1919 : 58 Ind Cas 635.

——Ss. 26 and 31 — Property under the charge of Court of Wards—Execution.

If the decree-holder files the requisite certificate from the Deputy Commissioner, the executing court has power to issue attachment or other process against the property of the judgment-debtor under the superintendence of the Court of Wards. AIR (Vol 6) 1919 Lah 150 : 23 P W R 1919 : 49 Ind Cas 476.

——S. 31.

——S. 31—"Proceedings in execution" not included.

As 'suits" and "proceedings in execution" are separately referred to in this section, the former will not include the latter. AIR (Vol 17) 1930 Lah 798 (DB)

——S 31 — Applicability — Decree for partition against Court of Wards—Execution by plaintiff's heirs - Not barred.

A Court of Wards was managing a certain estate. S brought a suit against it and others for partition of a share and obtained a decree. S thereupon became a joint proprietor and the Court of Wards assumed superintendence of his share. Heirs of S being dissatisfied with the superintendence sought to execute the decree for possession by partition.

Held, that S. 31 did not apply to the facts of the case and did not bar the application. S. 31 was to be read with S. 26 Heirs of S were not claimants but themselves held the property and they and not others claimed to execute the decree. 122 Ind Cas 569 : AIR (Vol 17) 1930 Lah 333.

——S 31—Decree prior to Court of Wards' management—Certificate by decree-holder - Execution proceedings without filing—Ultra vires.

Where the estate of a person comes under the management of the Court of Wards under Ss 9 and 10 and at that time there is an outstanding decree against the ward, the executing Court has no jurisdiction to go on with the execution of the decree until the decree-holder files a certificate under S. 31 (2). Proceedings in execution without such certificate are ultra vires and liable to be set aside. 106 Ind Cas 141 : 8 Lah 351 : 28 P L R 692 : AIR (Vol 14) 1927 Lah 638.

——S. 31—Powers of Executing Court under.

The Executing court has power under S. 31 of Act to order the sale of attached property under Court of Wards without their consent or concurrence. AIR (Vol 7) 1920 Lah 306 : 2 P R 1919 : 58 Ind Cas 631.

——S. 31 — Ward of Court — Execution of decree against — Filing of certificate if necessary on each application.

It is enough if one certificate is filed in the executing court to the effect specified in S. 3 (2) and the executing court has every power to take action upon a subsequent application for execution without a fresh certificate.

The property of the ward can be attached and sold in execution without the consent of the Court of Wards. AIR (Vol 7) 1920 Lah 305 : 3 P R 1919 : 58 Ind Cas 635.

——Ss. 31 und 34 — Refusal to grant certificate— Remedy.

No revision lies against an order of the Deputy Commissioner, refusing to grant a certificate of the description referred to in S. 31 (2) of the Act, but the order can only be dealt with by the Financial Commissioner as the Court of Wards under S. 34 of the Act. 6 P R 1910 : 142 P W R 1909 : 160 P L R 1910 : 4 Ind Cas 949 (DB).

——S. 31 (2)—Memorandum signed by Deputy Commissioner informing claimant that his claim is admitted to certain amount, amounts to a certificate. AIR (Vol 27) 1940 Lah 16 : 188 Ind Cas 533.

——S. 31 (2) — If includes certificate signed by decree-holder and produced in Court to the effect that his claim against estate has been submitted.

Section 31 (3) merely provides for the production of a certificate that the claim has been preferred as required by S. 26; it does not say that the certificate should be from any particular official or that it should not be by the decree-holder himself. The section is wide enough to cover the case of a certificate signed by the decree-holder and produced in Court to the effect that the claim has been submitted to the Deputy Commissioner as required by S. 26. AIR (Vol 24) 1937 Lah 736 : 39 P L R 923 : 169 Ind Cas 961.

——S. 31 (2)—Form of certificate.

The law does not provide for any form of a certificate and the mere intimation by the Deputy Commissioner given to the Court in which the execution proceedings are pending is a sufficient compliance with the provisions of S. 31, sub-s. (2) if a certificate from the Deputy Commissioner is contemplated by that sub-section. AIR (Vol 24) 1937 Lah 736 : 39 PLR 923 : 169 Ind Cas 961.

——S. 31 (3)—Execution can proceed on strength of certificate filed in original suit.

Section 31 (3) refers only to proceedings in respect of which no certificate had already been filed under sub-s. (2), either in the original suit or in the course of execution proceedings. If a certificate was filed in the original suit, execution of decree can proceed on the strength of that certificate and a fresh certificate is not necessary. AIR (Vol 29) 1942 Lah 304 : 45 P L R 42 : 203 Ind Cas 595.

——S. 31—Obiter.—Section 31 (3), applies only when the decree was against the ward and not when it was against Court of Wards. AIR (Vol 24) 1937 Lah 277 : 174 Ind Cas 458.

——S. 31 (3)—Provisions of sub-s. (3) are imperative.

The provisions of sub-s. (3) of S. 31 are imperative and the execution Court has no jurisdiction to proceed with the execution or issue any attachment or other process in execution until and unless the certificate referred to in that sub-section is produced. AIR (Vol 22) 1935 Lah 876 : 161 Ind Cas 242.

——S. 31 (3) (2)—Decree against Court of Wards, whether covered by sub-s. (3)—Sub-ss. (2) and (3), whether independent.

Sub-section (3) of S. 13 relates not only to execution of decrees passed against the ward but also to execution of decrees passed against the Court of Wards. It applies to all fresh proceedings in execution and the only exeception created in the sub-section is in respect of decrees which relate to a transaction subsequent to the date of the notification under S. 9.

It follows from sub-s. (2) of S. 31 that the proceedings would be resumed as soon as the necessary certificate was produced. It is, therefore, not necessary to make any separate provision for the proceedings in execution being continued after the production of the certificate. Therefore, sub-s. (3) must be taken to be independent of sub-s. (2). AIR (Vol 22) 1935 Lah 876 : 8 R D 700 : 161 Ind Cas 242.

—S. 32.

——S. 32—Modification of order.

Awarding additional and future interest would not amount to modification of the order of the Deputy Commissioner. AIR (Vol 27) 1940 Lah 512 : 193 Ind Cas 149.

——Ss. 32, 31 (3)—S. 32 scope—"Suit", whether includes execution proceedings.

Section 32 nowhere uses the words 'execution proceedings'. It merely prohibits the bringing or maintenance of a suit in respect of any claim which has not been notified or to set aside or modify the order of a Deputy Commissioner fixing a date for the payment of such claim or regulating the manner in which the claim has to be satisfied. The expression 'suits' has been used in the ordinary restricted sense and does not include 'execution proceedings'. AIR (Vol 24) 1937 Lah 277 : 174 Ind Cas 485.

—S. 46.

——S. 46—Disability removed except in respect of joint property of his and another ward—Capacity to enter into fresh contract—Debt incurred during minority if can be ratified.

Where the effect of a notification was to remove the legal incapacity of a ward of Court except in respect of any property which he owned jointly with another who continued to be under superintendence:

Held, that the former person was not thenceforth a ward of Court and was capable of entering into a fresh contract after the removal of the disability, but that he was not in a position to ratify any debt incurred during his minority. AIR (Vol 21) 1934 Lah 868 : 16 Lah 404 : 37 P L R 770 : 155 Ind Cas 1009.

PUNJAB COURTS ACT (18 of 1884)

—S. 9.

——S. 9 (a) — Scope of.

Section 9 (a) of the Punjab Courts Act provides for appeals from decrees and orders by single Judges, but does not confer a right of appeal from orders appealable under the Civil P. C. 98 P R 1909 : 172 P W R 1909 : 4 Ind Cas 852 (DB).

—S. 11.

——S. 11 — Reference to Full Bench by Single Judge—Verdict of Jury though given to be unanimous, was only of majority.

In a trial by jury an unanimous verdict of guilty was given, but was subsequently found to be only the verdict of the majority of jurors. The Judge thereupon took action under S. 11 and referred for the opinion of the Full Bench the question whether any proceeding should be taken in the matter and if so, what course should be adopted.

Held, that the Full Bench could give the opinion as the question arose before a Judge sitting as single bench, in a judicial proceedings. 6 P R 1913 Cr. : 175 P L R 1913 : 9 P W R 1913 (Cr.) : 13 Cri L J 815 : 17 Ind Cas 559 (FB).

—S. 13.

——S. 13—Power of Superintendence—Extent of.

Section 13 of the Act gives the Chief Court a power of superintendence and control only over Civil Courts. It does not apply where the Court is asked to revise the order of a District Magistrate.

AIR (Vol 1) 1914 Lah 399 : 18 P R 1914 Cr. : 51 P W R 1914 Cr. : 266 P L R 1914 : 15 Cri L J 601 : 25 Ind Cas 513 (DB).

——Ss. 13 and 70—Revision—Order declaring a person to be a tout—Legal Practitioners Act (18 of 1879), S 36.

Under S. 13 of the Punjab Courts Act, the Chief Court can revise an order passed by a Subordinate Court under S. 36 of the Legal Practitioners Act but not unless it can be shown that the provisions of that sections have not been duly complied with or for other good and substantial reason that the petitioner's name was included in a list of touts without any opportunity being given to him of showing cause against such inclusion.

Similarly the Chief Court will in a proper case interfere if it finds that there is no evidence whatever to support the finding of the Subordinate Court or that the evidence accepted cannot legally prove that the petitioner is a tout. 115 P L R 1909 : 28 P W R 1909 Cr. : 11 P L R 1909 Cr. : 10 Cri L J 443 : 3 Ind Cas 977 (DB).

—S. 14.

——S. 14—Rules under—Copying agent—If Officer of Court.

The copying agent is not an officer of Court to whom application for copies could properly be made and that he could not be regarded as of higher status than an agent of the appellants. 61 P L R 1911 : 189 P W R 1911 : 9 Ind Cas 381 (DB).

—S. 40.

——S. 40—Amended by Punjab Courts (Amendment) Act (1 and 4 of 1912)—Second appeal — Finding of fact—Dedication.

A finding that a house is a Dharamsala by dedication to religious uses is one of fact with which interference in second appeal is incompetent. AIR (Vol 6) 1919 Lah 130 : 1919 P R 1 : 49 Ind Cas 138.

——S. 40—Refusal of certificate — Appeal.

Where a certificate to appeal on the question of custom is not granted, no second appeal lies to the Chief Court irrespective of the ground on which the same is refused. AIR (Vol 2) 1915 Lah 380 : 24 P W R 1915 : 85 P L R 1915 : 27 Ind Cas 723.

——S. 40 — Value of suit under Rs. 1000 — Further appeal.

In a suit for declaration of the invalidity of a sale deed and injunction, plaintiff valued the suit at Rs. 1080 for purposes of jurisdiction and at Rs. 750-5-0 for purposes of stamp duty. The lower Courts decreed the claim and the defendant appealed to the Chief Court.

Held, that no further appeal lay to the Chief Court as the value of the suit was under Rs. 1000. An appeal filed as a further appeal under the Act of 1884 could not be altered after the coming into force of the new Act, into a second appeal or revision under S. 70 (1) of the old Act that the plaintiff was not estopped from contending that the value of the suit was really less than what he put it at. AIR (Vol 1) 1914 Lah 503 : 2 P R 1915 : 194 P L R 1915 : 28 Ind Cas 113 (DB).

——S. 40— Finding of fact — Ignoring evidence—Grounds of appeal.

A finding of fact will be set aside on second appeal, where the lower Court has decided a question by giving too exclusive an attention to one particular piece of evidence and ignoring the whole of the evidence in the case. AIR (Vol 1) 1914 Lah 404 : 174 PLR 1914 : 76 PWR 1914 : 24 Ind Cas 480.

——S. 40 — Certificate appeals — Applicability of O. 43, R. 1 of C. P. C.

The certificate appeals under S. 40 of the Act do notf all within the purview of the 2nd part of Cl. (u) of Rule 1 of O. 43, C.P.C. AIR (Vol 1) 1914 Lah 328: 162 PLR 1914 : 120 PWR 1914 : 85 P R 1914: 23 Ind Cas 817 (DB).

——S. 40—Unclassed suits— Same question — Each decree less than Rs. 2500 but both combined exceed Rs. 2500—Further appeal, if lies.

Where two decrees in unclassed suits involving the same question of inheritance, directly involved together property worth more than Rs. 2500 but each decree involved less than that amount, no further appeal lies under S. 40 of the Act as it stood before the Amendment Act of 1912. AIR (Vol 1) 1914 Lah 246 : 129 PLR 1914a : 90 PWR 1914 : 23 Ind Cas 109 (DB).

——S. 40—As amended by Acts I and IV of 1912 — Second appeal on question of custom—Without certificate—Revision.

Under S. 40 of the Act as amended by the Acts of 1912, no second appeal lies regarding the validity or existence of a custom, without a certificate even if a question of law or error in procedure have occurred and it would not be proper to interfere in revision either. AIR (Vol 1) 1914 Lah 179 : 4 PWR 1914 : 28 PLR 1914 : 23 Ind Cas 352.

——S. 40—Finding of fact without evidence.

A finding of fact based on no evidence on the record will be set aside in second appeal. AIR (Vol 1) 1914 Lah 167 : 179 PLR 1914 : 80 PWR 1914 : 24 1Mad Ind Cas 902.

——S. 40—As amended by Act IV of 1912 — Second appeal —Finding as to necessity of mortgage—If can be gone into.

The Chief Court will not interfere in second appeal with the finding of lower courts on the question of legal necessity for a mortgage. AIR (Vol 1) 1914 Lah 190 : 31 PWR 1914 : 117 PLR 1914 : 23 Ind Cas 940.

——S. 40—Second Appeal—Declaratory suit—Reversionary interest—Valuation for jurisdiction.

The jurisdictional value of declaratory suit to protect a reversionary interest in the land is 30 times the assessment. There would be no second appeal under the Punjab Courts Act before 1912 if the jumma is Rs. 8 only. 178 PWR 1913 : 311 PLR 1913 : 21 Ind Cas 308.

——S. 40—Punjab Courts (Amendment) Act (1 of 1912), S. 6 — Appellate decree passed after Act 1 of 1912—Further appeal, General Clauses Act (10 of 1897), S. 6 — Punjab General Clauses Act (10 of 1898), S. 4—C. P. Code S. 154.

An appellate decree passed after the date on which the Punjab Act I of 1912 came into force is open to no further appeal, under S. 40 of the Act XVIII of 1884, to the Chief Court. The express saving of the "present" right of appeal in S. 6 of the Punjab Act I of 1912 indicates the exclusion of any future right not in existence at the commencement of the Act. The word "present" in S. 6 of the Punjab Act 1 of 1912 means that there must be in existence a decree or order to the subject of appeal. 122 PR 1912 : 13 PLR 1912 : Suppl 256 PWR 1912 : 16 Ind Cas 983 (FB).

——S. 40—Suit for injunction & compensation for Rs. 3000—Appeal.

Where in a suit for injunction to stop the construction of a building the Lower Appellate court awarded Rs. 3000 as damages.

Held that a further appeal lay to the Chief Court as the decree involved a question regarding property of Rs. 3000 in value. 90 PR 1911 : 204 PWR 1912 : 14 Ind Cas 405 (DB).

——S. 40 (1) (a)—Second appeal— Question of fact, whether common ancestor occupied land — Punjab Tenancy Act, S. 59.

In a suit by a collateral for succeeding under S. 59, Punjab Tenancy Act, to an occupancy holding, the question whether, the land was occupied by a common ancestor is one of fact and cannot be made a

ground of second appeal. AIR (Vol 1) 1914 Lah 254 : 190 PLR 1914 : 92 PWR 1014 : 24 Ind Cas 687.

——S. 40 (1) (a)—Validity or existence of custom—Second appeal—Certificate.

A decision which is contrary to law, custom, or usage is open to second appeal and it is only where the contention is that the alleged custom is invalid or or does or does not exist that a certificate is necessary. AIR (Vol 1' 1914 Lah 247 : 207 PLR 1914 : 19 PR 1915 : 147 PWR 1914 : 24 Ind Cas 361.

——S. 40 (1) (a) (i) — Appellate decree declaring a house to be waqf property—Further appeal.

A further appeal lies from an appellate decree declaring a house to be waqf if its market value, exceeds Rs 1000. 52 PWR 1912 : 93 PLR 1912 : 13 Ind Cas 408

——S. 40 (1) (a) (i)—Valuation of suit for redemption for purposes of second appeal.

Where the Court of first instance found a certain amount as due from the mortgagor in a redemption suit and that amount is reduced by the appellate court, the valuation for second appeal would be determined by the amount found due by first court as payable by the mortgagor. 23 PWR 1909 : 37 PWR 1909 : 1 Ind Cas 870 (DB).

——S. 40. (1) (a) (ii)—Further appeal—Failure to pay required court-fee in first appeal.

Where the appellant failed to pay the required court-fee as directed and the appeal was on that account rejected, the decree of the first court being confirmed S. 40 (1) (a) (ii) of the Punjab Courts Act, before its amendment by Act 1 of 1912 precludes a further appeal. AIR (Vol 1) 1914 Lah 251 : 160 P L R 1914 : 150 P W R 1914 : 23 Ind Cas 451 (DB).

——S. 40 (3) — Punjab Courts Amendment Act (1 of 1912), S. 2—Second appeal—Question whether validity of custom properly raised before lower Court—Certificate, necessity for.

Where the question raised in a second appeal is not the validity or existence of a custom but whether the validity or existence of a custom was a question properly raised before the Lower Appellate Court a second appeal lies without the certificate of such Court under S. 40 (3) of the Act (18 of 1884) as amended Act (1 of 1912) S. 2. AIR (Vol 2) 1915 Lah 403 : 34 P R 1916 : 54 P W R 1916 : 31 Ind Cas 386 (DB).

—S. 41.

——S. 41 (1) (c)—Second Appeal—Finding of fact.

A finding of fact by a lower Appellate Court is open to question only where material evidence on the record and other material circumstances connected with the case have not been taken into consideration.

In cases of old mortgages, where mortgagors have expressly and impliedly admitted receipt of consideration, Courts will not expect mortgagees to give the same precised proof of payment and 'necessity' as in recent transactions. AIR (Vol 2) 1915 Lah 156 : 114 P L R 1915 : 228 P W R 1915 : 29 Ind Cas 785.

——S. 41 Sub-Sec. (3)—Custom, Question of court—Certificate.

Semble :—A certificate from the lower appellate Court on questions of custom or usage is necessary for the maintainability of an appeal under S. 41, Sub-Sec. (3). AIR (Vol 2) 1915 Lah 460 : 96 P R 1915 : 169 P W R 1915 : 31 Ind Cas 497.

—S. 70.

1. Delay.
2. Interlocutory order.
3. Material Irregularity.
4. Onus wrongly laid.
5. Question of fact.
6. Question of law.
7. Scope of.
8. Miscellaneous.

1. Delay.

——S. 70 (1) (a) — Delay — Order setting aside ex parte decree.

Where an ex parte decree was set aside on condition of payment of costs which were paid and received by the plaintiff without protest and a reply to the defendant's pleas was put in by the plaintiff and two months later he put in a petition for revision of the order setting aside the ex parte decree the plaintiff's conduct amounted to acquiescence in the order and no revision would lie. AIR (Vol 1) 1914 Lah 249 : 25 P R 1914 : 157 P L R 1914 : 23 Ind Cas 919 (DB).

——S. 70—Delay—If ground for refusing.

Dilatoriness of the petitioner in making his application is a good ground for refusing a revision. 79 P L R 1913 : 76 P W R 1913 : 18 Ind Cas 795.

2. Interlocutory order.

——S. 70 (a)—Court fee — Court-Fees Act, S. 7 (iv) (f) and II.

An interlocutory order in a partnership account suit directing plaintiff to pay enhanced Court-fee ealculated on a higher valuation, would not ordinarily be interfered with in revision. 115 P L R 1913: 94 P W R 1913 : 18 Ind Cas 480.

——S. 70 (1) (a)—Revision.

A High Court will not interfere on revision with interlocutory orders unless for special reasons. 17 P L R 1913 : 273 P W R 1913 : 11 P R 1913 : 16 Ind Cas 995 (DB).

——S. 70 (1) (a) — Application to sue in forma pauperis.

No revision lies against an order granting an application to sue in forma pauperis as it is only an interlocutory order. 193 P W R 1912 : 87 P R 1912 : 261 P L R 1913 : 14 Ind Cas 240.

——S. 70—An interlocutory order is not ordinarily open to revision. But it can be interfered with by the Chief Court where irreparable loss would result otherwise. 164 P W R 1911 : 243 P L R 1911 : 11 Ind Cas 880.

——S. 70—Final order appealable—Revision—Court fees.

An interlocutory order in a case e. g. to pay a higher Court fee cannot be interfered with in revision by the High Court where an appeal lies against the final order. 169 P W R 1911 : 253 P L R 1911 : 11 Ind Cas 840 (DB).

——S. 70 (1) (b) — Interference with a sub-judice case.

A case which is still sub-judice in the lower Courts should not be interfered with under Cl. (b) of S. 70 (1) of the Act. 101 P R 1910 : 41 P L R 1911 : 8 Ind Cas 1157 (DB).

——S. 70 (2)—Material irregularity.

Order of refusal to allow the plaintiff to rely on his alternative cause of action is an irregularity and is a fit subject for revision, though it is not a final order. It is unnecessary to wait for the final order. 72 P W R 1910 : 6 Ind Cas 939 (DB).

——S. 70 (a) and (b) — Preliminary finding as to valuation.

A preliminary finding of the first Court as to valuation for jurisdiction and Court fee is an interlocutory order : it can afterwards be questioned in appeal from the final decree of the Court but is not subject to revision. 43 P W R 1910 : 6 Ind Cas 647.

3. Material Irregularity.

——S. 70—Misapprehension of the nature of a claim and pleadings.

Where the lower Courts have misapprehended the nature of the claim and the pleadings of the parties and have wrongly dismissed the suit as barred by

limitation, the Chief Court will interfere in revision. 96 P W R 1913 : 135 P L R 1913 : 19 Ind Cas 5.

——S. 70 (1) (a) — Plea not adjudicated.

Omission to adjudicate a plea is a good ground for revision under S. 70 (1) (a) of the Act. 5 P W R 1913: 140 P L R 1913 : 18 Ind Cas 610.

——S 70 (b)—As amended by (XXV of 1889.)

If a Court bases its decision on a perverse view of the facts and on arbitrary assumption it commits a material irregularity which can be interfered with in revision. 163 P W R 1912 : 170 P L R 1912 : 17 Ind Cas 223.

——S. 70 (1) (a) — Order returning plaint for deficiency of court-fee.

An order returning a plaint for deficiency of the Court-fee is not open to revision. If, for non-compliance with the order, the Court rejects the plaint the order of rejection would be a decree and a pealable as such. 69 P R 1912 : 202 P W R 1912 : 212 P L R 1912 : 16 Ind Cas 475.

——S. 70—Revision.

A defendant must be limited to the defence set up by him in the first Court An appellate Court cannot go outside the merits, and consider a technical point not raised in the original pleading and if it does so it will be a material irregularity liable to be interfered with in revision. 81 P W R 1912 : 146 P L R 1912 : 14 Ind Cas 1008.

——S. 70 (1) (b) — Misconstruction of documentary evidence.

Misinterpretation of a post card which is only a piece of evidence is not such a substantial question of law to justify a revision petition to be treated as a second appeal, but misconstruction of a document forming the basis or a suit, or a contract or document of title is a sufficient ground for second appeal. 190 P W R 1912 : 14 Ind Cas 331.

——S 70 (1) (a) and (b)—Misunderstanding position of parties.

Where, in a suit for possession under S. 9, the Court misunderstood the plaintiff's position and ignored material evidence, and did not distinguish between possession and use or occupation held that all these constituted material irregularity so as to necessitate a retrial. 28 P W R 1912 : 14 P L R 1912 : 13 Ind Cas 6 (DB).

——S. 70—Overlooking statute.

It is material irregularity to overlook relevant portions of an Act of the legislature. 157 P W R 1911 : 245 P L R 1911 : 11 Ind Cas 833.

——S. 70—Substantial justice.

The Chief Court can interfere in revision only where the decree or order sought to be revised is manifestly injust and inequitable resulting in substantial harm to the litigant party. 149 P W R 1911 : 249 P L R 1911 : 11 Ind Cas 831.

——S. 70 (1) (a) — Erroneous decision on a point of limitation.

An erroneous decision by lower Court on a question of limitation (where it is a doubtful one especially) is not a material irregularity within the meaning of S. 70 (1) (a) of the Act and such an error is not a sufficient ground for revision. 204 P L R 1911 : 231 PWR 1911 : 11 Ind Cas 60.

——S. 70 (1) (a) — Suit for declaration — Decree for possession if can be passed in.

The passing of a decree for possession under whatever ground, in a suit for mere declaration is a material irregularity within the meaning of S. 70 (a). 199 P L R 1911 : 159 P W R 1911 : 11 Ind Cas 33.

——S. 70 (a) — Dismissal of suit on technical construction.

The dismissal of a suit solely on a techincal construction of S. 83 of the Neg. Instr. Act constitute "material irregularity" under S. 70 (a). 39 P R 1911: 142 P L R 1911 : 234 P W R 1911 : 10 Ind Cas 133 (DB).

——S. 70 (1) (a) — The Court will not interfere in revision merely on the ground that the construction placed on the words in a document is incorrect unless it finds that in the interpretation of those words a material irregularity has been committed. 125 P L R 1911 : 89 P W R 1911 : 9 Ind Cas 1008.

——S. 70 (1), Cl. (a) — A mere misinterpretation of documents or error of law does not amount to material irregularity. 20 P R 1911 : 93 P L R 1911 : 54 P W R 1911 : 9 Ind Cas 579.

——S. 70 (1) (a) —Assumption by Court against evidence on record.

The lower Appellate Court reversed the judgment of the original Court merely on assumption and there was no evidence in its support. On revision the chief Court set aside the judgment of the lower Appellate Court and restored that of the original Court. 127 P L R 1910 : 8 Ind Cas 552

——S. 70 (1) (a)—Ignoring vital facts.

Where the lower Appellate Court had ignored vital facts in deciding an appeal, the chief Court admitted revision against the decree passed on that appeal. 35 P L R 1910 : 3 Ind Cas 227.

——S. 70 (1) (a) — Misinterpretation of evidence — Failure to consider loss of an important document in the case.

An obvious misinterpretation of evidence is a material irregularity which justifies interference with a finding of fact. So also failure to consider the loss of an important document material to the decision of the case is a material irregularity. 97 P W R 1910 : 7 Ind Cas 713.

——S. 70 (a) and (b) — Mistaken view of rule of res judicata.

Throwing out a case upon a mistaken view, of the rule of res judicata is a good ground of revision under S. 70 (a) and (b) (of Act 1884 as amended by Act XXV of 1899). 42 P W R 1910 : 6 Ind Cas 646.

——S 70 (a)—Finding of fact against record.

Under S 70 (a) a finding of fact prima facie against the record is a material irregularity. 40 P W R 1910 : 6 Ind Cas 642.

—— S. 70 (a)— If the lower Appellate Court takes an erroneous view of the case, and misunderstands the plaintiff's claim, it is a materal irregularity and the Chief Court can interfere in revision. 13 P R 1910 : 20 P W R 1910 : 60 P L R 1910 : 5 Ind Cas 808.

——S. 70 (1) (a) — Misapplication of a ruling is a material irregularity. 45 P R 1909 : 3 P W R 1909 : 66 P L R 1909 : 2 Ind Cas 76.

4. Onus wrongly laid.

——S. 70 (1) (a) — A wrong adjustment of onus is a good ground of revision under S. 70 (1) (a) of the Act. AIR (Vol 1) 1914 Lah 100 : 8 P W R 1914 : 32 P L R 1914 : 22 Ind Cas 861.

——S. 70 (a) —If ground for revision.

A revision is not justified on the mere ground that the onus was placed on the wrong party. 102 P R 1912 : 207 P L R 1912 : 213 P W R 1912 : 15 Ind Cas 839.

——S. 70 (a)—A finding of fact arrived at by wrongly throwing the onus of proof on a person, is liable to be questioned in revision. 25 P W R 1910 : 24 P L R 1910 : 5 Ind Cas 891.

5. Question of fact.

——S. 70 (1) (a) — Possession not permissive — No revision.

That possession is not permissive is a finding of fact and cannot therefore be questioned in revision. 260 P W R 1912 : 17 Ind Cas 508.

——S. 70 (1) (b)—Appeal — Respondent can support on independent grounds.

At the hearing of an appeal, admitted under S. 70 (1) (b) of the Act, the petitioner cannot contest the lower Court's decision on findings of fact. But it is open to the respondent to support the decision on any grounds, including those decided by the lower Courts, in favour of the petitioner. 166 P L R 1912 : 273 P W R 1912 : 16 Ind Cas 769 (DB).

——S. 70 (1) (b) — Custom — Mortgage of house by occupant in village Abadi—Suit by some proprietors in their own right, for possession.

Where a suit by certain members alone of the proprietary and body of a village Abadi in their own right but not in a representative capacity for possession of a house mortgaged by the occupant is dismissed on the ground that they did not establish the individual rights asserted.

Held, no question of custom was involved in the suit and, therefore, there was no revision to the Chief Court. 95 P L R 1911 : 213 P W R 1911 : 11 Ind Cas 377.

——S. 70 (1) (b)—No revision.

A finding that a mortgage was not a fictitious transaction as the greater part of the consideration had been paid and that the judgment-creditor had failed to prove collusion between the mortgagee and the mortgagor is a question of fact. 114 P L R 1911 : 172 P W R 1911 : 9 Ind Cas 1018

——S. 70 (a) and (b)—Interference.

The Chief Court can interfere with questions of fact only if in deciding them the lower Appellate Court has been guilty of material irregularity resulting in injustice and can interfere on any question of law arising in the facts as found by the chief Court. 93 P W R 1910 : 7 Ind Cas 708.

——S. 70 (b)—Question of necessity.

The question of necessity is a pure matter of fact and the lower Appellate Court's finding thereon cannot be interfered with in revision. 67 P W R 1910 : 6 Ind Cas 986.

——S. 70 (1) (b)—Revision.

Abandonment is a question of fact and therefore no ground of revision lies under this section. 102 P L R 1909 : 154 P W R 1909 : 4 Ind Cas 965.

6. Question of Law.

——S. 70—Succession certificate, necessity for.

The question if a succession certificate is necessary in a case is open to revision under S. 70 of Act 18 of 1884 as amended by Punjab Acts I and IV of 1912. AIR (Vol 1) 1914 Lah 457 : 175 P L R 1914 : 73 P W R 1914 : 24 Ind Cas 893.

——S. 70 (1) (a)—Wrong decision by lower Court.

No revision lies where the lower Court has erred in law in relying upon an inapplicable ruling of the Chief Court. 132 P L R 1913 : 19 Ind Cas 847.

——S. 70 (1) (b)—Inference from facts.

An order of a Judge in chambers directing issue of notice on the ground that the amount involved was considerable and that some points were arguable is not an admission of the petition for revision under S. 70 (1) (b).

The mere fact that a finding as regards the nature of a contract is based on legal inference from facts does not sufficiently prove that an important question of law is involved. 136 P L R 1912: 116 P W R 1912: 14 Ind Cas 16.

——S. 70—Revision.

The fact that an appellate order may be open to some doubt on a question of law of some difficulty is no ground for interference in revision under S. 70 (1) (a). 178 P W R 1911 : 112 Ind Cas 733.

——S. 70 (1) (b)—The Chief Court is not, in revision,

competent to deal only with a pure question of law. 119 P L R 1911 : 256 P W R 1911 : 11 Ind Cas 518.

——S. 70 (1) (a) and (b)—Jurisdiction — Remand by lower Appellate Court to try suit.

An order of remand directing a lower Court to hear a suit on the ground that it had jurisdiction to do so is not open to revision under S. 70 (1) (a) or appeal under S. 70 (1) (b). 147 P L R 1911 : 258 P W R 1911 : 10 Ind Cas 36.

——S. 70 (1) (a) — Jurisdiction.

Under S. 70 (1) (a) of the Act, the Chief Court cannot interfere with an appellate judgment deciding though erroneously that the first Court had jurisdiction. 4 P R 1911 : 45 P L R 1911 : 26 P W R 1911 : 9 Ind Cas 674.

——S. 70 (b)—Limitation.

A point of limitation involving questions of law and custom is a good ground for revision under S. 70 (b). 141 P W R 1910 : 12 P L R 1911 : 8 Ind Cas 814 (DB).

——S. 70 (1) (b)—Serai.

The question whether upon facts found a certain building is a serai or not is a question of law. 96 P R 1910 : 192 P L R 1910 : 8 Ind Cas 356 (DB).

——S. 70 (a) and (b)—Wrong decision as to res judicata—Failure of justice.

Wrong decision as to jurisdiction is a good ground for revision but the broad principle to follow is to interfere only when a refusal to do so would result in injustice or failure of justice. 2 P R 1910 Rev : 101 P L R 1910 : 6 Ind Cas 735.

——S. 70 (a) — If substantial justice is done to both the parties and equities are on the respondent's side, an error of law is no ground for revision. 5 P W R 1910 : 5 Ind Cas 590.

7. Scope of.

——S. 70 — (as amended) — Scope of — Revision — Decree on private award, if open to.

A decree based on a private award filed in Court is not open to revision by the Chief Court under S. 70 of the Punjab Court's Act (amended). AIR (Vol 1) 1914 Lah 477 : 13 P W R 1914 : 114 P L R 1914 : 23 Ind Cas 950.

——S. 70 (a) and (b) — Scope of — Amendment of plaint.

A plaint can be amended in revision. 160 P W R 1913 : 280 P L R 1913 : 20 Ind Cas 831.

——S. 70 (1) (b) — Order under S. 25 of the Punjab Laws Act, if open to.

An order under S. 25 of the Punjab Laws Act of an Insolvency Court is not a decree ; consequently no application for revision of such order lies under S. 70 (1) (b). 64 P R 1911 : 187 P W R 1911 : 12 Ind Cas 867 (DB).

——S. 70 (1) (b)—A petition under S. 70 (1) (b) of the Act is not an appeal for the purposes of Art. 182 of the Limitation Act before it is admitted. 87 P W R 1909 : 81 P L R 1909 : 4 Ind Cas 629 (DB).

8. Miscellaneous.

——S. 70 (1) (b) and S. 70 of Act I of 1912 — Small Cause suit of the value of less than Rs. 2,500—Second appeal not lying—Whether could be treated as Revision Petition.

Where under S. 40 (1) (a) (ii) of the Act, a second appeal is precluded in the case of a small cause suit of a value of less than Rs. 2,500, the Court has no power to treat the memorandum of appeal as a revision petition as S. 70 of the Old Act has been repealed and S. 70 of the New Act gives no such power. A I R (Vol 1) 1914 Lah 251 : 160 P L R 1914 : 150 P W R 1914 : 23 Ind Cas 451 (DB).

——S. 70 (1) (b)—Revision.

Section 70 (1) (b) of the Act precludes the chief

Court from going into any question except the one on which the revision petition has been admitted as a further appeal. A I R (Vol 1) 1914 Lah 158 : 301 P L R 1913 : 203 P W R 1913 : 15 P R 1914 : 20 Ind Cas 755 (DB).

——S. 70 (1) (b)—Second Appeal — Powers of Chief Court—Amending Act, 1 of 1912.

The power of entertaining a second appeal in a land suit below Rs. 1,000 under S. 70 (1) (b) of the Act of 1884 has been withdrawn from the Chief Court by the amending Act, 1 of 1912. A I R (Vol 1) 1914 Lah 138 : 89 P W R 1914 : 44 P L R 1914 : 23 Ind Cas 85 (DB).

——S. 70 (1) (b)—Improvements.

A defendant's action pendente lite cannot affect the value of the suit so that for purposes of jurisdiction for an appeal in a pre-emption suit the value of improvement effected during suit should not be included. 68 P W R 1912 : 96 P L R 1912 : 13 Ind Cas 428.

——S. 70 (1) (a) and (b) — Revision petition made under S. 70 (1) (a)—Chief Court, if can consider matters under cl. (b).

Where a revision petition to the chief Court raising questions as to which law customary or personal governs the parties is inadvertently made under clause (a) of S. 70 (1) the chief Court is entitled to consider them under clause (b). 63 P R 1911 : 194 P L R 1911 : 171 P W R 1911 : 11 Ind Cas 63.

—S. 75.

——S. 75(2) - District Judge — Power of, to transfer case to Additional District Judge.

Section 75 (2) of the Act cannot be construed so as to prevent a District Judge from transferring to a Subordinate Court a case pending before himself. It is merely intended to invest a District Judge with power of control over the distribution of business and does not imply that an Additional District Judge has no judicial powers until District Judge confers them on him. AIR (Vol 1) 1914 Lah 187 : 110 P W R 1914 : 215 P L R 1914 : 3 P R 1915 : 25 Ind Cas 480 (DB).

PUNJAB COURTS ACT (3 of 1914)

——Jurisdiction — Decree before the Act — Appeal, if District Judge under the new Act can hear.

A District Judge under the New Punjab Court's Act has no jurisdiction to hear an appeal from the decree of an officer who was a District Judge before the Act came into force. Where, therefore, such an appeal was heard by a new District Judge, the Chief Court set aside the judgment and decree and transferring the appeal to its file, decided it on the merits. A I R (Vol 3) 1916 Lah 374:26 P W R 1916:33 Ind Cas 997.

—S. 10.

——S. 10 — Division Bench — Power to make reference, difference in point of law.

A Division Bench of the Punjab Chief Court cannot make a reference under S. 10 (2) (b) of the Act when the members of that Bench have differed on a point of law. The proper course is to refer the point under the proviso to S. 98, Civil P. C. A I R (Vol 3) 1916 Lah 113 : 109 P W R 1916 : 154 P L R 1916 : 70 and 71 P R 1917 : 34 Ind Cas 714 (DB).

—S. 21.

——Ss. 21, 28 and 39—Appeal—Forum — Erroneous valuation of Court fees—District Court.

An appeal from a decree in a suit of the Jurisdictional value of Rs. 5,500 was filed in the High Court. The figure Rs. 5,700 found its way into the decree apparently; because the plaintiff assessed the market value of the land in suit at that sum although the real value of the suit for purposes of jurisdiction calculated at 30 times the Jama was only Rs. 615 :

Held, that the appeal lay to the District Judge. (1920) 2 Lah L J 300 (DB).

——Ss. 21 (2), 28 and 39 — Decree by Subordinate Judge who has been appointed Additional Judge—Appeal—Forum.

An appeal from the decree of a Subordinate Judge who has been appointed Additional Judge when the case has not been transferred to him by the District Judge under S. 21 (2) of the Punjab Court's Act, lies to the District Judge if the value of the suit does not exceed Rs. 5,000 and not to the Chief Court.' A I R (Vol 4) 1917 Lah 17 : 38 P R 1917 : 108 P W R 1917: 41 Ind Cas 42 (DB).

—S. 34.

——S. 34—Ex parte decree by Subordinate Judge, if can be set aside by Munsif.

A Subordinate Judge of the second class exercises no control over a Munsif of the second class and his Court is not superior to that of the Munsif.

A Munsif to whom a case is transferred under S. 30 of the Act can validly set aside an ex parte decree though it had been passed by a Subordinate Judge. AIR (Vol 4) 1917 Lah 204: 86 P L R 1917: 84 P W R 1917 : 42 Ind Cas 242.

—S. 40.

——S. 40—Second appeal—Finding of fact—Dedication.

A finding that a house is a dharmasala by dedication to religious uses is one of fact with which interference in second appeal is incompetent. AIR (Vol 6) 1919 Lah 130 : 1 P R 1919 : 49 Ind Cas 138.

——S. 40(3)—Refusal of certificate — Grounds for—Revision.

No revision ordinarily lies from an order of the lower Appellate Court refusing to grant a certificate under S. 40 (3) of Act III of 1914. If certificate is refused on the ground that no general question of custom etc., is involved, the chief Court can revise the order and remand the application. A I R (Vol 2) 1915 Lah 322 : 23 P W R 1915 : 86 P L R 1915 : 27 Ind Cas 722.

—S. 41.

——S. 41 — Second appeal — Custom — Certificate, when necessary.

When the question for decision before the lower Appellate Court was whether the general rule of custom had been abrogated by a special custom, no second appeal lies without a certificate. A I R (Vol 7) 1920 Lah 115 : 2 Lah L J 503 : 56 Ind Cas 651 (DB).

——Ss. 41 and 44—Refusal of certificates.

The order of a District Judge refusing certificate under S. 41 (3) without considering the grounds therefor is open to revision and remand. AIR (Vol 6) 1919 Lah 282 : 50 Ind Cas 651.

——S. 41—Error of Law — Revision — Material irregularity.

An erroneous view of law or omission to decide a question of fact (i. e.,) whether or not a balance was struck, is a material irregularity justifying revision.

The omission to determine a question of fact on which the decision as to limitation depends is a material irregularity for which a revision lies. A I R (Vol 6) 1919 Lah 177:37 P L R 1919: 52 Ind Cas 115.

——S. 41—Second appeal—Onus.

Where a decision proceeds upon a wrong laying of onus there being no evidence on either side, the question of onus is one of law and a second appeal lies, but where onus being wrongly placed, a case is decided on evidence let in by both parties, the case is different. A I R (Vol 4) 1917 Lah 395 : 38 P W R 1917 : 40 Ind Cas 100.

——S. 41—Necessity, if a question of law—Shamilat allotted on partition if ancestral.

Shamilat when allotted on partition to the proprietor of a village which is an ancestral property also becomes his ancestral property.

Whether a question of legal necessity is a question

of fact or law depends on a consideration of the knowledge of the alienee about the use the money was put to or on the lower Court's violation of the rules and maxims of the Chief Court. A I R (Vol 4) 1917 Lah 301 : 16 P W R 1917 : 39 Ind Cas 644.

——S. 41 Onus wrongly placed.

A finding of fact can be set aside in second appeal if burden of proof is wrongly allocated. A I R (Vol 4) 1917 Lah 45 ; 37 P W R 1917 : 40 Ind Cas 176.

——S. 41—Second appeal—Misreading of evidence.

Misreading of evidence is sufficient reason for the Chief Court to interfere in second appeal. AIR (Vol 3) 1916 Lah 36: 81 P R 1916: 126 P W R 1916: 39 P L R 1917 : 35 Ind Cas 892.

——S. 41—Second appeal—Finding of fact.

A finding of fact will not generally be gone into in second appeal when it is sufficiently definite though not very clear. AIR (Vol 2) 1915 Lah 163 : 20 P W R 1915 : 67 P L R 1915 : 27 Ind Cas 620.

——Ss. 41, 38—Appeal—Forum of—How determined—Value of claim in land suits.

In land suits where the value of claim is calculated according to the revenue payable on the land, it is that value that decides the course of appeal and not the amount decreed in the lower Court. A I R (Vol 1) 1914 Lah 432 : 10 P L R 1914 : 21 P W R 1914 : 23 Ind Cas 89 (DB).

——S. 41 (c)—Second appeal — Substantial error, or defect in procedure.

A second appeal cannot be entertained on the ground of mere alleged error in weighing evidence. A I R (Vol 3) 1916 Lah 238 : 72 P R 1916 : 138 P L R 1916 : 119 P W R 1916 : 35 Ind Cas 366 (DB).

——S. 41 (1) (3)—Point overlooked—Remand.

Though under S. 41 (1) and (3) the Chief Court can, in the absence of a certificate, decide the "existence or validity" of a custom, it is not barred from remitting a case for decision on a point of custom overlooked or deliberately neglected by the lower Court. AIR (Vol 3) 1916 Lah 276 : 22 P R 1916 : 212 P W R 1915 : 34 Ind Cas 904 (DB).

——S. 41 (1) — Second appeal — Question of law — Interpretation of document.

The question "whether M, gifted shamilat patti to D" is one of fact though in deciding that question one has to interpret a document, and consequently no second appeal lies. When a question involving the interpretation of a document is one of law explained. A I R (Vol 3) 1916 Lah 85 : 68 P R 1916 : 182 P W R 1916 : 77 P L R 1917 : 36 Ind Cas 199.

——S. 41 (1)(c) — Second appeal — Omission to consider oral evidence.

An omission by a lower Appellate Court to consider the oral evidence and record a finding thereon, is a material irregularity and a ground for second appeal. A I R (Vol 2) 1915 Lah 414 : 73 P W R 1915: 149 P L R 1915 : 29 Ind Cas 901.

——Ss. 41 (2), 38 and 39 — Decision by Additional District Judge in a case not assigned.

Where a case has been heard and decided by an Additional District Judge, which had not been assigned to him by the District Judge and who had never been appointed as Subordinate Judge, an appeal from his decree lies to the Chief Court and not to the District Court. A I R (Vol 6) 1919 Lah 273 : 46 P R 1919 : 51 Ind Cas 437 (DB).

——S. 41 (3)—Custom—Second appeal.

The decision in the case of self-acquired property, that a daughter's son excludes a nephew depended upon a finding as to custom which cannot be disputed in second appeal, without a certificate. A I R (Vol 8) 1921 Lah 360 : 2 Lah L J 188.

——S. 41 (3)—Second appeal—Point of custom.

In the absence of a certificate, a second appeal is not competent on a question of onus in a case of custom. On a refusal of certificate on the ground that the case was not covered by S. 41 (3), a remand for reconsideration of the question as to whether certificate should be granted cannot be ordered. A I R (Vol 7) 1920 Lah 468 : 2 Lah L J 470 (DB).

——S. 41 (3)—Second appeal—Custom.

Whether by the custom prevailing in the tribe to which the parties belong, a union between a man and his nephew's widow is recognised as valid and whether by custom the issue of such a union should be regarded as legitimate and entitled to succeed are questions of custom into which the High Court cannot enter in second appeal in the absence of a certificate. A I R (Vol 7) 1920 Lah 461 : 2 Lah L J 370 (DB).

——S. 41 (3)—Second appeal—Custom.

A finding that the parties are governed by Hindu Law and not by custom cannot be challenged in second appeal without a certificate. AIR (Vol 7) 1920 Lah 407 : 1 Lah L J 60 : 2 U P L R (Lah) 114 : 56 Ind Cas 944 (DB).

——S. 41 (3)—Second appeal.

An appeal was held to have been filed within time where the widow explained that her delay in applying for a certificate was, until she discovered her mistake, due to an erroneous supposition that a second appeal from the decree would lie as of right to the Chief Court. A I R (Vol 7) 1920 Lah 63: 1 Lah 245 : 57 Ind Cas 204.

——S. 41 (3)—Second appeal—Defective certificate.

A second appeal cannot be admitted on the strength of a certificate not in accordance with S. 41 (3) of the Act of 1914. A I R (Vol 5) 1918 Lah 356 : 4 P W R 1918 : 148 P L R 1917: 44 Ind Cas 87.

——S. 41 (3)—Question of onus in custom case — When question of law.

The question of onus probandi in a custom case is not a pure question of law, unconnected with custom; on the other hand, it is not under all circumstances a question relating to the validity or the existence of a custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom as laid down by the judicial decisions or otherwise. AIR (Vol 5) 1918 Lah 338 : 7 P R 1918 : 44 Ind Cas 162 (DB).

——Ss. 41 (3) and 44 — Revision — Order refusing certificate.

When an application for a certificate under S. 41 (3) of the Act is refused by the District Judge on the erroneous ground that no question of custom arose, there is a revision to the Chief Court from the order of refusal on the ground that the District Court has failed to exercise the jurisdiction vested in him. AIR (Vol 5) 1918 Lah 152 : 18 P R 1918 : 44 Ind Cas 732.

——S. 41 (3)—Refusal of certificate—Second appeal—Gifted property whether reverts to the donor.

Where the question involved in an appeal to the District Judge was one of custom and he rejected an application for a certificate under S. 41 (3) of the Act, a second appeal is not maintainable against his decree. Even where the lower Appellate Court, decided the rule of custom erroneously and on a misconception of prior decisions, a certificate under S. 41 (3) is necessary to sustain a second appeal on the point of custom.

The view that gifted property reverts to the heirs of the donor in the event of all the heirs of the donee being exhausted is erroneous. AIR (Vol 5) 1918 Lah 70 : 109 P R 1917 : 71 P W R 1917 : 43 Ind Cas 299 (DB).

——S. 41 (3) — Order of remand on question of custom—Appeal.

No appeal rom an order of remand as to the existence or non-existence of a custom lies, where however parties are admittedly governed by customary law, the order of remand should be set aside and a decree must be passed by the trial Court for what the plaintiff was entitled to by custom. A I R (Vol 4) 1917 Lah 392 : 76 P W R 1917 : 109 P L R 1917 : 39 Ind Cas 775.

——S. 41 (3) — Unreasonable refusal to certify — Procedure.

The Chief Court cannot on the revision side consider the reasonableness of a refusal to grant certificate nor regard it as granted when it is unreasonable. The question cannot be considered in the absence of a certificate. AIR (Vol 4) 1917 Lah 147 : 6 P R 1917 : 39 Ind Cas 96.

——S. 41 (3)—Second appeal—Custom—Certificate.

Where the lower Court found that the parties are governed by custom and not by Hindu Law, the aggrieved party cannot in second appeal urge as a ground of appeal that the parties are governed by Hindu Law and not by custom in the absence of a certificate under S. 41 (3) of the Act. A I R (Vol 4) 1917 Lah 74 : 141 P W R 1917 : 42 Ind Cas 115.

——S. 41 (3) —Second appeal, certificate for, on point of custom—When to be granted.

The certificate referred to in S. 41 (3) of the Act should be granted only when the lower Appellate Court is satisfied that the evidence regarding custom is conflicting or uncertain and there is substantial doubt regarding its existence. The Chief Court will not act upon a certificate which is not granted having regard to the aforesaid terms. A I R (Vol 3) 1916 Lah 102 : 82 P R 1916 : 129 P W R 1916 : 38 P L R 1917: 35 Ind Cas 884 (DB).

—S. 41.

——S. 44—Revision—Arbitration cases.

The High Court is reluctant to interfere on revision in arbitration cases unless it is compelled to do so in circumstances of gross and material irregularities.

The judgment of the lower Appellate Court being entirely based on inaccuracies or misunderstandings is vitiated thereby and cannot be upheld. A I R (Vol 8) 1921 Lah 375 : 2 Lah L J 681.

——S. 44—Revision—Interlocutory order.

The High Court is not bound to interfere on the revision side even though the lower Court acts without jurisdiction unless failure of justice has directly resulted from such a defect.

An order in a suit for partition after the preliminary decree and before the final decree is an interlocutory order, and it is not open to appeal. A I R (Vol 8) 1921 Lah 265 : 2 Lah L J 673.

——S. 44—Revision—Interference in—Equities.

The chief Court would not be justified in interfering with the order of the lower Court in revision, if the equities were all against the appellant. A I R (Vol 7) 1920 Lah 377 : 168 P R 1919.

——S. 44—Revision—Interlocutory order.

The chief Court should not ordinarily interfere with an interlocutory order in revision, but in exceptional cases it may, to shorten litigation. AIR (Vol 6) 1919 Lah 437 : 1 Lah L J 220.

——S. 44 — "Decided" meaning of — Civil P. C., O. 41, R. 5—Interlocutory orders.

A case cannot be said to be decided under S. 44 of the Act, if there has been an order of remand under Or. 41, R. 25, Civil P. C. The Chief Court will not interfere in revision with interlocutory orders. A I R (Vol 5) 1918 Lah 377 : 58 P L R 1918 : 134 P W R 1918 : 46 Ind Cas 554.

——S. 44—Revision—Limitation.

A case is within S. 44 if a suit has been erroneously held to be either within time or barred by limitation owing to the application to it of an article of the Limitation Act which cannot apply to the facts. (39 C. 473 ; 20 A. 78 Not foll.) A I R (Vol 5) 1918 Lah 365 : 59 P L R 1918 : 139 P W R 1918 : 46 Ind Cas 541 (DB).

——S. 44—Onus wrongly placed—Revision.

A wrong placing of the onus, resulting in a totally erroneous decision is sufficient for interference in revision. A I R (Vol 5) 1918 Lah 268 : 146 P W R 1918 : 46 Ind Cas 777.

——S. 44—Revision —Material irregularity.

The failure to determine whether an application is governed by the Limitation Act of 1877 or by the Act of 1908, is a material irregularity and is a good ground for revision. AIR (Vol 4) 1917 Lah 144 : 101 P R 1916 : 37 Ind Cas 292 (DB).

——S. 44—Revision—Wrong decision on question of law.

The Chief Court would not entertain an application for revision made on the ground that the lower Appellate Court has taken a wrong view of law in making the petitioners liable to the claim if it appeared that their conduct was most reprehensible. 88 P L R 1917.

——S. 44 — Revision — Interference in — Ends of justice.

The Chief Court is not bound to interfere in revision if the order of the lower Court does justice as between the parties. A I R (Vol 2) 1915 Lah 293 : 6 P W R 1915 : 38 P L R 1915 : 27 Ind Cas 589.

——S. 44—Revision—Finding of fact— Evidence not considered.

A finding of fact by an appellate Court without fully considering the evidence of the parties is liable to be set aside in revision. A I R (Vol 2) 1915 Lah 290 : 7 P W R 1915 : 120 P L R 1915 : 27 Ind Cas 593.

PUNJAB COURTS ACT (6 of 1918)

——Notifications under—Notifications Nos. 570 and 571 of 1889—Applicability to N.-W. F. P.

Notifications Nos. 570 and 571 of 1889 under the Punjab Courts Act, directing that the Divisional Courts should be deemed to be the District Courts for the purposes of the Succession Act are inconsistent with the N.W. F. P. Courts Regulation which abolished Divisional Courts. These notifications, therefore, ceased to have any effect when the N.-W. F. P. Courts Regulation was passed. A I R (Vol 26) 1939 Pesh 30 : 183 Ind Cas 657 (DB).

——A suit for land occupied as a fruit garden is a suit for land within the meaning of the Punjab Courts Act. Where a person is entered as a tenant-at-will of a garden, on his death it must be held that the tenancy has come to an end. His heir is not therefore entitled to a decree for possession though he is entitled to remove the trees. AIR (Vol 23) 1936 Lah 780 : 161 Ind Cas 975 (DB).

—S. 3.

——S. 3 (2)— Land Suit— Land in village abadi.

A suit relating to a piece of land in the village abadi which is not being occupied for any agricultural purposes is not a land suit within the meaning of the Act. AIR (Vol 22) 1935 Lah 105.

—S. 18.

——S. 18 — Order 47, R. 5, Civil P. C., applies only to a Court consisting of more than one Judge and a District Judge and an Additional Judge are not members of the same Court but different Courts under the Punjab Courts Act. AIR (Vol 20) 1933 Lah 130 : 34 P L R 229 : 141 Ind Cas 392 (1).

—S. 21.

—S. 21—Arbitration — Additional District Judge, if can entertain proceedings.

Under S. 21, the Additional District Judge in matters of arbitration can exercise all the powers of the District Judge but the District Judge has to assign such powers to him.

There was no express order on the record sending the case to the Additional District Judge, but previously the case was on the record of the District Judge who actually heard it and subsequently it went to the Additional District Judge who disposed of it :

Held, that under the circumstances, it must be assumed that the District Judge did assign this case to the Additional District Judge. AIR (Vol 25) 1938 Lah 838 : 182 Ind Cas 159.

—S. 26.

——S. 26—(as amended by 4 of 1919 and 9 of 1922) —Remand by Superior Court—Subordinate Court — Jurisdiction not conferred.

A remand order cannot confer on the subordinate Court a jurisdiction which that Court would not have had but for the remand. It would be highly anomalous to hold that a Court not having jurisdiction in the ordinary course becomes competent in consequence of a remand by a Superior Court. AIR (Vol 16) 1929 Lah 534 : 30 P L R 244 : 116 Ind Cas 324 (DB).

—S. 34.

——S. 34—Civil P. C., S. 24 and O. 41, R. 25—Additional District Judge remanding case to Subordinate Judge under O. 41, R. 25, Civil P. C.—District Judge has power to transfer proceedings from Subordinate Judge to another Subordinate Judge of equal and competent jurisdiction. AIR (Vol 20) 1933 Lah 29 : 33 P L R 1015 : 13 Lah 806 : 140 Ind Cas 238.

——S. 34 — Position of distributing Judge — Ministerial act— Discretion overrides S. 15, C. P. Code.

Where a judge receives plaints for distributing to proper Courts, he is acting not in the capacity of a Court but ministerially for the convenience of the litigants. His discretion overrides the provisions of S. 15, C. P. Code, in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction, but no such discretion is conferred on the suitor who remains bound by the provisions of the Code. A I R (Vol 15) 1928 Lah 484 : 110 Ind Cas 293 (DB).

——S. 34—Presentation and institution—Limitation, etc.—Date of presentation to distributing officer — Presentation not same as institution.

When the plaint distributed under S. 34 has reached the Court of the Judge who will dispose of it, the date of presentation for purposes of limitation and kindred matters is taken to be that on which it was presented to the distributing officer in the first instance.

But this is not the same as saying that it is instituted in the Court of such distributing officer, for once he or any other Court takes cognizance of a plaint and makes the necessary entries in the register he remains seized with that plaint and cannot send it elsewhere unless and until it is transferred by competent authority. A I R (Vol 15) 1928 Lah 484 : 110 Ind Cas 293 (DB).

—S. 35.

——S. 35—Warrant of attachment — Obstruction — Notice for prosecution — Transfer of proceedings to Additional Judge—Complaint by latter—Validity.

A warrant of attachment was issued by the Judge of a Small Cause Court and was handed over to the Bailiff under his order. The obstruction to the warrant was reported to that Judge who ordered notice to issue to the persons who caused the obstruction to show cause why they should not be prosecuted under S. 186, I. P. C. After this had .been done, the proceedings were made over by the Judge to the Additional Judge for disposal who, under the provisions of S. 8 (2), Provincial Small Cause Courts Act, had the same powers as the Judge in this matter which had been assigned to him by the Judge:

Held, that a complaint filed by the Additional Judge under the circumstances was a good complaint. AIR (Vol 18) 1931 Lah 530: 32 Cr L J 964: 33 P L R 401: 13 Lah 16: 132 Ind Cas 842.

—S. 37.

——S. 37 — Section 37 read with S. 24, Civil P. C., does not make the provisions of O 21, R. 5 of the Code a mere surplusage. AIR (Vol 20) 1933 Lah 859: 147 Ind Cas 584.

—S. 38.

——S. 38—Forum of appeal in suit for injunction.

A suit for issue of a perpetual injunction ordering the defendant to demolish a wall built by him near the plaintiff's ventilator and to restrain him from building second storey on his shop within five feet of the plaintiff's windows falls under R. 4 of the rules framed by Lahore High Court under S. 9, Suits Valuation Act, and must be valued at a sum exceeding Rs. 100 and not exceeding Rs. 500. In such a suit, a first appeal lies only to the District Judge. A I R (Vol 21) 1934 Lah 796: 155 Ind Cas 153.

—S. 39.

——S. 39 — Discretion of Court — Interference in appeal—Principles — Punjab Pre-emption Act, S. 22 (4).

A Court of appeal can interfere with the exercise of discretion by the Court below if such discretion has been exercised on wrong or inadequate materials as for example, if it can be shown that the Court has acted under a misapprehension of fact in that it either has given weight to irrelevant or unproved matters or has omitted to take into account matters that are relevant. A I R (Vol 37) 1950 East Punj 264 (DB).

——S. 39 — Original plaint amended with Court's permission—Determination of forum of suit and appeal.

The valuation as given in the original plaint is no longer the valuation of the suit, when the original plaint has, with Court's permission, been amended but it is the relief asked for, and the value fixed in the amended plaint, which determine the nature and forum of the suit as well as of appeal under S. 39. AIR (Vol 28) 1941 Lah 397 : 43 P L R 628 : 197 Ind Cas 319.

——S. 39—Account suits—Forum of appeal.

In suits for rendition of accounts, if the aggregate amount exceeds Rs. 5,000, the appeal lies to the High Gourt and not to the District Judge. (1939) 41 P L R 145.

——S. 39—Jurisdiction—Consent or waiver.

Notification under S. 39 (3) directed an appeal from the Court of first instance to be filed before the Senior Subordinate Judge — Appeal filed in the Court of District Judge:

Held, that the consent and acquiescence of the parties could not give jurisdiction to the District Judge to decide the appeal. A I R (Vol 24) 1937 Lah 401: 39 P L R 677: 174 Ind Cas 139.

——S. 39—Suit for rendition of account — Appeal to District Court — Power of District Judge to pass a decree in excess of his pecuniary jurisdiction — Appeal—Jurisdiction.

Suit for dissolution of partnership and rendition of accounts—Suit valued at Rs. 2000—The defendant in his written statement pleading that nothing was due to the plaintiff, and alleging that the plaintiff owed him a very large sum—A preliminary decree dissolving the partnership and ordering that accounts be taken—Final decree for Rs. 3286—Both parties filing appeals in the District Court — In his memorandum of appeal, the plaintiff stating that "the value of the suit was Rs. 2000 but he valued the appeal for pur-

poses of jurisdiction and court-fee at Rs. 5000 or more on accounts," and paying ad valorem fee on Rs. 5000 stating that he was prepared to make good the deficiency in court-fee in the event of the Court finding that on the evidence, he was entitled to a larger sum — The defendant valuing his appeal at Rs. 8286—The District Judge dismissing defendant's appeal and accepting that of the plaintiff and passing a decree in favour of the plaintiff for Rs. 32,932-2-3 with costs and interest at 6 per cent. per annum:

Held, that for the purposes of determining the forum of appeal, the value of the original suit was Rs. 3286 and the appeals lay to the District Court and Ss. 25, 26, and 39, Punjab Courts Act, relate also to jurisdiction to decide the suit or appeal and as such, the District Court had no jurisdiction to pass a decree for more than Rs 5000 and that the proper course for him was to return the memorandum of appeal for presentation in High Court;

Held, also that in appeals of which the High Court is properly seized, it has jurisdiction to pass a decree for any sum however large or small it may be. A I R (Vol 21) 1934 Lah 545 : 15 Lah 512 : 36 P L R 361 : 151 Ind Cas 703 (FB).

——S. 39 — Pre-emption of sale of agricultural land —Forum of appeal.

The value of the suit for purposes of jurisdiction in suits for pre-emption of sales of agricultural land is admittedly thirty times the land revenue assessed on land and under S. 39, the forum of appeal is determined by the 'value of the original suit.' The mere fact that the Court passes a decree for possession subject to an encumbrance, which exceeds the pecuniary jurisdiction of the Court does not make the decree so passed ultra vires. A I R (Vol 20) 1933 Lah 767: 35 P L R 26: 147 Ind Cas 29 (DB).

——S. 39—Redemption suit—Forum of appeal.

The value of a suit for redemption for determining the forum of appeal is not value tentatively given by the plaintiff but the amount found by the Court to be payable for redemption. AIR (Vol 20) 1933 Lah 155: 148 Ind Cas 234 (DB).

——S. 39—Jurisdiction in appeal—Suit valued at less than Rs. 5,000—Decree for over Rs. 5,000 — Appeal lies to District Judge, not to High Court.

The value of pre-emption suit for the purposes of jurisdiction calculated at thirty times the land revenue of the land in dispute was less than Rs. 5,000, but a decree was passed in the suit ordering payment of a sum larger than Rs. 5,000.

Held, an appeal arising from the suit lay under S. 39 (1) (a) of the Punjab Courts Act to the Court of the District Judge and not to the High Court. A I R (Vol 12) 1925 Lah 41: 76 Ind Cas 196 (DB).

——Ss. 39 and 40 — Jurisdiction—First appeal—Test of.

The question of jurisdiction in respect of a first apppeal must be determined with reference to the claim made and not with reference to the decision upon the claim. There is a distinction between first appeals under S. 39 and further appeals under S. 40 of the Punjab Courts Act. 3 P L R 1913: 274 P W R 1912: 16 Ind Cas 865 (DB).

——S. 39 (1) — Suit for money on unsettled account —'Amount or value of subject-matter of the original suit', meaning of—Court-fees.

In suits for recovery of money on unsettled accounts, the "value as determinable for computation of court-fee" is the value as given in the plaint unless it is enhanced by an adjudication of the Court that a higher sum is due in which case it is this latter sum which becomes the value on which court-fee is computed and which, therefore, is also the proper value for purposes of jurisdiction.

But there is no variation of the value as originally fixed in the plaint if the amount found due is less than that claimed or if the suit is dismissed, the plaintiff being held entitled to nothing. In the last mentioned class of cases, the value as originally fixed continues to be the value for computation of court-fee and consequently, is also the value for purposes of jurisdiction.

The plaintiff brought a suit against the defendant for dissolution of partnership and rendition of accounts and valued the suit for purposes of jurisdiction and court-fee tentatively at Rs. 8000 and paid court-fee on that amount stating that if a higher sum was found due on taking the account, he would pay additional court-fee thereon. The trial Court found him entitled only to Rs. 3375-4-6.

Both parties appealed, the defendant appealing to the District Court valuing the appeal for purposes of jurisdiction and court-fee at Rs. 3375-4-6. The plaintiff appealed to the High Court contending that the Subordinate Judge had erroneously fixed the amount due by the defendant to him at Rs. 3375-4-6 and praying that the decretal amount be enhanced to Rs. 9824-10-9 as found by the Local Commissioner. He valued the appeal for purposes of jurisdiction at Rs. 8000 and for court-fee at Rs. 6449-6-3 on which amount he paid ad valorem court-fee:

Held, (Agha Haider J. dissenting) that the "value of the subject-matter of the original suit" was Rs. 8000 as stated in the plaint, and not Rs. 3375-4-6 for which the Subordinate Judge had passed a decree and therefore under S. 39 (1), Punjab Courts Act, appeals against that decree whether instituted by the plaintiff for enhancement of the decretal amount or by the defendant for the total dismissal of the suit, lay to the High Court. A I R (Vol 21) 1934 Lah 488 : 15 Lah 151: 36 P L R 391: 151 Ind Cas 641 (FB).

——S. 39 (3)—Notification under — Relationship between Subordinate Judge and District Judge — Transfer of case by District Judge.

Section 39 (3) does not affect the status of the District Judge or the Subordinate Court who has been empowered by notification to hear appeals of certain class lying to the District Judge, or the relationship inter se between them in the same District. The latter Court still 'remains subordinate to the District Judge. Consequently, the District Judge is empowered to transfer the appeal from the Court of the Subordinate Judge to his own Court if sufficient grounds are made out before him. AIR (Vol 26) 1939 Lah 578: 186 Ind Cas 139.

——S. 39 (3)—Jurisdiction — Consent or waiver.

There is a defect of jurisdiction if a District Judge entertains an appeal direct from a Court of first instance which, under the provisions of S. 39 (3), lies to First Class Subordinate Judge. The consent and acquiescence of the parties to a suit cannot give jurisdiction to a Court of limited jurisdiction. AIR (Vol 23) 1936 Lah 575 : 38 P L R 990 : 164 Ind Cas 440 (DB).

——S. 39 (3)—Ground for second appeal.

The absence of jurisdiction to hear an appeal is a good ground for second appeal. AIR (Vol 23) 1936 Lah 575 : 38 P L R 990 : 164 Ind Cas 440 (DB).

—S. 41

1. **Absence of certificate**
2. **Certificate necessary**
3. **Certificate not necessary**
4. **Discretion about certificate**
5. **Effect of certificate**
6. **Limitation**
7. **Object and scope**
8. **Points not covered by certificate**
9. **Revision**

1. Absence of certificate

——S. 41—Certificate—Finding regarding custom.

A finding that the parties are governed by custom

on the one hand or their personal law on the other cannot be challenged in appeal in the absence of a certificate. (1937) 170 Ind Cas 89 : 39 P L R 773.

——S. 41—Certificate necessary.

In the absence of a certificate, the High Court will not re-open a decision on the question of custom. AIR (Vol 21) 1934 Lah 289 : 36 P L R 495 : 15 Lah 683 : 151 Ind Cas 209.

——S. 41—Custom not proved — Certificate refused —Appeal without certificate on ground of onus wrongly placed—Not maintainable.

Two daughters of a Rajput Mahomedan who had migrated to Lyallpur challenged an alienation by their widowed mother, alleging that they were governed by custom and could so challenge it. The onus of proving the custom was placed on the plaintiff, who failed to prove it. Then plaintiff, failing to obtain certificate, appealed on the ground that onus was wrongly placed and no certificate was necessary.

Held, that as the counsel had previously admitted the right placing of onus, the appeal should be dismissed being without certificate. AIR (Vol 16) 1929 Lah 765 (DB).

——S. 41—Finding as to custom.

Findings of the lower Courts that by the custom the mother was the guardian of her son and competent as such to alienate his property cannot be challenged in second appeal in absence of a certificate. AIR (Vol 14) 1927 Lah 873 : 9 L L J 399 (DB).

——S. 41—Question of law applicable — Certificate necessary.

The question as to the representative rights of inheritance was a matter of fact in issue.

Held, the District Judge's finding that the parties are governed by Muhammadan Law and not by custom on this point cannot be challenged in the absence of a certificate. AIR (Vol 10) 1923 Lah 284 : 75 Ind Cas 458.

——S. 41—Custom as to Hindu widow's power to gift.

The question whether a Hindu widow has a right by custom to make a gift, is one that cannot be raised in the absence of a certificate in second appeal. AIR (Vol 10) 1923 Lah 53 : 70 Ind Cas 838 (DB).

2. Certificate necessary

(a) Custom general
(b) Custom regarding village and grazing lands
(c) Custom regarding share in property
(d) Question as to applicability of personal law

(a) Custom general

——S. 41 — A question of custom cannot be agitated in second appeal without a certificate even when no specific issue on the question of custom was framed in the trial Court provided it was implied in the pleadings and arose by implication on the issues which were actually framed and was, in fact, in direct contest between the parties at the trial. AIR (Vol 28) 1941 Lah 47 : 42 P L R 796 : 192 Ind Cas 879.

——S. 41 (3) — Suit involving question of custom—Parties relying on judicial precedents as instances — Court holding instances cited by plaintiff sufficient to rebut presumption arising from riwaj-i-am :

Held, that second appeal was not maintainable without certificate under S. 41 (3). (AIR (Vol 24) 1937 Lah 938 : 175 Ind Cas 890.

——S. 41 — Certificate necessary only on grounds covered by the section.

It is only when the grounds in support of the appeal are covered by S. 41 (1) (a) that a certificate by the District Judge is necessary and not otherwise. AIR (Vol 15) 1928 Lah 427 : 110 Ind Cas 172.

——S. 41—Second appeal.

Question of custom cannot be gone into in second appeal without a certificate. (1928) 109 Ind Cas 562 (Lah).

——S. 41—Question of mercantile usage.

An appeal to contest a decision on a question of mercantile usage does not lie without furnishing a certificate in accordance with provisions of S. 41. AIR (Vol 13) 1926 Lah 227 : 91 Ind Cas 506.

——S. 41—Custom invalidating will.

A finding that a custom existed by which a certain will became invalid cannot be challenged in second appeal without a certificate. AIR (Vol 12) 1925 Lah 52 : 84 Ind Cas 904 : 6 L L J 310 (DB).

——S. 41—Cross objections— Respondent not prohibited from agitating question of custom.

S. 41 (3) only provides that an appeal shall not be entertained on questions relating to custom without a certificate and does not in any way prohibit a respondent from agitating the question of custom in answer to the appeal and from supporting the decree on any of the grounds that may have been decided against him in the Court below under Order 41, Rule 22. AIR (Vol 11) 1924 Lah 368 : 76 Ind Cas 10 : 5 L L J 341 (DB).

——S. 41—Wrong decision as to existence of custom —Still certificate necessary.

An application for a certificate was made to the lower Appellate Court but was dismissed on the ground that there was no material on the record on which any decision, as to the custom alleged, could be arrived at. In second appeal, it appeared to the High Court that a question of custom was involved.

Held, that even if the decision of the learned District Judge on the merits of the case be erroneous, a second appeal was not competent without a certificate. AIR (Vol 10) 1923 Lah 589 : 72 Ind Cas 403 : 5 L L J 293 : 6 L L J 452 (DB).

——S. 41—Finding as to custom—Second appeal.

A decision depending upon a finding as to custom cannot be disputed in second appeal without a certificate. AIR (Vol 8) 1921 Lah 360 : 68 Ind Cas 106 : 93 PLR 1922.

——S. 41—Question of onus probandi relating to custom.

The question of onus probandi in a case of custom is not a pure question of law, unconnected with custom and therefore a question of onus probandi regarding custom cannot be raised in appeal without a certificate. AIR (Vol 8) 1921 Lah 226 : 63 Ind Cas 657 : 2 Lah 167 : 82 PLR 1921 (DB).

——S. 41—Second appeal—Question of custom mixed with question of onus probandi— Certificate necessary.

Where the question of burden of proof can in no way be separated from the question of custom, the question of burden of proof clearly involves a question of custom and no second appeal lies without a certificate. AIR (Vol 8) 1921 Lah 77: 66 Ind Cas 492: 2 Lah 348 : 103 PLR 1921 (DB).

——S. 41 (3)—Second appeal — Custom.

An appellant cannot in second appeal, challenge a right on the basis of custom without a certificate. AIR (Vol 6) 1919 Lah 176: 40 PLR 1919: 50 I.C. 895.

(b) Custom regarding village and grazing lands.

——S. 41—Re-agitation of question in second appeal.

The interpretation of a clause in the village statement of custom involves a decision regarding the validity or existence of a custom and, therefore, a certificate is necessary before the question of custom can be agitated in the High Court in second appeal. AIR (Vol 25) 1938 Lah 524 : 40 PLR 272 : 177 Ind Cas 395.

——S. 41 (1) and (3) — Interpretation of clause in statement of custom—Decision involving question of validity of custom.

The natural meaning of S. 41 (1) and (3) is that (a) even though the decision on custom by the lower Appellate Court is wrong (b) even though the lower Appellate Court has failed to determine a material point of custom; (c) even though the lower Appellate Court's procedure is marred by grave irregularities, still the High Court shall not interfere unless the certificate is issued.

Obiter.—The interpretation of a clause in the village statement of custom would involve a decision regarding the validity or existence of a custom and before an appeal is preferred to the High Court, a certificate would therefore, be necessary under S. 41 (3). AIR (Vol 25) 1938 Lah 33 : ILR (1937) Lah 642: 40 PLR 295 : 175 Ind Cas 689 (DB).

——S. 41—Question in dispute relating to existence of custom.

Certain proprietors sued the tenants for restraining them from grazing cattle saying that the suit lands, though once included in common grazing land, was on partition appropriated by them. The tenants pleaded their right of grazing.

Held, that the question in dispute related to the existence of a custom and a certificate by the District Judge was necessary. (1928) 112 Ind Cas 872 (Lah).

——S. 41—Custom as to grazing.

The rights of grazing over shamilat being based on custom a second appeal could not be entertained without a certificate in a case to enforce the rights. AIR (Vol 9) 1922 Lah 470 : 68 Ind Cas 751 (DB).

(c) Custom regarding share in property.

——S. 41 (3)—Lower Court holding that plaintiff as remote reversioner is not entitled to challenge alienation by widow—Plaintiff wishing to establish custom to contrary in second appeal—Certificate is necessary. AIR (Vol 28) 1941 Lah 43: 42 PLR 819 : 194 Ind Cas 310.

——S. 41 (3)—One G widow of R, made a gift of her land in favour of one A, on which the proprietors of the pattis in which the land in suit was situated instituted a suit for a declaration that the gift should not affect their reversionary rights. At the trial, reliance was placed on answer to question No. 56 of the Manual of Customary Law of the District of Karnal. The Sub-ordinate Judge came to the conclusion that both the widow and the donee had failed to prove that any such permission was given and he, consequently, decreed the suit. On appeal, the District Judge referred to the evidence examined by the donee on this point and, relying upon it, allowed the appeal. The plaintiffs preferred a further appeal to the High Court which came on for hearing before a Single Judge. The plaintiff's suit was decreed. On Letters Patent Appeal :

Held, that the finding of the District Judge did involve the question of the existence or validity of the custom relied on by the defendants. The finding of the District Judge in their favour amounted to declaring the custom as proved by them to be existing and valid, and this finding could not be impugned on second appeal without the necessary certificate under S. 41, sub-s. (3), Punjab Courts Act. AIR (Vol 25) 1938 Lah 191 : 40 PLR 573 : 181 Ind Cas 422 (DB).

——S. 41—Right of sons of adopted person to share in property of natural grand-father — Question of custom.

The right of the sons of an adopted person to share in the succession to property which has descended from their natural grandfather is a question of custom, and necessitates a certificate for agitating the question in second appeal. AIR (Vol 22) 1935 Lah 944,

——S. 41—Decision as to custom right or wrong — Certificate necessary.

Where the Appellate Court has held, whether rightly or wrongly, that a custom exists applicable to the parties by which collaterals, no matter how remote, succeed in preference to a sister's son, the decision about the existence of a custom cannot under the law be attacked on any of the grounds set forth in S. (41) (1) (a) (b) (c) without the certificate under Section 41 (3). AIR (Vol 12) 1925 Lah 145 : 80 Ind Cas 527 : 6 LLJ 261 (DB).

(d) Question as to applicability of personal law.

——S. 41 (3) — The question whether a person is governed by Hindu Law or by custom is one which cannot be gone into in second appeal without a certificate under S. 41 (3), Punjab Courts Act. AIR (Vol 24) 1937 Lah 560 : 39 PLR 243 : 170 Ind Cas 388.

——S. 41—Custom not proved—Validity of—Second Appellate Court cannot go into without certificate.

Where the plaintiff has failed to prove that a Jain widow has power to adopt a son without authority of her husband, the second Appellate Court is precluded from examining the validity of the custom in absence of the necessary certificate from the lower Appellate Court. AIR (Vol 16) 1929 Lah 814 (DB).

——S. 41 — Finding that Mahomedan step-mother is not legal guardian.

The finding that a step-mother is not a legal guardian of step-son cannot be challenged without a certificate under S. 41 (3). AIR (Vol 12) 1925 Lah 239 : 84 Ind Cas 923 : 6 Lah L J 516.

——S. 41 — Question of custom involved—Second appeal — Certificate necessary.

The question in issue was the existence of a custom by which a Jat could contract a valid marriage with a 'Chhimbi' woman whose first husband, though alive, had repudiated her.

Held, that the words "notwithstanding anything in sub-section (1) of this section" with which sub-s. (3) of S. 41 commences, preclude a Court of second appeal in the absence of a certificate from going into the question of whether the first Appellate Court had erred in law or procedure. Hence second appeal in this case was not competent without a certificate. AIR (Vol 10) 1923 Lah 377 : 73 Ind Cas 924.

——S. 41 (3)—Custom or Hindu law—Finding as to.

The lower Court's finding that the parties are governed by Hindu law and not by custom cannot be challenged in second appeal without a certificate. AIR (Vol 7) 1920 Lah 407 : 1 Lah L J 60: 2 U P LR (Lah) 114 : 56 Ind Cas 944 (DB).

——S. 41—Finding regarding custom—Whether can be challenged.

The finding by the lower Appellate Court that the parties are governed by Hindu law cannot be challenged in second appeal without a certificate. AIR (Vol 7) 1920 Lah 191 : 1 Lah 554 : 2 Lah L J 481 : 114 Pat L R 1920 : 56 Ind Cas 742 (DB).

3. Certificate not necessary.

(a) General.

(b) Finding of custom based on no evidence.

(a) General.

——S. 41—Fact of adoption disproved — Certificate.

Where the finding of fact is that there was no adoption, no certificate should be granted as regards what the custom of adoption was. AIR (Vol 26) 1939 Lah 135 : 183 Ind Cas 853 (DB).

——S. 41 (3) — Question whether custom giving right to reversioner to challenge alienation extends to involuntary sales also is one of legal principle :

Held, that second appeal involving such question is competent without certificate. AIR (Vol 24) 1937 Lah 564 : 174 Ind Cas 993 (1).

——S. 41 (3) — Where the Judge has based his deci-

sion on a question of custom which did not arise and has failed to consider the real point involved in the litigation, the matter can unquestionably be agitated in second appeal without a certificate. AIR (Vol 24) 1937 Lah 250 : 39 P L R 146 : 171 Ind Cas 808.

——S. 41 — Appeal not raising the question of custom—Certificate of custom, if necessary.

Where, in an appeal, the plaintiffs are not raising any question as to the validity or existence of a custom but merely are contending that the District Judge has misunderstood the nature of their claim as well as para. 64 of Rattigan's Digest on which he has relied and that he was wrong in holding that the plaint did not disclose any cause of action, no certificate of custom is required in support of the appeal. AIR (Vol 21) 1934 Lah 229 : 149 Ind Cas 1049 (DB).

——S. 41 — Where, in a suit by some of the proprietors against another proprietor who had purchased a house in the abadi from a non-proprietor, a decree was passed for removal of the material and the vendee appealed :

Held, a certificate under S. 41 was not necessary. AIR (Vol 20) 1933 Lah 963 : 34 P L R 605 : 144 Ind Cas 626.

——S. 41—Where the appellants challenge the decision of the lower Appellate Court solely on the ground that it is contrary to law, inasmuch as it was not open to that Court to go into the question of custom no certificate under S. 41 appears to be necessary. AIR (Vol 20) 1933 Lah 606 : 144 Ind Cas 669.

——S. 41 — Apart from any question of custom, it is a settled rule of law that a disclaimer of the landlord's title made before a suit for ejectment occasions a forfeiture of the tenancy, permanent or otherwise. AIR (Vol 20) 1933 Lah 221 : 13 Lah 796 : 34 P L R 87 : 141 Ind Cas 825 (1) (DB).

——S. 41—Question of locus standi to contest alienation.

Where the locus standi of a plaintiff to challenge an alienation has been decided purely on a point of law and not on the basis of any custom, no certificate is necessary for a second appeal. AIR (Vol 19) 1932 Lah 473 : 33 P L R 564 : 13 Lah 826 : 139 Ind Cas 110.

——S. 41 — Loan for marriage expenses — Question of necessity.

No certificate is necessary to determine the question whether the money raised for the marriage of one brother does or does not constitute valid necessity for the sale of ancestral lands by another brother and the married brother. AIR (Vol 16) 1929 Lah 585 : 119 Ind Cas 724 (DB).

——S. 41 — Failure to decide an issue — If certificate necessary.

It is doubtful whether a certificate is at all necessary if the party aggrieved wishes to appeal from the decree of the District Judge on the ground that he has failed to decide a particular issue involved in the case, even if that issue relates to a matter of custom. AIR (Vol 15) 1928 Lah 527 : 110 Ind Cas 172.

——S. 41 — Decision on extraneous matter not required for deciding the case.

Where the decision of the lower Court proceeded on a point which was neither in the pleading nor put in issue and a decision on which was not really required for the decision of the case :

Held, that it was not necessary to file certificate under S. 41 (1) (3) with memorandum of appeal. AIR (Vol 15). 1928 Lah 285 : 9 Lah 95 : 112 Ind Cas 41 (DB).

——S. 41 — Declaratory suit impeaching widow's alienation.

A second appeal without a certificate is competent when the suit is for a declaration that an alienation by widow should not affect the reversionary rights of the plaintiffs as there is no question as to the existence or validity of any custom, because a widow cannot effect an alienation except for necessity when the case is governed by custom. AIR (Vol 13) 1926 Lah 247 : 92 Ind Cas 725.

——S. 41—Finding as to custom under O. 41, R. 25.

A finding under O. 41, R. 25 as regards custom can be challenged without a certificate referred to in S. 41. AIR (Vol 11) 1924 Lah 455 : 5 Lah 268 : 6 L L J 145 : 78 Ind Cas 404 (DB).

——S. 41—Custom well known—No issue framed.

Where the custom relied on by the appellants is well known and there is no dispute between the parties as to its existence and no issue was framed by the trial Court about it, no certificate is necessary. AIR (Vol 11) 1924 Lah 289 : 69 Ind Cas 538.

——S. 41—Custom alleged not gone into by Court.

Where a Court of first appeal fails to go into the question of custom and a second appeal is preferred with the object of having the question of custom tried, no certificate under S. 41 (3) is necessary. AIR (Vol 11) 1924 Lah 278 : 5 L L J 511 : 73 Ind Cas 1 (DB).

——S. 41—Decision as to ancestral nature of land.

When the question raised in the second appeal is not the validity or existence of a custom, but whether the decision of the District Judge as to ancestral nature of the land is correct, no certificate under S. 11 (3) of the Punjab Courts Act is required. AIR (Vol 9) 1922 Lah 65 : 4 Lah L J 31 : 64 Ind Cas 428 (DB.)

——S. 41 (3)—Second appeal—Custom.

If the appellant do not dispute the custom of reversion to the donor no certificate to prefer a second appeal is necessary. AIR (Vol 6) 1919 Lah 80 : 50 Ind Cas 769 (Lah).

(b) Finding of custom based on no evidence.

——S. 41—Where the finding on the question of custom is not based on any evidence second appeal lies even without a certificate. AIR (Vol 26) 1939 Lah 366 : 41 P L R 812.

——S. 41 (3) — Evidence of custom not produced by either party — Riwaj-i-am not produced — Court relying on presumption only—Certificate is not necessary. A I R (Vol 24) 1937 Lah 449 : 174 Ind Cas 708.

——S. 41—The cases under the Customary Law cannot be decided on mere analogy.

Where the Judge of the lower Appellate Court has not decided the matter as to succession to a chela on the basis of any evidence but merely on the analogy to the succession to the estate of an appointed heir, a certificate is not necessary in the circumstances and an appeal from the decision without a certificate under S. 41 is competent. A I R (Vol 23) 1936 Lah 920 : 38 P L R 838 : 163 Ind Cas 695.

——S. 41—It is doubtful whether a certificate is necessary to enable the plaintiffs to file a second appeal in the High Court where the question of custom does not depend upon any evidence but only on the interpretation to be placed on a certain para in Customary Law of the District. A I R (Vol 23) 1936 Lah 660 : 38 P L R 851 : 165 Ind Cas 78 (1).

——S. 41—Where no question of custom is involved but the decision rests on the entry in the wajib-ul-arz, and even if the parties were at issue as to its interpretation, a second appeal would be competent without a certificate inasmuch as where the conclusion of the District Judge is based, not upon a consideration of evidence that is to say, on a decision as to the weight of evidence, but is based on an interpretation of a clause in the wajib-ul-arz, a second appeal to the High Court lies without a certificate. (1935) 157 Ind Cas 341 : 37 P L R 390 (DB).

——S. 41 (3) — Where the contentions in second appeal is that the lower appellate Court has legally erred in not discussing or rather not considering the evidence produced by the appellants in support of their plea, it is doubtful if a certificate under S. 41 is necessary for second appeal. A I R (Vol 21) 1934 Lah 300 : 35 P L R 110 : 150 Ind Cas 356.

——S. 41 — Finding as to custom based on interpretation of wajib-ul-arz.

Where a finding as to custom is based not upon a consideration of the evidence but on the interpretation of a clause in the wajib-ul-arz, a second appeal can be maintained without a certificate under S. 41. AIR (Vol 19) 1932 Lah 463 : 33 P L R 479 : 138 Ind Cas 683.

——S. 41—Finding of custom based on construction of riwaj-i-am.

Where a finding as to custom is based on the interpretation of a clause in the riwaj-i-am and not on the evidence in the case, there is a question of law and a second appeal is maintainable without a certificate. A I R (Vol 19) 1932 Lah 397 : 33 P L R 416 (2) : 138 Ind Cas 680.

——S. 41 (3)—Deciding question of custom without referring to evidence—Second appeal.

Where a question of custom is decided by the lower Appellate Court without reference to any evidence in the case purely on the strength of an authority pertaining to a different district and a different tribe, there is a question of law for purposes of second appeal. A certificate under S. 41 (3) is unnecessary. A I R (Vol 19) 1932 Lah 61 : 32 P L R 617 : 134 Ind Cas 826.

——S. 41—Decision contrary to law but not based on evidence.

Where a decision is contrary to law and the case consequently falls under the first portion of S. 41 (1) (a), the proviso to cl. (3) of the said section does not apply and there is no need for a certificate under the said section.

A certificate under S. 41 (3) is not invalid merely because no evidence whatsoever was called in the case. If evidence in the shape of precedents exists, the certificate would be adequate and in order. AIR (Vol 18) 1931 Lah 495 : 32 P L R 446 : 13 Lah 180 : 134 Ind Cas 197 (DB).

4. Discretion about certificate.

——S. 41—Where, in the circumstances of a case, it was the duty of a District Judge to grant the certificate under S. 41 of the Act and it was not granted :

Held, that High Court could direct District Judge under S. 107, Government of India Act, 1915, to give the necessary certificate. AIR (Vol 22) 1935 Lah 592: 160 Ind Cas 105 (1).

——S. 41 (3)—'Evidence,' meaning of.

In granting a certificate under S. 41 (3), the test is not whether the question involved is difficult but whether it is of sufficient importance and the evidence for and against it is conflicting or uncertain. The word "evidence" in this sub-section does not merely mean the instances actually proved in a particular case, but also includes the entries in the published riwaj-i-ams and previous judicial decisions in which the question of custom had been raised and decided. A I R (Vol 22) 1935 Lah 554 : 158 Ind Cas 119.

——S. 41 (3) — Where a District Judge considers an application before him and finds that a certificate should not be granted, a second appeal is not competent without a certificate and the High Court has no power to send back the case to him for re-consideration or with an order to grant the required certificate. A I R (Vol 21) 1934 Lah 861 : 16 Lah 307 : 36 P L R 256 : 155 Ind Cas 212 (DB).

——S. 41 (3) — Where a District Judge has based his decision on a question of custom on a ruling of the High Court which is exactly in point and not contradicted by other authority, he cannot be held to have erred in the exercise of his jurisdiction in refusing a certificate. A I R (Vol 20) 1933 Lah 269 : 34 P L R 189 : 141 Ind Cas 462.

——S. 41—Certificate when granted—Clear finding of fact—Certificate not to be granted.

Where there is a clear finding that a person was not adopted, no certificate under S. 41 (3) should be granted entitling him to raise the question of the validity of the custom of adoption. AIR (Vol 16) 1929 Lah 192 : 10 Lah 581 : 30 P L R 605 : 114 Ind Cas 705 (DB).

——S. 41 — District Judge's discretion not to be interfered with—Lahore High Court—Practice.

The discretion of refusing or granting a certificate has expressly been given by the legislature to the District Judge and ordinarily it is not the practice of the Lahore High Court to interfere with the order passed by the District Judge, unless it appears that it is perverse or proceeds on an apparent error in procedure or on a misapprehension of the nature of the case before him or of his jurisdiction. A I R (Vol 15) 1928 Lah 527 : 110 Ind Cas 172.

——S. 41—Benefit of doubt as to necessity of certificate.

Where it was doubtful whether a flaw in the District Judge's judgment was such as to absolve the appellant from the necessity of producing a certificate for second appeal, the benefit of doubt was given to the appellant. A I R (Vol 9) 1922 Lah 471 : 68 Ind Cas 767.

——S. 41 — Entirely in lower appellate Court's discretion—Indication as to regard having been given to requirements of Act necessary.

The grant of a certificate under S. 41 (3) of the Punjab Courts Act for the purpose of carrying the matter to a higher tribunal is entirely in the discretion of the lower appellate Court, but the Court refusing such a certificate must indicate by its order that the requirements of the Statute have been borne in mind in coming to the conclusion it has arrived at. (1922) 69 Ind Cas 425 (Lah).

——S. 41—Refusal of certificate—Remand improper.

On a refusal of certificate on the ground that the case was not covered by S. 41 (3) a remand for reconsideration of the question as to whether certificate should be granted cannot be ordered. AIR (Vol 7) 1920 Lah 468 : 2 L L J 479 : 69 Ind Cas 392 (DB).

——S. 41—Question of onus as to custom.

Where there is no certificate, a second appeal is not competent on a question of onus in a case of custom. AIR (Vol 7) 1920 Lah 468 : 2 L L J 479 : 69 Ind Cas 392 (DB).

5. Effect of certificate.

——S. 41 (3) — The fact that the District Judge discussed a custom which was not pleaded before him and gave a certificate under S. 41 (3) that a question of custom arose, cannot confer jurisdiction on the High Court to decide that question. A I R (Vol 25) 1938 Lah 299 : 175 Ind Cas 87 (FB).

——S. 41—Certificate, what is—Evidence described as "meagre and uncertain" — Certiticate not defective.

The use of the words "meagre and uncertain" with regard to evidence does not make the certificate defective. So long as the Judge expresses his opinion that the evidence is either conflicting or uncertain, it is sufficient compliance with the terms of S. 41. AIR (Vol 17) 1930 Lah 900 (DB).

——S. 41 — The High Court will ignore a certificate which does not fulfil the provisions of S. 41 (3). AIR (Vol 12) 1925 Lah 429 : 6 Lah 338 : 7 L L J 190 : 26 P L R 510 : 92 Ind Cas 709 (DB).

——S. 41—Order itself may amount to a certificate.

Where the order of the District Judge was in the following terms : —

"I have held that parties are bound by Hindu Law. Petitioner's contention is that they are bound by custom. The evidence is conflicting and difficult. The question affects a whole village and is thus important. I accordingly grant a certificate under S. 41 of the Punjab Courts Act."

Held, that this order itself amounts to a certificate and that the requirements of the section had been satisfied. AIR (Vol 11) 1924 Lah 365 : 4 Lah 434 : 75 Ind Cas 938 (DB).

6. Limitation.

——S. 41 (3) — Application for grant of certificate — Dismissal of, by District Judge — High Court on revision remanding case for re-hearing application— Certificate subsequently granted by District Judge :

Held, that the period between date of application for certificate and date of its granting must be excluded. AIR (Vol 27) 1940 Lah 109 : 42 P L R 70 : 189 Ind Cas 636.

——S. 41—Extension of time—Grounds.

Where an application for certificate under S. 41 was not made till about four months after decree and the affidavit merely mentioned the fact that the applicant had been ill all these days and no evidence was produced to substantiate the allegations :

Held, that it was incumbent on the Judge either to reject the application or to give reasons to show that there was sufficient cause for the non presentation of the application within the prescribed period, and the Judge had no power to grant the certificate. AIR (Vol 22) 1935 Lah 213 (2) : 35 P L R 338 : 149 Ind Cas 434.

——S. 41 — Application for certificate not made within 30 days of order — Absence of legal evidence to show sufficient cause for delay—No jurisdiction to grant certificate. A I R (Vol 21) 1934 Lah 617 : 37 P L R 342 : 148 Ind Cas 1126.

——S. 41 — Period between filing application for copy and actual obtaining it—Not excluded.

In computing the period of limitation the period between filing of an application for copy of certificate and the actual obtaining of the same cannot be excluded since the application for a certificate ceases to be pending, the moment the application is granted. AIR (Vol 17) 1930 Lah 863 (DB).

——S. 41—Application for certificate after expiry — Sufficient cause for extension of time must be shown.

The lower Appellate Court has no power to grant a certificate regarding custom on an application made after expiry of prescribed period of 30 days from the date of its decree where there is no legal evidence on which it could have satisfied itself that there was sufficient cause for extending the prescribed period. AIR (Vol 16) 1929 Lah 624 : 115 Ind Cas 863 (DB).

——S. 41 — Time-barred application for certificate —Sufficient cause for delay — District Judge must decide.

On an application for a certificate under S. 41, for second appeal made beyond the period of 30 days, before dismissing the application as time-barred, it is a question for the District Judge to decide whether there was sufficient cause for not presenting it within time. (1926) 93 Ind Cas 932 (Lah).

7. Object and scope.

——S. 41—Finding of fact—Finding as to ancestral character of land.

A finding as to the ancestral character of land which is based upon the perusal and construction of a large number of revenue records, cannot be regarded as a finding of fact. AIR (Vol 37) 1950 East Punj 179 (DB).

——S. 41—Effect of.

The right of appeal is regulated in the Punjab by S. 41. The language of S. 41 is conceding the right of second appeal is more emphatic than that employed in S. 100, Civil P. C. There is nothing in S. 41 to restrict a right of second appeal in arbitration case and the language used in paras. 16 and 21 of Sch. II, Civil P. C., in all cases refers to decree of the trial Court and finality is given only to such decree. AIR (Vol 32) 1945 Lah 127 : I L R (1945) Lah 335 : 47 P L R 114 : 220 Ind Cas 107 (FB).

——S. 41 (3)—Only point raised on appeal that lower Appellate Court omitted to determine point that reversioner had no right to succeed to deceased in presence of his daughter and her son according to Hindu Law :

Held, that appeal does not fall under S. 41 (3). AIR (Vol 25) 1938 Lah 824 : 179 Ind Cas 284.

——S. 41 (3) — A custom or usage may refer to any other kind of business or transaction representing human activity and enterprise, and need not be confined to agricultural custom only. AIR (Vol 23) 1936 Lah 649 : 38 P L R 859 : 166 Ind Cas 438 (2).

——S. 41 (3)—Section 41 (3) is the only provisions of the law which requires a certificate for filing an appeal on a question of custom in the High Court but its operation is restricted to second appeals against appellate decrees. It has no application to appeals against orders. AIR (Vol 21) 1934 Lah 366 : 35 PLR 420 : 15 Lah 807 : 151 Ind Cas 225 (DB).

——S. 41—Quaere.—Whether under S. 41, it is sufficient if certificate is obtained only by one of the appellants. A I R (Vol 20) 1933 Lah 1005 : 35 P L R 314 : 147 Ind Cas 712 (1).

——S. 41—Wrong inference from facts—If question of law — Choosing one of two possible alternative conclusions — Question of fact.

When from certain facts only one inference is legally possible and the District Judge has drawn an inference reverse to that, then probably his conclusion will amount to conclusion on a question of law as the inference in such a case could be an inference of law.

If however, it is permissible to him to arrive at two alternative conclusions as to the intention of a person and he chooses to arrive at one of such conclusions then his conclusion is a finding as to fact and cannot be attacked in second appeal. A I R (Vol 17) 1930 Lah 936 : 31 P L R 662.

——S 41 — Question of custom — Decision right or wrong—No question of law.

Where the question decided by the lower Courts is one of custom, the fact whether or not they failed to correctly appreciate certain documentary evidence does not turn the question of the existence of custom into a question of law. AIR (Vol 16) 1929 Lah 624 : 115 Ind Cas 863 (DB).

——S. 41—Question of fact—Price not fixed in good faith—No second appeal.

The finding in a pre-emption suit that the price was not fixed in good faith or paid, cannot be agitated in second appeal. (1928) 110 Ind Cas 412 (Lah).

——S. 41—Debt required for necessities—No second appeal.

The finding that a debt is required for personal necessities is a finding of fact which cannot be contested in second appeal. A I R (Vol 14) 1927 Lah 605 : 8 Lah 340 : 28 P L R 708 : 100 Ind Cas 943.

——S. 41—Nature of dues.

The question of the nature of the dues is not a question of fact. A I R (Vol 14) 1927 Lah 259 : 100 Ind Cas 49.

——S. 41—Construction of a document—Question of law.

The construction to be placed on a document on which a suit to a large extent is based is one of law. AIR (Vol 14) 1927 Lah 221 : 9 L L J 197 : 28 P L R 619 : 100 Ind Cas 577 (DB).

——S. 41—Absence of jurisdiction—Second appeal.

Absence of jurisdiction to hear an appeal is a good ground for second appeal. AIR (Vol 14) 1927 Lah 187 : 100 Ind Cas 92.

——S. 41 — Erroneous deduction of adverse possession.

Deducing adverse possession from the mere factum of physical possession unaccompanied by any proof of a claim to hold as of right as proprietor is an error in law. AIR (Vol 14) 1927 Lah 39 : 98 Ind Cas 870.

——S. 41—Remand—Appeal from, if lies.

The object of the Legislature by enacting sub-s. 3 of S. 41 of the Punjab Courts Act was to make an exception in matters of second appeal regarding a question of custom or usage, of sufficient importance and to allow an appeal on evidence also. To hold that the right of questioning a decision on custom exists in appeals from decrees and does not exist in appeal from orders of remand would create an anomaly. A I R (Vol 9) 1922 Lah 178 : 3 Lah 218 : 4 Lah L J 359 : 68 Ind Cas 849 (FB).

——S. 41 — Second appeal — Question of law—Preemption—Question whether property is a shop.

The question whether a property of which preemption is claimed is a shop is one of law, i. e., the facts found by the Court below are unchangeable, but the inference to be drawn from these facts is one of law. A I R (Vol 7) 1920 Lah 483 : 2 Lah L J 302 (DB).

8. Points not covered by certificate.

——S. 41—Clerical error in certificate.

When the real nature of the dispute is evident from the order of the District Judge granting the certificate, the appeal cannot be excluded by a defect in the certificate which has resulted from clerical error. AIR (Vol 25) 1938 Lah 849 : 179 Ind Cas 560.

——S. 41 — Where, in granting a certificate under S. 41, the Judge, through oversight, misses to include a point in it, the certificate can be amended. It is not the case of a new application wherein the applicants have raised a new point on which they want a certificate. A I R (Vol 23) 1936 Lah 687 : 38 P L R 901 : 166 Ind Cas 386.

——S. 41—Doubt as to evidence of custom — Omission to state — Certificate invalid — Appeal not competent.

Where District Judge in granting the certificate omits to state that the evidence regarding the custom in question was so conflicting or uncertain that there was such substantial doubt regarding the validity or existence as to justify the appeal the certificate is not in accordance with the requirements of the Act and therefore there is no competent appeal. (1929) 113 Ind Cas 544 (Lah) (DB).

——S. 41—No second appeal lies.

The second appeal will be confined to questions in respect of which the certificate has been granted by the lower appellate Court. AIR (Vol 9) 1922 Lah 426: 3 Lah 344 : 69 Ind Cas 507 (DB).

9. Revision.

——S. 41 (3) — Refusal to grant certificate under S. 41 (3) under the impression that custom cannot be changed except by legislation is material irregularity which is liable to be set aside in revision. (1938) 40 P L R 588.

——S. 41—Refusal to grant certificate on erroneous ground—Revision lies.

The question of onus probandi in a custom case cannot be raised in second appeal without a certificate under S. 41 (3) of the Punjab Courts Act. When an application for a certificate under S. 41 (3) of the Punjab Courts Act is refused by the District Judge on the erroneous ground that no question of custom arose, a revision to the Chief Court from the order of refusal is competent on the ground that the District Judge had failed to exercise the jurisdiction vested in him. AIR (Vol 11) 1924 Lah 37 : 67 Ind Cas 759 : 4 Lah 102 (DB).

—S. 42.

——S. 42—Determining factor — Cause of appeal — — Nature of original plaint decides — Subsequent dropping of or inability to prove part of claim — —Immaterial.

The course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim :

A plaintiff sued a defendant for ejectment. But later he withdrew his prayer for ejectment and confined his claim merely to recovery of rent, the amount of which was below Rs. 500. It was contended that no second appeal could lie from the decision in that case because after the withdrawal of the prayer for ejectment the suit assumed a character of a small cause.

Held, second appeal would lie. 115 Ind Cas 858 : A I R (Vol 15) 1928 Lah 764.

——S. 42 — Execution proceedings of Small Cause suit—No second appeal from order on.

No second appeal lies under S. 42 from a decision in the execution proceedings which relate to a decree passed in a suit the value of which is below Rs. 500 and which is of a small cause nature. 108 Ind Cas 373 : AIR (Vol 15) 1928 Lah 713.

——S. 42 — Suit of small cause nature — No second appeal lies.

Under the Punjab Courts Act no second appeal lies to the High Court against a decree passed on appeal in a suit of small cause nature. 107 Ind Cas 488 : A I R (Vol 15) 1928 Lah 444.

——S. 42 (2)—Second appeal—When lies.

Where the original suit is not tried by a Small Cause Court but it is a suit of the nature cognizable by a Court of Small Causes and the claim is less than Rs. 500, a second appeal is barred by S. 42 (2). A I R (Vol 21) 1934 Lah 515 : 35 P L R 521 : 153 Ind Cas 119 (2).

—S. 44.

1. Scope.
2. Exercise of jurisdiction not vested by law.
3. Failure to exercise jurisdiction.
4. Exercising jurisdiction illegally or with material irregularity.
5. Revision.
6. Interlocutory orders.

1. Scope.

——S. 44 — The provisions of S. 44, Punjab Courts Act, and S. 115, Civil P. C., are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act is revisable. A I R (Vol 23) 1936 Lah 695 : 38 P L R 900 : 17 Lah 768 : 165 Ind Cas 664 (1).

2. Exercise of jurisdiction not vested by law.

——S. 44 — Jurisdiction in appeal — Senior subjudge — Limited to Rs. 100 — But decree can be passed for over Rs. 100.

Though the jurisdiction of a Senior Sub-Judge to entertain an appeal in unclassed suits is limited to Rs. 100, his powers to pass a decree in such suits are unlimited and he cannot be said to have exercised a jurisdiction not vested in him by law in passing a decree for sum over Rs. 100 in an appeal of which he was properly seised. 102 Ind Cas 39 : A I R (Vol 14) 1927 Lah 856.

3. Failure to exercise jurisdiction.

——S. 44—Refusal to amend decree—Wrong refusal to amend decree—Revisable.

Where the lower Court had declined to exercise a jurisdiction of amending a decree vested in it by law on the wrong assumption that the decree which was sought to be amended was in conformity with judgment it is clearly open to the High Court to interfere on the revision side under S. 44, Punjab Courts Act. 115 Ind Cas 542 : 30 P L R 363 : AIR (Vol 16) 1929 Lah 664 (DB).

4. Exercising jurisdiction illegally or with material irregularity.

——S. 44—Material irregularity — Omission of price in sale proclamation.

The mere omission to state the estimated price of the property is not a material irregularity. 67 Ind Cas 385 : 4 Lah L J 441 : A I R (Vol 9) 1922 Lah 35.

——S. 44 — Judgment based on misunderstanding—Arbitration case revisable.

Where the judgment of appellate Court is entirely based on inaccuracies or misunderstandings, it is vitiated thereby and cannot be upheld. Much as the High Court is reluctant to interfere on revision in arbitration cases it is compelled to do so in circumstances of gross and material irregularities. 67 Ind Cas 260 : 69 P L R 1922 : A I R (Vol 8) 1921 Lah 375.

——S. 44—Overlooking important admission.

In overlooking an important admission by a party, a Court is guilty of material irregularity. 4 LLJ 416 : AIR (Vol 8) 1921 Lah 336.

——S. 44—Revision—Error of law — Not a sufficient ground.

An error of law is not a material irregularity and is not a good ground for interference in revision, nor is it a good ground that the Court below had come to a wrong conclusion on the question of limitation. AIR (Vol 7) 1920 Lah 123 : 56 Ind Cas 848.

5. Revision.

——S. 44—Plaintiff directed to make up deficiency in court-fee — Revision is incompetent under S. 115, Civil P. C. (1937) 172 Ind Cas 497 : ILR (1937) Lah 430 : 39 P L R 819.

——S. 44—Error of law—Revision.

A mere error of law which does not raise any question affecting jurisdiction is no good ground for interference in revision. A I R (Vol 21) 1934 Lah 1019 (1): 36 P L R 283 : 155 Ind Cas 533.

——S. 44—Lower Court having jurisdiction to determine if appeal is barred — Revision from decision does not lie. A I R (Vol 20) 1933 Lah 783 : 34 P L R 966 (1) : 146 Ind Cas 505.

——S. 44— Appeal heard by superior Court — No ground for revision.

The mere fact that an appeal has been heard by a superior Court is not a ground for revision unless there has been a material prejudice. (1926) 96 Ind Cas 822 (Lah).

——S. 44 —"Case decided" what is —Order that suit lies, as framed not 'case decided'—Not revisable.

The word case, as was held in 60 P. R. 1897, does not necessarily mean the whole case, but it must at least mean a particular branch of a case for which an independent remedy or different procedure is provided by the Code. 'An order that the suit can be brought in its present form, i.e., as a suit for administration and rendition of accounts' is not open for revision. 75 Ind Cas 662 : A I R (Vol 10) 1923 Lah 288.

——S. 44—Revision before Act — Revision filed before new Act — Admission by mistake — Power of treating it as appeal.

A revision petition filed under S. 70 of the Punjab Courts Act of 1884 was admitted after the Act of 1914 came into force by mere inadvertence.

Held, as at the time of filing it, the petitioner could file as appeal he could go on with the merits. (1922) 67 Ind Cas 358 : 1 L L J 126 (DB).

——S. 44 — Interference except in very obviously necessary cases, improper.

It is only in very exceptional cases that the High Court should exercise its revisional powers of interfering with an order of interlocutory nature, and although an order passed under Order 41, Rule 25, Civil Procedure Code is an interlocutory order, the High Court should only interfere in an order passed under that rule in exceptional cases, the reason being that an order under this rule, is not a final one. Where however the order complained of is very obviously unnecessary it should be interfered with. 67 Ind Cas 269 : 79 P L R 1922 : A I R (Vol 8) 1921 Lah 370.

——S. 44—Decision on question of Jurisdiction—Not case decided — No revision lies.

An order of the Court determining the question of jurisdiction is not a decision of a case, either under S. 115 of the C. P. Code or S. 44 of the Punjab Courts Act, and is not open to revision. 41 All 602, Dissented from. 59 Ind Cas 680 : 45 P L R 1921 : A I R (Vol 8) 1921 Lah 184.

——S. 44 — Order allowing additional evidence—No irreparable damage—No revision lies.

No revision lies from an order allowing additional evidence to be recorded, where irremediable damage will not result from non-interference. 46 Cal 962. Diss. from. (1921) 59 Ind Cas 450 : 23 P L R 1921.

——S. 44—Substantial justice.

The High Court may not exercise revisional powers where substantial justice has been done. AIR (Vol 7) 1920 Lah 454 : 2 U P L R (Lah) 60 : 55 Ind Cas 82.

——S. 44—Revision —Powers of chief Court—Interlocutory order—Interference.

The Chief Court may interfere with interlocutory orders, only in exceptional cases, to shorten litigation but it should not ordinarily do so. A I R (Vol 6) 1919 Lah 437 : 1 Lah L J 220.

——S. 44—Misconstruction of document—Revision.

A Court misconstruing a definitely worded document commits an irregularity which invites revision. AIR (Vol 6) 1919 Lah 91 : 3 P W R 1919 : 30 P L R 1919 : 50 Ind Cas 614.

6. Interlocutory orders.

——S. 44—Under S. 44, the High Court cannot entertain an application for revision from an interlocutory order declining to re-issue interrogatories. A I R (Vol 24) 1937 Lah 28 : 39 P L R 250 : 169 Ind Cas 687.

——S. 44 — Interlocutory order to pay additional court-fee — Plaint rejected on his refusal to pay — Proper course is not revision but appeal. (1934) 147 Ind Cas 347 (Lah).

——S. 44—Order refusing stay—Not revisable.

Order rejecting an application for stay of suit and refusing to stay the suit is an interlocutory order and is, therefore, not subject to revision under S. 115, C. P. Code, and S. 44, Punjab Courts Act.

It is, however, open to the appellate Court if the circumstances justify such course to interfere either under S. 151, C. P. Code, or S 107, Government of India Act. A I R 1925 Lah 144 not Foll., 31 P L R 174 : AIR (Vol 17) 1930 Lah 525.

——S. 44—Ex parte proceedings set aside on conditions—Order amending conditions—No revision lies.

Orders amending the conditions on which ex-parte proceedings are set aside are interlocutory orders and are not orders in a case which has been decided by a Subordinate Court' within the meaning of S. 44, Punjab Courts Act, and a revision is not competent

against them. 107 Ind Cas 396 : A I R (Vol 15) 1928 Lah 304.

——S. 44 — Not a "case"—Not revisable.

An interlocutory order cannot constitute a "case" within the meaning of S. 44, Punjab Courts Act and C. P. Code, S. 115. The High Court has no jurisdiction to entertain an application for the revision of an interlocutory order. 60 P. R. 1897, Dissented from. 84 Ind Cas 359 : 5 Lah 283 : 6 L L J 558 : AIR (Vol 11) 1924 Lah 425 (FB).

——S. 44— Erroneous decision on jurisdiction — No revision lies.

An appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit is not open to revision by the Chief Court under S. 70 (1) (a), (1884) the lower appellate Court having had jurisdiction to entertain and decide the appeal. 71 Ind Cas 827 : AIR (Vol 11) 1924 Lah 278.

——S. 44—Civil P. C., S. 115.

Interlocutory orders cannot be interfered with in revision. 75 Ind Cas 107 : A I R (Vol 10) 1923 Lah 301.

——S. 44—Interference exceptional.

The High Court should hesitate as a rule to interfere in revision with interlocutory orders of the lower Courts, but should interfere in exceptional cases. 67 Ind Cas 335 : 85 P L R 1922 : A I R (Vol 8) 1921 Lah 367.

—S. 46-A.

——S. 46-A (as amended by Act 9 of 1922) — Rules under, whether can override provisions of Civil P.C., O. 3, Rr. 1, 2 (a).

Rules framed by the High Court (Lahore) under S. 46-A, Punjab Courts Act, 1918, as amended by Act IX of 1922 cannot be construed to override the provisions of O. 3. Rr. 1 and 2, Civil P. C. A I R (Vol 23) 1936 Lah 894 : 38 P L R 760 : 163 Ind Cas 524.

PUNJAB CUSTOM

See Custom (Punjab).

PUNJAB CUSTOM (POWER TO CONTEST) ACT (2 of 1920)

—S. 2.

——Ss. 2 and 7—Suit to contest will of non-ancestral property in favour of daughter.

Under Ss. 2 and 7, no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to custom, the term 'alienation' including a testamentary disposition of property. Therefore, the will of the father in favour of his daughters in respect of his self-acquired property cannot be contested. AIR (Vol 20) 1933 Lah 680 : 34 P L R 849 : 145 Ind Cas 415 (DB).

—S. 3.

——S. 3—Scope of.

In view of S. 3, the Act cannot be applied to cases where the custom of appointment of heirs does not obtain amongst the parties at all, because, in such cases, the parties cannot be said to be governed by any custom in regard to such appointment. In case of people whose personal law does not recognise adoption or appointment of an heir, and who are not bound to follow any custom sanctioning adoption or such appointment, the adoption 'or appointment, if made, cannot and does not confer on the adoptee or appointee any legal status and does not give him any right to succeed to the property of the adopter or appointer on the latters' death. The adoption or appointment in such a case really does not exist in the eye of law and has to be simply ignored. A I R (Vol 34) 1947 Lah 49 : 225 Ind Cas 349.

—S. 6.

——S. 6 — Scope of — Nature of bar of right to contest, stated.

The right to contest has been taken away from persons other than those mentioned in S. 6 only to the extent that they would not be able to contest an alienation of ancestral immovable property or an appointment of an heir on the ground that such an alienation or appointment is contrary to custom. The right to contest an appointment of heir or alienation on other grounds has not been taken away by the section, with the result that all other pleas including that of limitation are still available to a party regardless of the fact whether he falls within the category of persons mentioned in S. 6 of the Act. AIR (Vol 33) 1946 Lah 272 : 48 P L R 45 : 222 Ind Cas 162.

——S. 6 – Applicability.

Possession of insolvent's property taken by Official Receiver – Suit by insolvent's son for declaration that property belonged to him under will of his grandfather — Official Receiver can resist suit on ground that will was not valid. AIR (Vol 26) 1939 Lah 262 : 41 P L R 192 : 187 Ind Cas 551 (DB).

——S. 6 — Village proprietary body, whether entitled to sue.

Under S. 6, no person can bring a suit to contest an alienation of ancestral immovable property unless he is within five degrees of the alienor. The village proprietary body cannot bring such a suit in their capacity as members of the body. AIR (Vol 18) 1931 Lah 706 : 32 P L R 598 : 14 Lah 203 : 34 P L R 550 : 134 Ind Cas 788 (DB).

——S. 6—Right to contest alienation—Who can sue.

The relationship contemplated by the Punjab Custom (Power to Contest) Act II of 1920 must be through males and not females. A reversioner claiming through females cannot question an alienation. (1930) 31 Punj L R 125 : 122 Ind Cas 226 (DB).

——S. 6—Great grandfather—Not necessarily in the male line.

A person who is descended in direct male descent from the great-grandfather of the alienor can contest an alienation of ancestral land and it is not further necessary that the great-grandfather mentioned in S. 6 must be also in the male line of ascent. AIR (Vol 16) 1929 Lah 553 : 11 L L J 149 : 119 Ind Cas 765.

——S. 6—Appointed heir –Collateral of 7th degree—Cannot contest.

Status of an appointed heir even coupled with his previous relationship of a collateral of seventh degree with his adoptive father does not make him competent to contest an alienation made by his appointor : AIR (Vol 16) 1929 Lah 426 : 11 L L J 110 : 10 Lah 868 : 31 P L R 93 : 117 Ind Cas 380 (DB).

——S. 6—Limited to lineal male descendant.

The Act has the effect of limiting the right to contest an alienation of ancestral land only to those persons who are descended in the direct male line from the great-great-grandfather of the alienor. AIR (Vol 15) 1928 Lah 35 : 9 Lah 260 : 28 P L R 595: 104 Ind Cas 661 (DB).

——S. 6—Suit by heirs against appointed heirs—Not barred.

The section deals only with the case of an allegation that the appointment of an heir is contrary to custom. Where plaintiffs sued for possession as heirs, and were resisted by defendants on the ground that he was an appointed heir.

Held, that the section did not bar the suit. A I R (Vol 11) 1924 Lah 675 : 78 Ind Cas 123.

—S. 7.

——S. 7—Scope and object.

Section 7 of Punjab Act, II of 1920, is simply intended to restrict the powers of reversioners to file suits to contest alienations or appointments of heirs which are contemplated by Act I of 1920 and for which that Act provides limitation. Where a suit is

outside the scope of Act I of 1920, it must be held to be equally outside the scope of the restrictive provisions of Act II of 1920. A I R (Vol 34) 1947 Lah 49 : 225 Ind Cas 349.

——S. 7—Awans of Gujranwala District.

Notwithstanding anything to the contrary contained in the riwaj-i-am, a bequest by an Awan of Gujranwala of non-ancestral property cannot be challenged in view of S. 7. A I R (Vol 22) 1935 Lah 154 : 16 Lah 604 : 37 P L R 711 : 158 Ind Cas 251 (DB).

——S. 7 — Alienation of non-ancestral property — Defence.

Section 7 is intended to and does debar the descendants, collaterals, or other relations of proprietor from controlling his alienations of self-acquired or non-ancestral property and thus deprive them of the right, which according to the custom prevailing in some tribes, they might have possessed before its enactment. It is immaterial whether the contest to the alienation is raised by the descendants, collaterals or relations of the alienor in a suit instituted by them, or by way of defence to a claim brought by the alienee. AIR (Vol 22) 1935 Lah 154: 16 Lah 604: 37 P L R 711 : 158 Ind Cas 251 (DB).

——S. 7—Scope.

Section 7 lays down that no person shall contest the appointment of an heir to non-ancestral immovable property on the ground that such an appointment is contrary to custom, but when, as a matter of fact, there was no appointment of an heir at all, the section is no bar and the plaintiffs can maintain their suit for possession by successfully denying that no adoption whatsoever took place. A I R (Vol 21) 1934 Lah 1002 : 154 Ind Cas 665.

——S. 7— Scope of — Punjab Laws Act (IV of 1872), S. 5.

Under S. 7, notwithstanding anything to the contrary contained in S. 5, Punjab Laws Act, no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to Custom. A I R (Vol 20) 1933 Lah 697: 34 P L R 1029 : 146 Ind Cas 816 (DB).

——S. 7 — The will of the father in favour of his daughters in respect of his self-acquired property cannot be contested. AIR (Vol 20) 1933 Lah 680 : 34 P L R 849 : 145 Ind Cas 415 (DB).

PUNJAB CUSTOMARY LAW

See Custom (Punjab).

PUNJAB DEBTORS' PROTECTION ACT (2 of 1936)

——Preamble — Applicability — Loan advanced by Bank, Co-operative Society or company.

The phrase "debtor" for whose protection the Punjab Debtors' Protection Act is intended and the phrase "money-lender" against whose acts the debtor has to be protected do not within their purview bring in the case of a loan advanced by a bank, Co-operative Society or Company. AIR (Vol 36) 1949 E P 94 (FB).

——Preamble—Object of Act—Protection of debtors.

The preamble to the Punjab Debtors' Protection Act clearly shows that the object of the Act was to protect debtors, and the preamble cannot be read to mean that it was a debtor to a money-lender who alone was to be protected by the provisions of the Act. (1947) 26 L L T 26.

——Preamble—Act, if retrospective.

The Act is not retrospective. A I R (Vol 24) 1937 Lah 716 : 39 P L R 637 : 172 Ind Cas 407.

——Preamble—Applicability of Act.

Lease granted by executing Court before Act—Act in force at time of hearing of appeal — Appellate Court applying Act and setting aside lease :

Held, that the order was erroneous and the Judge had only to see whether the order of lease was correctly passed on the date on which it was passed. A I R (Vol 24) 1937 Lah 496 : 39 P L R 237 : 170 Ind Cas 224 (2).

—S. 2.

——S. 2 (6)—A sum given without interest as a payment in advance for a property which is to be sold cannot be called a loan within the meaning of the Act. A I R (Vol 26) 1939 Lah 562 : 41 P L R 513 : 185 Ind Cas 613.

—S. 4.

——S. 4—Scope—Prospective only.

Plain words of S. 4 make it clear that it was intended only to have prospective and not retrospective effect. Hence, S. 4 applies only to proceedings in which orders were made after the passing of the Act and not to proceedings where attachment and orders for sale had been made before the Act came into force. The use of the phrase "whenever a Civil Court orders that land be attached" in S. 4 (1) strongly suggests that the section was only intended to apply to orders made after the section came into force. A I R (Vol 30) 1943 Lah 238 : 45 P L R 279 : 208 Ind Cas 431 (DB).

——S. 4 — Lease granted before commencement of Act set aside — Subsequent order for re-sale of lease —Fresh lease, if governed by S. 4.

An order as regards attachment and temporary alienation was originally passed before the Act came into force. It was held by the Court that the provisions of S. 4 were not applicable to the auction of the lease (mustajiri) which had taken place before the commencement of the Act. After the case had been remanded on this ground, the judgment-debtors' objections were accepted and the lease of the land which had been originally granted was set aside. When the Court ordered re-sale of the lease, the judgment-debtors again objected that the proceedings must be transferred to the Collector under S. 4:

Held, that the fresh lease of the land was governed by the provisions of S. 4. A I R (Vol 28) 1941 Lah 464 : 198 Ind Cas 670.

——S. 4—Decision of Collector with regard to period of alienation and amount of land for maintenance depends on decision of executing Court. AIR (Vol 28) 1941 Lah 327 : 43 P L R 479 : 196 Ind Cas 611 (DB).

——S. 4—Scope—Attachment and alienation ordered before coming into force of Act — Section, if applies retrospectively.

The intention of the Legislature was not to make the provision of S. 4 retrospective, but its operation was confined only to those cases in which a Civil Court "orders" that land be attached and alienated temporarily at a time when the Act is in force.

On July 24, 1933, the decree-holder applied for attachment and temporary alienation of certain agricultural land and a garden belonging to the judgment debtor. The application was granted. The Collector suggested a lease for a certain sum for a period of 20 years. The Subordinate Judge agreed to the period but in order to find out if a larger sum could be realized, ordered that the "lease be sold". The decree-holder applied for permission to bid at the auction, and this permission was granted on November 4, 1935. The auction was held on December 4 and 5, 1935, by the bailiff, who reported that the highest bid was that of the decree-holder for a period of 20 years. The judgment-debtor, on December 21, 1935, filed an application of objections, purporting to be under O. 21, R. 90 and S. 47, Civil P. C. This application came up before the Court on March 27, 1936. A date in August was fixed for the evidence of the parties. Before that date, however, the Act came into force on June 6, 1936 :

Held, that S. 4 did not apply but even if it be held that S. 4 was intended to govern cases in which the

order of the Civil Court that land be attached and alienated temporarily, had been passed before its commencement, and in which final orders had not been passed, the present case had reached a stage when the decree-holder had acquired substantial rights which could not be affected by a change in the procedural law without any provision to this effect in the Amending Act. AIR (Vol 26) 1939 Lah 9 : 40 P L R 976 : 181 Ind Cas 385.

——S. 4 — Decree amount made charge on property by decree—Execution of decree.

If property is already subjected to a mortgage or charge by the decree itself, the Legislature perhaps did not intend to interfere with the operation of the decrees and allow the Collector to exclude any portion of the property for the maintenance of the judgment-debtor. Section 4 has no application to the execution of such decrees. A I R (Vol 25) 1938 Lah 433 : 40 P L R 441 : 177 Ind Cas 530.

——Ss. 4, 5—Retrospective effect.

In execution of a decree held by a Hindu joint family a temporary alienation of the judgment-debtors' lands was sanctioned by the executing Court in favour of the decree-holders on December 20, 1935. Against this order the judgment-debtors preferred an appeal to the District Judge, which, however, could not be heard until June 29, 1936, in the meantime the Act came into force. The District Judge relying upon the provisions of Ss. 4 and 5 of the new Act, set aside the order of the executing Court, and remanded the case for disposal in accordance with those provisions :

Held, that Ss. 4 and 5 did not provide mere matters of procedure and, therefore, had no retrospective effect. Even if the exemption under S. 5 claimed in these proceedings were a mere matter of procedure, the order made by the executing Court at a time when no such exemption existed could not be held to be wrong on the subsequent enactment of that exemption. A I R (Vol 24) 1937 Lah 740 : 39 P L R 854 : I L R (1938) Lah 221 : 175 Ind Cas 637 (DB).

[A I R (Vol 24) 1937 Lah 506 : 173 Ind Cas 912, Reversed.]

——S. 4 — Land attached in execution—Report of Collector that it could not be leased out—Punjab Debtors' Protection Act coming into force in the meantime—Proceedings consigned to record room — Held, Court ought to have transferred proceedings to Collector under S. 4—Order for attachment includes order for temporary alienation within Punjab Alienation of Land Act. A I R (Vol 24) 1937 Lah 716 : 39 P L R 637 : 172 Ind Cas 407.

——S. 4—Receiver in insolvency.

A Receiver in insolvency has power to lease agricultural land for a period of 20 years. Section 4 does not apply to the case. A I R (Vol 24) 1937 Lah 558 : 39 P L R 738 : 175 Ind Cas 7.

——Ss. 4 and 5—Land attached before Act—Alienation after Act.

Sections 4 and 5 relate to procedure and will, therefore, apparently govern pending cases also although there is no specific provision in the Act giving them retrospective effect. Where, therefore, the land was attached before the Act came into force, these sections would govern the procedure if the alienation was to be made in satisfaction of decree after it came into force. A I R (Vol 24) 1937 Lah 52: 39 P L R 109: ILR (1937) Lah 291: 169 Ind Cas 656.

——S. 4 (1)—Applicability to Receiver.

The words "Civil Court" in S. 4 (1) as defined in S. 2 (4) include an Insolvency Court but do not include a Receiver nor are the words "attached and alienated" equivalent to "attached or alienated." Therefore, a Receiver has jurisdiction to arrange for the temporary alienation of agricultural land of the insolvent for a period not exceeding 20 years as provisions of S. 4 (1) do not apply to such a case. A I R (Vol 26) 1939 Lah 237 : 41 P L R 128.

——Ss. 4 (1), 2 (4)—Lease of insolvent's land granted by Official Receiver—S. 4 (1), if applies.

Before sub-s. (1) of S. 4 comes into play, the attachment and alienation of land must emanate from a Civil Court and although "Court" includes an Insolvency Court, it does not include a Receiver in insolvency. Sale of an insolvent's property being an act of the Receiver and not of the Court, S. 4 (1) does not apply to the lease of the insolvent's land granted by the Receiver. A I R (Vol 24) 1937 Lah 446 : I L R (1937) Lah 721: 40 P L R 206: 172 Ind Cas 418 (DB).

—S. 5

See also Punjab Debtors' Protection Act 1936, S. 4.

——S. 5—Applicability.

Section 5 does not apply to the case of an insolvent. AIR (Vol 26) 1939 Lah 39 : 40 P L R 1057 : 179 Ind Cas 772.

——Ss. 5, 4 — S. 5, if retrospective — Applicability and scope.

The exemption contained in S. 5 in so far as it creates a new right in favour of the judgment-debtor so as to protect a part of his land from his decree-holder deals with something more than a mere procedure. It brings into existence a right which the judgment-debtor can claim henceforth, and as such, the new provision of law creating that right cannot have a retrospective effect unless an express provision had been made therefor.

When the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights. An appeal may, for certain purposes, be a continuation of the original proceeding but it cannot be reasonably urged that an Appellate Court will be justified in setting aside the judgment of a trial Court which, when delivered, was not open to any objection on the ground on which the Appellate Court seeks to set it aside. AIR (Vol 24) 1937 Lah 740 : 39 P L R 854 : ILR (1938) Lah 221 : 175 Ind Cas 637 (DB).

—S. 6

——S. 6— Order of Collector directing temporary alienation of land in execution of decree—Review — If competent.

The Collector is not competent to review his order directing alienation of the judgment-debtor's land for a certain period in execution of the decree against him. Under S. 6 of the Punjab Debtor's Protection Act the Collector is deemed to be acting judicially only when he decides the period of alienation under S. 4 or decides under S. 5 whether any portion of the judgment debtor's land should be exempted from alienation. Once these points have been determined, he must be deemed to have ceased to act judicially, and the powers which he possessed as a judicial officer temporarily for a specific purpose cease to exist. (1947) 26 L L T 13.

—S. 9

——S. 9 — Applicability — Conditions Joint Hindu family.

In order to get the benefit of S. 9 of the Punjab Debtors' Protection Act it is essential to establish two things: (1) that the custom is the rule of decision in regard to succession to immovable property, and (2) that the objector is the subsequent holder of the ancestral property. The section is obviously inapplicable to the case of a joint Hindu family, because in a joint Hindu family the property passes by survivorship and not by succession. AIR (Vol 35) 1948 Lah 52 : 49 P L R 110 (DB).

——S. 9—Widow of collateral of last male-holder is not collateral and "subsequent holder" within S. 9. AIR (Vol 31) 1944 Lah 369 : ILR (1944) Lah 509 (FB).

——S. 9—Subsequent holder.

A widow of a deceased proprietor is not a subsequent holder of his estate within the meaning of S. 9. AIR (Vol 29) 1942 Lah 87 : 44 P L R 80: 199 Ind Cas 700 (DB).

——S. 9—Objection—Authority competent to decide.

The validity of objections under S. 9 can be decided by the Court which passed the decree or order, that is, the executing Court. The Collector has no jurisdiction to decide such objections. The executing Court, however, has no jurisdiction to deal with objections under S. 9 regarding the attachability of the land after it has actually been alienated by the Collector in full satisfaction of the decree.

When a special jurisdiction is conferred, it must be taken as strictly limited to the terms in which it is created and cannot be extended to cover matters to which no express reference has been made or which do not have to be decided in order to carry out the purpose for which the special jurisdiction has been created. AIR (Vol 28) 1941 Lah 225 : 43 P L R 246 : 194 Ind Cas 634 (DB).

——S. 9—Plea under, when may be raised.

An application under S. 9 is inconsistent with the plea of the judgment-debtor that the property attached is his personal property. His failure, therefore, to raise the plea under S. 9 in an application based on personal claim does not debar him from raising the plea subsequently. AIR (Vol 27) 1940 Lah 27 : 186 Ind Cas 653.

——S. 9—Protection under, who can get.

The opening part of S. 9 does not make it a condition precedent that the person who seeks its benefit should necessarily be an agriculturist. Any person who can satisfy the Court that he is governed by custom in the matter of succession can avail himself of this protection be he an agriculturist or not. AIR (Vol 27) 1940 Lah 27 : 186 Ind Cas 653.

——S. 9—"Loan", if same thing as "debt."

The word "loan" has not been used in S. 9 and cannot, in any circumstances, be considered as synonymous with the word "debt", as used therein. The expression "loan" was defined as it had been used in the definition of "money-lender" and the word "money-lender" appears only in S. 12 and not in S. 9. Any discussion, therefore, on the ground of the profession of the 'original judgment-debtor or of the decree-holder is out of place in considering whether he is protected by S. 9. AIR (Vol 27) 1940 Lah 27 : 186 Ind Cas 653.

——S. 9—Khatris of Jhang District.

Among the Khatris of Jhang District. ancestral property in the hands of a subsequent holder is entitled to protection under S. 9 since they are presumed to follow custom in the matter of succession. AIR (Vol 27) 1940 Lah 27 : 186 Ind Cas 653.

——S. 9—Ancestral land, when can be sold.

Under S. 9, there has to be an express charge by mortgage on ancestral land before it can be sold or otherwise disposed of in execution of a decree against a predecessor-in-interest. An attachment in the lifetime of the predecessor-in-interest is not sufficient as attachment does not amount to a charge. AIR (Vol 27) 1940 Lah 4 : ILR (1940) Lah 63 : 42 P L R 699 : 190 Ind Cas 194 (DB).

——S. 9—Applicability.

Where the Act had come into force before the papers were sent to the Collector to arrange for the lease or farm of the judgment-debtor's land, the land cannot be sold or otherwise transferred even if the attachment had been effected before the Act came into force. AIR (Vol 27) 1940 Lah 4 : 42 P L R 699 : ILR (1940) Lah 63 : 190 Ind Cas 194 (DB).

——S. 9—Scope and retrospective effect.

Where the Act came into force several weeks before the record was sent to the Collector to arrange for the lease of the judgment-debtor's land, liability of the land to attachment and sale is taken away by a new enactment before the record was sent to the revenue authorities to arrange for the lease, and consequently, the provisions of the Act cannot be said to have been applied retrospectively by the revenue authorities and the Civil Court refusing to sell the land, as it was no longer subject to attachment and sale. AIR (Vol 26) 1939 Lah 168 : 41 P L R 635.

——S. 9—Applicability.

A petitioner obtained a money-decree against M who died sometime after. The petitioner attached ancestral land in the hands of the sons of the deceased. During the pendency of the case, the Punjab Debtors' Act came into force :

Held, that as the land was not under attachment when the Act came into force, its liability for the unsecured debts of M must be determined according to the Debtors' Protection Act and that the petitioner must be given an opportunity to show that he can satisfy the conditions laid down in the proviso to S. 9. AIR (Vol 24) 1937 Lah 303 : 175 Ind Cas 46.

—S. 10

——S. 10—Applicability—Mortgage decree.

S. 10 of the Punjab Debtors' Protection Act has no application if the decree sought to be executed is a mortgage decree in which there is a direction for the sale of agricultural land covered by the mortgage. AIR (Vol 36) 1949 E P 94 (FB).

——S. 10—Fruit of garden.

Fruit of the garden must be regarded as a crop within the meaning of S. 10, and is, therefore, not liable to attachment. AIR (Vol 26) 1939 Lah 101 : 183 Ind Cas 654.

——S. 10—Applicability.

Where standing trees belonging to the judgment-debtor have been attached in execution of money decree before the Punjab Debtors' Protection Act came into force and order for their sale is made after coming into force of the Act as the attachment does not create a charge or lien upon the attached property nor confers any title on the attaching creditor, but merely has the effect of preventing and avoiding private alienation by the judgment-debtor, the order directing sale of the trees is contrary to S. 10 of the Act and cannot be maintained. AIR (Vol 24) 1937 Lah 560 : 39 P L R 243 : 170 Ind Cas 388.

——S. 11.

——S. 11 — "Decree" — Meaning of—If includes mortgage decree.

The expression "loan" is only defined in the Punjab Debtors Protection Act for the purpose of giving meaning and content to the expression "money-lender" which itself occurs only once in an operative section, viz., S. 12 whereby the burden is placed upon the money-lender to prove that consideration passed from him in certain specified circumstances. That provision does not apply, if the loan be in the nature of a mortgage, i. e., in that case a money-lender would not be required to establish the passing of consideration, but that is the only limiting effect of the mention of "mortgage" in the definition of "loan," and that definition cannot certainly be called in aid for limiting the meaning of the word "decree" as used in S. 11. It cannot therefore be said that a mortgage decree does not fall within the purview of that section. AIR (Vol 37) 1950 Lah 94.

——S. 11—"Decree passed against a debtor"—If includes joint decree against more than one judgment-debtor—Some of them not debtors—Punjab Relief of Indebtedness Act, S. 7 (2).

The definition of "debtor" in S. 7 (2) of the Punjab Relief of Indebtedness Act applies to individuals and not to groups of persons, so that a joint decree against more than one person is not "a decree passed against a debtor" within the meaning of S. 11, Punjab Debtors Protection Act. Further where a decree is against more than one judgment-debtor, and one or more of such judgment-debtors is or are not within the definition of "debtor," the decree is not governed, for purposes of execution, by S. 11, Punjab Debtors Protection Act, as this involves repeal of the ordinary law, in respect of persons to whom the special law, viz., the Punjap Debtors Protection Act does not relate and operate in derogation of the legal rights of the judgment-creditor. AIR (Vol 37) 1950 Lah 94.

——S. 12.

——S. 12—Scope—Promissory note—"Holder in due course" money lender within Punjab Act — If can recover from maker of pro-note without proof of execution or consideration.

So far as promissory notes are concerned, S. 12 modifies S. 118, Negotiable Instruments Act, which can only apply when some question of consideration arises and is relevant to the case. If it is not necessary to prove the passing of consideration, no question relating to the burden of proof would arise. But the Punjab Debtors' Protection Act has left untouched S. 43, Negotiable Instruments Act, and therefore, a "holder in due course" of a promissory note, even though he be a "money-lender" as defined in the Punjab Act, is entitled to recover from the maker of the note, without being under any obligation to prove that the promissory note had been executed by the maker in favour of the original obligee for valuable consideration. AIR (Vol 29) 1942 Lah 16 : 43 PLR 651: ILR (1943) Lah 53 : 198 Ind Cas 485 (DB).

PUNJAB DEBTORS PROTECTION (AMENDMENT) ACT (9 of 1938).

——S. 3.

——S. 3—Retrospective effect—Receiver— Termination of —Lease granted by him, if automatically terminates under S. 3.

Section 3, Punjab Debtors' Protection (Amendment) Act, IX of 1938, is not retrospective in its effect. Therefore, where a Receiver appointed before the Punjab Act IX of 1938 came into force has executed a lease of property which was then valid to liquidate a debt of the judgment-debtor, the lease granted by him cannot be made to terminate automatically under S. 3 of the Act IX of 1938, for the intention of the Legisture in enacting S. 3 as gathered from the language employed was to prohibit for the future, the appointment of Receivers for any of the purposes mentioned in the section and to terminate on a certain date all appointments already made but not to invalidate transactions validly entered into by them with third parties so as to affect vested rights. AIR (Vol 29) 1942 Lah 126 : 44 PLR 74 : ILR (1943) Lah 179 : 201 Ind Cas 87 (DB).

PUNJAB DISTRICT BOARDS ACT (20 of 1883)

——S. 4.

——S. 4—Tax on trade profession and calling whether income tax—Imposition of tax by Municipality without sanction of Governor-General in Council, validity of.

The District Board of Ferozepore imposed a tax on certain trades, professions and callings. The tax was made payable according to the trade, profession or calling of particular individuals and the amount depended, not upon the income of the person but on the trade, profession or calling carried on. But the notification imposing it made a proviso that it shall not be leviable from any person whose annual income was less than a certain amount :

Held, that the tax was not a tax on income in spite of the proviso and was not ultra vires merely because it was imposed without the sanction of the Governor-General in Council, AIR (Vol 18) 1931 Lah 508 : 32 PLR 403 : 131 Ind Cas 633.

——S. 20.

——S. 20—Punjab District Boards Tax Validating Act (III of 1927)—Haisiat tax

Where a rate-payer obtained a permanent injunction restraining a District Board from realising Haisiat tax on the ground that the tax was illegal but an Act was passed validating the imposition of such a tax and thereafter, the District Board proceeded to realise the tax from him and he applied for execution of his decree against the Board :

Held, that as the tax which the Board was trying to realise was valid under the new Act, the decree had no application to such tax and the Board was entitled to realise the tax. AIR (Vol 20) 1933 Lah 41: 14 Lah 230 : 34 PLR 546 : 140 Ind Cas 533.

——S. 30.

——Ss. 30, 31—Profession tax — Pleader — Place of business.

The place where the contract is entered into and where the vakalatnama is signed is where the lawyer carries on his profession or trade and if his office or chambers are not within the municipal limits, then it cannot be said that he carries on his profession within those limits. He may act in connection with his engagements, for instance pleading in Court, etc. within those limits, but that cannot amount to carrying on his profession within those limits. AIR (Vol 31) 1944 Lah 385 : 218 Ind Cas 452 (DB).

——S. 30—Question whether resolution under S. 30 was passed with Provincial Government's sanction is one of mixed law and fact.

An objection that the District Board had failed to prove that the resolution under S. 30 imposing the tax was passed with the sanction of the Provincial Government is a mixed question of law and fact and cannot be raised, when it was not raised in the trial Court at a later stage. AIR (Vol 31) 1944 Lah 69: 46 P L R 34: 211 Ind Cas 634.

——S. 30—Haisiyat tax —Rate varying according to income—Governor-General's sanction necessary.

The haisiyat tax not fixed at a flat rate for particular profession, calling or trade, but varying according to the income of such individual assessee is in the nature of a tax on income, and can only be imposed with the previous sanction of the Governor-General-in-Council and if this is not done, the assessees are not legally liable to pay it. AIR (Vol 13) 1928 Lah 332: 107 Ind Cas 601: 9 Lah 424: 30 P L R 660: 9 A I Cr R 488: 29 Cr L J 265.

——S. 30 — Profession tax on Vakils — Definition of class of persons—Includes Vakils—Tax legal.

Where a Notification issued under S. 31 (2) described the class of persons to be taxed as "All persons who carry on any trade or follow any profession or calling within the said area."

Held, the notification sufficiently defined the class of persons to be taxed.

It may be that this definition may give rise to certain suits on the ground that the persons taxed do not carry on a trade or follow a profession or calling and that they are therefore not liable to be taxed. The tax is not therefore illegal by reason of the want of definition of the class of persons to be taxed and the members of the bar cannot object to its imposition as they come within the class defined. A I R (Vol 15) 1928 Lah 53 : 106 Ind Cas 882 : 9 Lah 340 : 29 P L R 177.

—S. 34.

——S. 34 — Suit for money wrongfully recovered — Maintainability—"Approach," meaning of.

Section 34 does not bar the institution of a suit for refund of money wrongfully recovered by one side

or the other from one party to the contract. It refers only to compensation and abatement of rent allowable under the Act.

The word "approach" in the said Act includes an approach from the highway to the landing place. It is not confined to the distance from the landing place to the river bank. A I R (Vol 20) 1933 Lah 890 : 144 Ind Cas 682.

—S. 56.

——S. 56 — Fine for future continuing breach — If ultra vires—Fresh complaint, if necessary.

An order on conviction under Regul. 13 for payment of an additional fine for future continuing breach is ultra vires. The District Board must bring a fresh complaint on which a continuing fine may be imposed from the date of the first conviction to the date of the complaint. A I R (Vol 21) 1934 Lah 428 : 36 Cr L J 105 (1): 152 Ind Cas 166.

——S. 57.

——S. 57 — Map signed by Executive Engineer and Sub-Divisional Officer while transferring land to District Board—Presumption of accuracy.

A plan which is signed by the Executive Engineer and Sub-Divisonal Officer of the P. W. D., when land was transferred to the District Board must be presumed to be accurate under S. 83, Evidence Act, and the measurements thereon are admissible under S. 36 of the Act and the blue print of the plan is secondary evidence under S. 63 (2). AIR (Vol 24) 1937 Lah 155: 39 P L R 143 : 17 Lah 843 : 38 Cr L J 438 : 167 Ind Cas 573.

——S. 57—District Board Notification, Regulation 8 —Future continuing fine—Legality of.

Imposition of future continuing fine under Regulation 8 of the District Board Notification at the time of adjudication is illegal, as it is an adjudication in respect of an offence which had not been committed when the order was passed. If the Board wants to subject the party to a continuing fine, they should wait and institute a fresh prosecution. A I R (Vol 24) 1937 Lah 155: 17 Lah 843 : 39 P L R 143 : 38 Cr L J 438: 167 Ind Cas 573.

—S. 58.

——S. 58 — Magistrate member of District Board — Prosecution directed against District Board Officials —Magistrate debarred from trying.

Where a Magistrate, as a member of a District Board, presided at a meeting of the Board at which the proposal in the Commissioner's letter to start the prosecutions was adopted, and it was resolved that the police be called in to make an enquiry and to proceed against such of the District Board Officials as the result of the enquiry might warrant:

Held, that the Magistrate is debarred from trying the cases. A I R (Vol 15) 1928 Lah 114 : 138 Ind Cas 271: 9 L L J 583: 29 P L R 282: 29 Cr L J 371.

—S. 58-B.

—— S. 58-B—Public ferry transferred to management of District Board—Recovery of lease money — Application to Magistrate—If competent.

Where the management of a public ferry has been transferred to a District Board under S. 7A of the Northern India Ferries Act (1878) and the District Board leases the ferry, the recovery of the lease money on a part of it, is the consequence of the contract between the District Board and the lessees. Any dispute between them must be determined by the Civil Court and it would be open to one or the other party to raise appropriate pleas. The District Board cannot, therefore proceed to recover the balance of the lease money by an application to a Magistrate under S. 9 of the Northern India Ferries Act. AIR (Vol 37) 1950 Lah 193.

——S. 58-B, as inserted by Punjab Act (XI of 1922)— Applicability.

A lease money on account of public ferry, transferred to the management of a District Board is not a money claimable under the Act and the magistrate cannot, therefore, act under S. 58B. AIR (Vol 37) 1950 Lah 193.

——S. 58-B — Auction of right to levy toll — Money due from parchaser—Recovery —Civil suit is proper remedy.

Where a District Board auctions the standing reeds and the right to levy toll the sums due from the purchaser cannot properly be said to be due under the Act. They are due on contracts and should properly form the subject-matter of an ordinary civil suit. AIR (Vol 15) 1928 Lah 109 : 110 Ind Cas 811 : 9 L L J 541: 29 P L R 252 : 9 A I Cr R 405 : 29 Cr L J 779.

—S. 76.

——S. 76 —'Exaction', meaning of—Haisiyat tax imposed by Board — Suit to declare taxation illegal — Jurisdiction.

The word 'exaction' in S. 76 does not connote a mere "demand" of an amount which is sought to be illegally taken, but also the "demand and wresting" of such an amount. Section 76 does not apply to a case where the District Board having imposed a haisiat tax on a person, he has filed a suit for declaration that the Board has no authority to tax. The Civil Court has jurisdiction to try the suit. A I R (Vol 24) 1937 Lah 319: 173 Ind Cas 848.

——S. 76 — Suit by sahukar for refund of haisiat tax —Jurisdiction of Civil Court—Burden of proof.

A 'sahukar' does not fall within the category of 'others' in S. 76 and a Civil Court has, therefore, jurisdiction to entertain a suit for refund of haisiat tax brought by a sahukar.

Such a suit does not fall within the scope of Art. 1 of Sch. II of the Provincial Small Cause Courts Act.

In a suit for refund of tax paid on the ground that it was illegally levied, the burden is on the plaintiff to show that the tax has been illegally exacted from him and not on the Board to show that he had been properly assessed. A I R (Vol 20) 1933 Lah 124 : 34 P L R 219 : 141 Ind Cas 378.

PUNJAB DISTRICT BOARD (TAX VALIDATING) ACT (3 of 1927)

See also Punjab District Boards Act, 1883, S. 30.

——Whether ultra vires.

The Punjab District Board (Tax Validating) Act 1927 is not ultra vires. A I R (Vol 19) 1932 Lah 87 : 33 P L R 135 : 134 Ind Cas 110 (DB).

PUNJAB DISTURBED AREAS ACT (1 of 1947)

—S. 3.

——Ss. 3 and 4 — Scheduled offence committed in disturbed area while notification is in force — Case instituted after withdrawal of notification—Whether exclusively triable by Sessions Court—Punjab Public Safety Act, S. 37—General Clauses Act, S. 6—Punjab General Clauses Act, S. 4.

In a case of a trial in respect of one of the scheduled offences under the Punjab Disturbed Areas Act alleged to have been committed at a time when in respect of the area where it was committed a notification of the Provincial Government declaring it to be a disturbed area under S. 3 of the Act was in force, the higher penalty imposed by S. 4 of the Act ceases to be awardable immediately when such a notification is rescinded, and from that time onwards the only penalty which can be awarded is that laid down in Penal Code. Consequently, after a notification as aforesaid has been rescinded, the question of the Court having jurisdiction to try such offence must be decided in relation to the lower penalty provided by the Penal Code. It follows, therefore, that a case instituted after the withdrawal of the notification in respect of a schedule l offence alleged to have been committed in a disturbed area while

the notification was in force, is not exclusively triable by a Sessions Court. A Magistrate before whom the case is instituted is quite competent to try it, and he is not obliged to make it over to the Sessions Court under S. 37, Public Safety Act.

The present case is not covered by S. 4, Punjab General Clauses Act or S. 6, General Clauses Act, which are, in essential respects, identical. The necessary conditions for their application are firstly that the statute should be of a permanent nature and secondly that it should have been repealed by an Act of the Provincial or Central Legislature. Neither of these conditions is satisfied in the present case. There can be no doubt whatsoever that the Punjab Disturbed Areas Act is essentially a temporary statute. It is a Governor's Act made during the continuance of a period of a Governor's rule under S. 93, Constitution Act, and as will appear from sub-s. (4) of S. 93, such a law is limited in its operation in point of time. Further it is clear from the preamble and S. 3 of the Punjab Disturbed Areas Act that the intention of the legislature was that the application of the Act should be strictly limited in point of time. The withdrawal of the application of the Act from a disturbed area is effected by a simple notification of the Provincial Government, in which the Provincial Legislature has no hand or part. Such a withdrawal cannot be regarded as being in any sense a repeal.

The general law in relation to temporary statutes is that once such a status has expired it ceases altogether to have effect as if it had never been, except as to transactions past and closed. This result follows unless there be provision made in the statute itself for continuing the effect thereof in any respect and there is no such provision in the Punjab Disturbed Areas Act. The position is not otherwise in relation to statutes like the Punjab Disturbed Areas Act which affect only the punishment provided for specified offences. AIR (Vol 36) 1949 Lah 191 : 50 Cr L J 783 : Pak L R (1949) Lah 23 (FB).

PUNJAB ELECTORAL RULES

——Punjab Govt. Notification No. 9 dated 31st July 1920, Reg. 7 — Not to be strictly construed against nomination— Nomination delivered before day fixed —If valid.

The language of Regulation 7 in Punjab Government Notification No. 9 dated 31st July 1920 is ambiguous, but as it is a disabling provision it must not be strictly construed against nomination.

The regulation does not mean that a nomination paper delivered to the Returning Officer before the day fixed is invalid. (1921) 61 Ind Cas 744 (Court of Election Commissioners Punjab.)

—R. 5

——Rr. 5 and 31 (2) — Election petition — False return of expenses—Question before Election Commissioners—Jurisdiction to decide.

Where the question of the falsity of the return of expenses filed by a candidate is before the Election Commissioners in the exercise of their powers under R. 31 (2) of the Punjab Electoral Rules, they have jurisdiction to decide the question. (1921) 61 Ind Cas 744 (C. E. C. Punjab).

——R. 5 (8) — Jurisdiction to hold inquiry — False return of expenses—No complaint by Government— Magistrate has no jurisdiction.

A Magistrate has no jurisdiction to hold a judicial inquiry under R. 5 (4) of the Punjab Electoral Rules as to whether a candidate at an election had lodged a false return of his election expenses where there is no complaint by the Government in the matter. AIR (Vol 12) 1925 Lah 449 : 6 Lah 188 : 26 P L R 379 : 26 Cr L J 1234 : 88 Ind Cas 850.

—R. 31

——R. 31—Election petition—Direction to give further particulars—Power of Commissioner to order.

If particulars adequate for the purposes of an election petition are not stated in the petition the Commissioners have full power to allow further and better particulars to be furnished subsequently provided that no new substantive-charge is introduced and that the respondent is not taken by surprise. (1921) 61 Ind Cas 744 (C. E. C. Punjab.)

——R. 31 — Nomination paper — Filed before day fixed—Objection not taken before Returning Officer —Election Commissioners—Jurisdiction to decide.

The returned candidate was declared duly elected on a single nomination paper, there being no balloting. The validity of the petitioner's nomination paper was called into question on the ground that it was delivered to the Returning Officer before the time fixed :

Held, the result of the election was materially affected and the Commissioners had power to decide the point irrespective of the fact whether it was raised before the Returning Officer or not. (1921) 61 Ind Cas 744 (C. E. C. Punjab).

——R. 31—Allegations of corrupt practices — Fuller particulars not given—If petition can be summarily rejected.

There is nothing in the Punjab Electoral Rules justifying the view that a petition which gives particulars of the corrupt practices relied on is to be summarily rejected for want of fuller particulars. But further and better particulars may be ordered to be given with the reservation that the petitioner is not to be permitted to make out a new case. The object of furnishing such particulars is to avoid surprise to the respondent, and from that point of view, they are necessary in the interests of the parties concerned as in those of justice and fair play. (1921) 61 Ind Cas 357 (C. E. C. Punjab).

—R. 34

——R. 34—Nomination paper—Name and signature of sender—Not appearing in proper place—Paper if invalid.

The mere fact that the name and signature of the seconder of a candidate seeking election do not appear in the space provided for the purpose in the form of nomination, but are given in another portion of the form, would not render the nomination invalid. (1921) 61 Ind Cas 315 (C. E. C. Punjab).

—R. 42

——R. 42—Candidate and agent.

The election agent of a candidate can be his proposer or seconder and vice versa. (1921) 61 Ind Cas 744 (C. E. C. Punjab).

——R. 42—Acts of agent—Limit of candidate's responsibility for.

A candidate is responsible generally for the deeds of those who to his knowledge for the purpose of promoting his election canvass and do such other acts as may tend to promote his election, provided that the candidate or his authorised agent has reasonable knowledge that those persons are so acting with that object. (1921) 61 Ind Cas 357 (C. E. C. Punjab).

——R. 42 — The relation of candidate and agent is much wider than that of principal and agent under the ordinary law. Such relationship is to be inferred from facts.

On the following days several voters were fed by men intimately connected with a candidate and acting on his behalf :

Held, the inference is clear that they were fed in order to induce them to vote for the candidate. The effort to win votes may succeed in some cases and fail in others, but that would be immaterial. (1921) 61 Ind Cas 353 (C. E. C. Punjab).

——R. 42 — Improper inducement — Voters fed by candidates' agents — Inference as to failure in winning votes—Immaterial.

On the following day several voters were fed by men intimately connected with a candidate and acting on his behalf.

Held, inference is clear that they were fed in order to induce them to vote for the candidate.

The effort to win votes may succeed in some cases and fail in others, but that would be immaterial. (1921) 61 Ind Cas 353 (C. E. C. Punjab).

—Sch. 4, R. 2-A

——Sch. 4, Rr. 2 (a) and (b) — Corrupt practice — Returning Officer not allowing candidate to approach with nomination paper—If proof of.

The refusal by a Returning Officer to allow a candidate to approach him with his nomination paper would not without proof of corrupt motive or intention amount to a corrupt practice within Rules 2 (a) and (b) of Sch. IV of the Punjab Election Rules. (1921) 61 Ind Cas 315 (C. E. C. Punjab).

——Sch. 4 Rr. 2 (a) and (b) — Party respondent—If Returning officer can be made—Costs—Law borne.

The Returning Officer cannot be made a party respondent in an inquiry into the validity of an election if such inquiry necessitated by the action of the Returning Officer, the parties should be left to bear their own costs, even though the result of the inquiry may be to render the election invalid. (1921) 61 Ind Cas 315 (C. E. C. Punjab).

——Sch. 4 — Rr. 2 (a) and (b) — Refusal to receive nomination paper — Presumption of grave irregularity—Rebuttal—Onus heavy on candidate elected.

It is obligatory on a Returning Officer to receive a nomination paper of a candidate relating to the constituency of which he is the Returning Officer, provided it is presented to him within the time prescribed. If he improperly and without jurisdiction refuses to receive a nomination paper, the presumption would arise that the election nas been seriously affected and the improper refusal is so grave an irregularity that the presumption would require the strongest and most conclusive proof for its rebuttal; it lies heavily on the candidate alleging the validity of election to rebut the presumption so raised. The refusal by a Returning Officer to allow a candidate to approach him with his nomination paper would not without proof of corrupt motive or intention, amount to a corrupt practice within R. 2 (a) and (b) of Sch. IV of the Punjab Electoral Rules. (1921) 61 Ind Cas 315 (C. E. C. Punjab)

PUNJAB EXCISE ACT (12 of 1896)

—S. 20

——Ss. 20, 21 and 49—Sale of drug when complete.

The sale of an intoxicating drug is not complete until its delivery to the purchaser or some one on his behalf. Therefore a licensed vendor who sells the charas—in the hands of the excise authorities to an unlicensed person, who cannot take delivery until he takes out a license does not under S. 21 break the condition of his license and is not liable under S. 49. 5 P W R Cr 1911 : 4 P R Cr 1911 : 89 P L R 1911 : 12 Cr L J 192 : 10 Ind Cas 682.

PUNJAB EXCISE ACT (1 of 1914)

—S. 6

——S. 6—Notification under S. 3 (3) (c) of the Excise Act (1861)—Cocaine—Anaesthine.

The words having a like physiological effect as that of cocaine in Notification No. 1205 issued under S. 3 of the Excise Act, 1861 mean that a prohibited drug must have all the physiological effects of cocaine and not merely one or some of them. Anaesthine which resembles cocaine in producing local insensibility is not prohibited. AIR (Vol 4) 1917 Lah 148: 32 PWR 1917 Cr : 18 Cr L J 934 : 42 Ind Cas 166 (DB).

—S. 9

——S. 9—Investment of powers on Excise Commissioner by name — If confers same powers on his successor.

Under S. 9 of the Punjab Excise Act the investment of powers on an Excise Commissioner by name cannot be deemed to confer the same powers on his successor. A I R (Vol 36) 1949 Lah 210 : Pak L R (1949) Lah 375 : 50 Cr L J 984.

—S. 24

—— S. 24 (3)—Effect of provisions in Excise Manual —Excise Act not affected by S 407, Vol. 1 of Manual —Possession of liquor in excess—Punishable.

S. 407 of Vol. I of the Excise Manual cannot, and does not, override the provisions of the Excise Act and therefore a licensee in possession of liquor in excess of the prescribed quantity and outside the place of license is rightly punishable under S. 61; AIR (Vol 11) 1924 Lah 73 : 4 Lah 10 : 5 L L J 412. 3 P L R Cr 1923 : 24 Cr L J 667 : 73 Ind Cas 699 (DB).

——S. 24 (4) — Powers of Provincial Government—Scope and extent — Delegation of such powers to Excise Commissioner —Permissibility —Restrictions upon possession of intoxicants — Discrimination against particular community —Validity —Notification of 15th September 1948 and permit in Form P R. 11 — if ultra vires powers of Provincial Government.

S. 24 (4) of the Punjab Excise Act gives powers to the Provincial Government to do one of two things, viz.. it may "prohibit the possession of any intoxicant" or it may restrict such possession by such conditions as it may prescribe" and by "such possession the possession of any intoxicant" is obviously meant. The powers are perfectly distinct in themselves; there is either to be prohibition in respect of "any intoxicant" or there is to be restriction of possession of "any intoxicant" under conditions which must be laid down by the Provincial Government. Whichever steps may be taken by the Provincial Government, they must apply to every subject and every class of subject equally, and without distinction such as that of colour or race or religion. To prohibit in relation to a certain class of persons, and to restrict by the same order in relation to another calss, would be a misuse of the powers conferred by S. 24 (4). S. 24 (4) empowers the Provincial Government, when exercising its powers to restrict possession under conditions to do so itself; this follows from the use of the words "such conditions as it may prescribe". Under S. 24 (4) the prescription of conditions by the Provincial Government must be by either notification or by Rules and as appears from S. 58 the rules also must be notified. As by S. 13 the Provincial Government is empowered to delegate its functions under S. 24 (4) to the Financial Commissioner, the Provincial Government could leave it to the Financial Commissioner to prescribe the conditions under which possession of any intoxicant is to be held, if the Provincial Government chooses to exercise its powers to restrict possession rather than to prohibit possession.

The Notification, dated 15th September 1948, issued by the Governor of West Punjab in exercise of the powers conferred by S. 24 (4) of the Punjab Excise Act renders all possession of liquor illegal, unless it is by a permit-holder, and complies with the terms and conditions of the permit. The conditions of the permit are not laid down in the notification which only says that the permit may be granted by the Excise Commissioner or any Excise officer of the first class authorised by him. The permit in Form P. R. 11 contains a large number of conditions of a restrictive nature and was not published in the form of a notification. So far as is provided by powers given under this Act, a permit in such form embodying as it does a number of restrictive conditions could only

be issued validly under S. 24 (4) of the Act, either by the Provincial Government itself or by the Financial Commissioner and in each case, the Provincial Government or the Financial Commissioner would have to act by the method of notification.

The notification even if construed as an act whereby the power of the Provincial Government to prescribe the conditions of the permit was delegated to the Excise Commissioner or Specified Excise Officer, is in contravention of the provisions of the Act which in S. 13 allows the Provincial Government to delegate its powers either to the Financial Commissioner or to the Commissioner and to no other authority. Conferment by the Provincial Government upon the Excise Commissioner of any of its powers under the Act is not countenanced by the Act at all, and further S. 13 only enables the Provincial Government to confer upon the Excise Commissioner the powers given to a Financial Commissioner by the Act itself, and not any powers which the Provincial Government is permitted by S. 13 to delegate to a Financial Commissioner. Further, the discriminatory action taken by the Provincial Government by means of the Notification as subsequently put into operation is directly in contravention of the statutory powers. Form P. R 1, which is prescribed for applications for the grant of a permit taken in conjunction with the strict conditions in Form P. R. 11 that liquor may not be possessed under the permit "in a residential house or building occupied by a Muslim", shows a clear discrimination against the Muslim community.

For the above reasons, the action taken by the Provincial Government, namely, the issue of the notification, and the imposition of permits thereunder is clearly beyond the powers conferred by the Punjab Excise Act, and consequeutly is invalid in law. It, follows, therefore, that disobedience of those provisions attracts no penalty since it is no offencc. A I R (Vol 36) 1949 Lah 210 : Pak L R (1949) Lah 375 : 50 Cr L J 984.

——S. 50.

——S. 50 — "Raid report"—Accused not entitled to see.

The accused are not entitled to see the document called the "Raid Report" submitted under S. 50, Punjab Excise Act, since the document is a highly confidential one. A I R (Vol 16) 1929 Lah 429 : 30 Cr L J 760 : 117 Ind Cas 377.

—S. 58

——S. 58 — N.-W. F. P. Government Notification that rules in Punjab Excise Manual shall apply to N.-P. F. P. until separate rules were framed—Rules, if ultra vires.

There was a notification by the Provincial Government adopting the rules framed by the Punjab Government as they were published in Punjab Excise Manual, Vol. I, 1925 Edition until separate rules were framed by the N.-W. F. P. Accused who was convicted for violation of one of such rules contended that the rule was ultra vires as it had not been framed by the N.-W. F. P. Govt. as required by S. 58, Punjab Excise Act :

Held, that in view of the Notification, the rule was not ultra vires. A I R (Vol 28) 1941 Pesh 102 : 43 Cr L J 169 : 1941 Pesh L J 102 : 197 Ind Cas 420.

——S. 58 (2) (d) — Rules by N.-W. F. P., R. 30 — Bottles arriving in morning—Entry in register.

Under R. 30, the entry of bottles in the register may be made at any time during the day, when the bottles arrive in the morning. A I R (Vol 25) 1938 Pesh 21 : 39 Cr L J 435 : 1933 PeshL J 24 : 174 Ind Cas 531 (DB).

——S. 58 (2) (d) — Rules under — Rules by Local Government of N.-W. F. P.—Restrictions placed by Revenue Commissioner by Notification No. 4-Exc.—R. 50 by Local Government—Form L-17.

The Local Government of N.-W. F. Province having exempted the import, export or transport of foreign liquor from all restrictions by R 3 published under Notification No. 753-Exc. dated November 13, 1916, R. 3, Framed by Revenue Commissioner under Notification No. 4 Exc., dated January 5, 1917, placing restrictions on the transport of foreign liquor is ultra vires and the breach of this rule cannot be punished.

License in Form L. 17 under R. 50 of Notification under S. 58 (2) (d), Punjab Excise Act deals only with the sale of the denatured spirit in the premises which is specified in it and it is, therefore, only logical to hold that the bottles, when exposed for sale on the premises, are required to bear the prescribed labels. There is nothing in the rules to indicate that a licensee is bound to put the labels on the bottles when they are in transit, viz., when he sends them from one place to another or when they are kept in quarters behind the shops. A I R (Vol 25) 1938 Pesh 21 : 39 Cr L J 435 : 1938 Pesh L J 24 : 174 Ind Cas 531 (DB).

——S. 58 (2) (d) — Rules under — Delegation of powers by Punjab Government under S. 8 and Rules under S. 58—N.-W. F. P., if can be deemed to have also so delegated—Revenue Commissioner of N.-W. F. P. so appointing Excise Sub-Inspector—Appointment, legality of.

Held, that in the absence of notification the rules framed by the Punjab Government delegating its powers under S. 8 of the Punjab Excise Act and the rules framed under Ss. 58 and 59 of the Act could not be applied to N.-W. F. Province, and the Local Government of N.-W. F. P. could not, therefore, be deemed to have delegated its powers merely because the Punjab Government had done so.

Held also, that the appointment of the Excise Sub-Inspector by the Revenue Commissioner of N.-W. F. Province was, therefore, illegal, the Revenue Commissioner having no power to do so. But though the appointment was illegal, the Excise Sub-Inspector was a "public servant" within the meaning of S. 21, I. P. C., as at the time of his appointment he could only be appointed by the Local Government, he could only be dismissed by that authority and not by the actual authority which did appoint him without being empowered to do so. A I R (Vol 24) 1937 Pesh 52 : 38 Cr L J 1042 : 1937 Pesh L J 52 : 170 Ind Cas 772 (DB).

—S. 61.

——S. 61 — Nature of possession, necessity to constitute offence.

To constitute criminal liability, possession of bottles of liquor must be actual and not constructive. Possession of which a man is not conscious, cannot constitute an offence A I R (Vol 23) 1936 Lah 758 : 37 Cr L J 939 : 38 P L R 1059 : 164 Ind Cas 435.

——S. 61—Proper sentence.

In awarding punishment for an offence under the Excise Act, the Courts should bear in mind that illicit distillation implies a good deal of preparation and results not only in the loss of the excise revenue but also in drunkenness; moreover the offence often escapes detection and it is, therefore, necessary to impose a sentence which will have a deterrent effect.

There cannot be one law for the rich and one for the poor or rather one for the good family and one for the bad. Therefore, the fact that the accused is a member of the Punjab Chiefs Association is not a ground for awarding a lighter sentence. (1933) 34 Cr L J 180 : 34 P L R 552 : 141 Ind Cas 592.

——S. 61—Joint possession of house—Articles found in house—All inmates having access— Presumption of possession — Illicit liquor found in son's room—Presumption of his guilt does not arise.

Where articles are found in a house in such place or places as several persons living in the house may

have access to, there is no presumption as to possession and control of any other person than the house-master, though it is open to the prosecution to prove that the possession was with some other member of the family.

When most of illicit liquor is found in the room occupied for the night by the son and his family for sleeping, it does not necessarily mean that the son was in the exclusive possession of the room. The legal possession still remains with the father, the house-master, and there is obvious possibility that the liquor could have been placed there by the father. The mere fact that the son does not report the matter to proper authorities but uses the room along with his wife and family to sleep in does not make him guilty of the offence of being in possession of that liquor. AIR (Vol 17) 1930 Lah 884 : 31 Cr L J 352 : 11 Lah 305 : 122 Ind Cas 108.

——S. 61—Sentence—Distinction between seller and user.

There ought to be a distinction between a manufacturer or seller of an excisable article, who not only derives profit from the transaction but also demoralises other people, and a person who possesses it for his own use, in awarding sentence. AIR (Vol 16) 1929 Lah 29 : 10 Lah 524 : 30 P L R 638 : 30 Cr L J 15 : 11 A I Cr R 553 : 112 Ind Cas 783.

——S. 61—Spontaneous growth of hemp — Garden neglected and open to public—Owner negligent in weeding out—Not guilty of cultivation.

Where there was spontaneous growth of hemp in a neglected garden open to the public and no attempt at secrecy was made.

Held, the owner cannot be convicted under S. 61 (2) (b) and his negligence in not recognising these plants and having them weeded out of his garden did not make him guilty of the offence of cultivating them. A I R (Vol 15) 1928 Lah 861 : 26 Cr L J 693 : 10 A I Cr R 431 : 110 Ind Cas 325.

——S. 61 — Burden of proof — Possession of illicit liquor.— Crown to prove that liquor did not come in the ordinary way.

The accused was charged with being in possession of illicit liquor. The Chemical Examiner's opinion was that the suspected liquor was not definitely distinguishable from the spirits made at K distillery.

Held, that until and unless the Crown had shown that the liquor could not in the ordinary way of business have come from K distillery, the onus did not shift on to the accused of showing that that was where he got it from. A I R (Vol 15) 1928 Lah 191 : 10 Lah 431 : 28 Cr L J 661 : 30 P L R 557 : 103 Ind Cas 197.

——S. 61 — Imported article examined in transit—Custom Officials authorised to examine—Interruption in transit—Does not cease to be importation.

Cocaine was despatched from Germany in two registered packets, one consigned to Multan and the other to branch post office in the Multan district to fictitious addresses. The packets, which came via Karachi, were opened at that port by the custom officials, who on examining them and ascertaining the nature of the contents, sent them on to the post office for delivery to the consignees. On the petitioners calling, at the post office for the packet in question, it was handed over to them after certain enquiries had been made and the petitioners were then arrested and convicted under S. 61 (1) (a).

Held, that the act of the Custom officials being authorized by the Customs Act and the regulations made thereunder, the article does not cease to be imported by the consignee merely because it was interrupted in transit by the Custom officials acting under, and in accordance with, their statutory powers. A I R (Vol 14) 1927 Lah 191 : 8 Lah 100 : 9 L L J 213 : 28 Cr L J 468 : 28 P L R 495 : 101 Ind Cas 596.

——S. 61—Accused an Arain—No point in accused's favour.

The fact that the accused is an Arain who has nothing to do with liquor, is no ground in accused's favour. (1927) 99 Ind Cas 1012 : 27 P L R 197 : 28 Cr L J 212 (DB).

——S. 61—Foreign alcohol—Included in "rectified spirit".

For purposes of S. 61 (1) (a) absolute alcohol of foreign origin is included in the term rectified spirit, all spirit of a strength of more than 43 degrees or more overproof being rectified spirit. A I R (Vol 13) 1926 Lah 517 : 7 Lah 341 : 27 P L R 502 : 27 Cr L J 1311 : 8 L L J 613 : 98 Ind Cas 255 (DB).

——S. 61 — Provision in Criminal Procedure Code as to first offenders—Not applicable.

Although after the amendment of the Code in 1923, S. 562 is no longer confined to offences under the I. P. C. but extends to all offences, still in an offence under S. 61 of the Punjab Excise Act, S. 562 should not be resorted to, as such an offence is not usually the 'first offence' as contemplated by S. 562. A I R (Vol 13) 1926 Lah 317 : 27 Cr L J 478 : 93 Ind Cas 702.

——S. 61—Must be deterrent.

In awarding punishment for an offence under the Excise Act the Courts must always bear in mind that illicit distillation implies a good deal of preparation, and results not only in the loss of excise revenue, but also in drunkenness. The offence also often escapes detection and it is necessary to impose a sentence which would have a deterrent effect. AIR (Vol 13) 1926 Lah 166 : 7 Lah 32 : 27 P L R 221 : 27 Cr L J 561 : 94 Ind Cas 129.

——S. 61—Visitors sitting near cocaine—Not liable.

The accused and three other persons were found sitting round a fair quantity of cocain in a house. The cocaine as well as a pair of scissors and paper was lying on the ground before them. One of the three persons was not an inmate of the house and the remaining had come from some other place. The house had been leased to the accused.

Held, that under the circumstances, accused alone should be held to have been in possession of the cocaine. AIR (Vol 12) 1925 Lah 519 : 26 P L R 9 : 26 Cr L J 729 : 86 Ind Cas 217.

——S. 61 — Shop kept by father and son — Place where liquor was found accessible to public—Father absent from village—Son not a drinker or seller — Guilt not made out.

Two bottles of illicit liquor were recovered from a sweetmeatshop kept by the accused who were father and son. The portion of the shop from which the bottles were recovered was accessible to the public. At that time the father was absent from the village and returned several days later. The son was not shown to be a drinker or to be selling liquor from the shop.

Held, that under these circumstances the possession of the illicit liquor was not brought home to the accused and that they were not guilty. AIR (Vol 12) 1925 Lah 437 : 26 Cr L J 720 : 26 P L R 10 : 86 Ind Cas 160.

——S. 61—Liquor brought by visitor—Owner not a joint possessor.

Bringing of liquor by A to B's house does not make B a joint possessor nor can the latter be said to have joined in the sale if he asks A to bring the bottles and hands them or the money to him. A I R (Vol 11) 1924 Lah 233 : 8 P W R Cr 1923 : 24 Cr L J 381 : 72 Ind Cas 381.

——S. 61—Filing of complaint — Police officer can make complaint.

Under the new Excise Act a complaint can be brought by a Police Officer for an offence under the Act, the Local Government having empowered all Inspectors and Sub-Inspectors of Police with power of an excise officer: 13 P R 1910, Cr. Overruled. AIR (Vol 9) 1922 Lah 220 : 6 P W R Cr 1923 : 24 Cr L J 183 : 71 Ind Cas 599.

——S. 61 — Illicit liquor and distilling apparatus found—Accused joint owners of place—Nothing to connect them with distillation—Not liable.

The mere fact of the accused being joint owners of the house and the field, where some bottles of illicit liquor and distilling apparatus were found, is not sufficient for their conviction under Section 61 when there is nothing further to connect them with the actual distillation. AIR (Vol 8) 1921 Lah 214 : 15 P L R 1921 : 22 Cr L J 30 : 59 Ind Cas 142.

——S. 61—Members other than managing member —Proof of possession with—Nature of.

To establish that possession and control of a place are with some member of the family, other than the managing member there must be good and clear evidence of the fact before the Court can arrive at such a conclusion. (1921) 61 Ind Cas 720 : 22 Cr L J 432 (Lah).

——S. 61—Must be deterrent.

For the offence of manufacturing liquor and being in possession of it, deterrent sentences are absolutely necessary. (1921) 60 Ind Cas 653 : 22 Cr L J 258 (Lah).

——S. 61—Two brothers—Presumption is against the elder.

Where illicit liquor is found in a house occupied by two brothers, the presumption is that the elder brother was in possession of the liquor. (1921) 60 Ind Cas 672 : 22 Cr L J 272 (Lah).

——S. 61—Husband and wife—Wife not guilty.

Where liquor is found in a house, in the joint occupation of a husband and wife but which belongs to the husband, the latter alone must be regarded as being in possession of the articles. The wife is not guilty under S. 61 of the Act. AIR (Vol 7) 1920 Lah 210 : 22 Cr L J 141 : 9 P W R 1921 Cr : 52 Ind Cas 653.

——Ss. 61, 75 (1)—Magistrate—Jurisdiction.

A Magistrate has no jurisdiction to act unless on a complaint or a report by an excise officer. AIR (Vol 3) 1916 Lah 295 : 17 Cr L J 151 : 18 P W R 1916 Cr : 33 Ind Cas 631.

——S. 61—Nature of sentence—Reasons.

The offence of manufacturing illicit liquor implies a good deal of preparation. A man found in manufacturing illicit liquor must have done it many times previously without detection and as it is an offence which probably escapes detection depriving Government of its revenue besides demoralising the people, deterrent sentences are necessary in such cases. The view that is sometimes expressed that, because an excise offence is a malum prohibitum and not malum in se, the culprit should be mortified in pocket rather than in person is wholly incorrect. The Legislature intended that substantial terms of imprisonment should be awarded in these cases. A I R (Vol 3) 1916 Lah 189 : 19 P R 1916 Cr. : 41 P W R 1916 Cr. : 144 P L R 1916 : 17 Cr L J 310 : 35 Ind Cas 486.

——S. 61 (1) (a)—Seven persons found sitting in hotel around table on which were found some tumblers with some liquor and others empty—All accused convicted as collectively responsible for possession of liquor on table :

Held, that collective responsibility could not be enforced without finding out whether each accused was in individual possession of liquor. A I R (Vol 27) 1940 Lah 36 : 41 P L R 707 : 41 Cr L J 341 : 186 Ind Cas 581.

——S. 61 (1) (a)—Presumption as to possession.

Where a house is in possession of three brothers living together as members of a family, and if illicit liquor is found therein, the presumption is that it is in possession of the eldest of them who is to be regarded as house-master. (1937) 172 Ind Cas 864 : 39 P L R 133 : 39 Cr L J 232.

——S. 61 (1) (a)—Presumption in favour of accused —Sentence.

In a prosecution for possession of illicit cocaine, if there is no evidence to show how much cocaine was in the possession of the accused, the Court must presume that there was only a small quantity and award a light sentence. A I R (Vol 19) 1932 Lah 10 : 32 P L R 778 : 33 Cr L J 114 : 135 Ind Cas 40.

——S. 61 (1) (a)—Possession of liquor bottles on behalf of person not entitled to possess it, whether amounts to offence — Punjab Government Notification No. 840 of 12-6-15.

The notification makes incumbent to obtain a pass from the District Excise Officer in order to possess liquor up to 10 gallons for purposes of marriage or like festivities. The notification covers the case of a liquor contractor who also would be guilty of disobeying the provisions of the notification, much more the person acting on his behalf. A I R (Vol 4) 1917 Lah 244 : 16 P R 1917 Cr : 18 Cr L J 521 : 39 Ind Cas 489 (DB).

——S. 61 (1) (a) and (2) (a)—Cocaine—Illicit possession—Traces found in a phial—Benefit of doubt.

The finding of a phial containing traces of cocaine discovered by the Chemical Examiner by washing out the phial with distilled water only proves that small particles of cocaine were adhering to the bottle. There is nothing improbable in the bottle having been purchased from a Kabari in the condition in which it was found in the house of the accused. It is exceedingly difficult to believe that the accused could have sold a packet of cocaine to an informer who was helpful to the excise authorities in a public place in the presence of others. 54 P L R 1917 : 5 P W R Cr 1917.

——S. 61 (1) (c) — Kind of sentence on first conviction under this section.

Though illicit distillation entails loss of excise revenue and promotes drunkenness and crime, a heavy sentence of fine is preferable to imprisonment in the case of a person who is otherwise law abiding for his first conviction for the offence in view of the demoralising effect of a sojourn in jail. A I R (Vol 3) 1916 Lah 345 : 63 P L R 1916 : 26 P W R 1916 Cr : 17 Cr L J 282 : 34 Ind Cas 1002.

——S. 61 (2) (a) — Father having licensed shop for sale of liquor at G—His son having grocer's shop at N some 12 miles from G, but having no license to sell liquor — One H ordering liquor at son's shop to be delivered at N—Son bringing liquor and putting it in H's car at N — Payment made to father personally at N :

Held that son acted as agent for H and that there was no sale at N but at G. A I R (Vol 25) 1938 Lah 529 : 40 P L R 226 : 39 Cr L J 762 : 176 Ind Cas 648.

—S. 75.

——S. 75—Excise offence in Native State — Trial in British India — Accused discharged for want of certificate — Certificate granted after one year — Proceedings, legality of.

A person who was sent up for trial in respect of an offence committed on June 17, 1930, was discharged by a Magistrate on July 25, 1930, on the ground that the offence was committed in the Patiala State territory and the accused could not be tried without a certificate from the Agent to the Governor-General, Punjab States, under S. 188 of the Criminal P. C. Such a certificate was then applied for and granted on

April 16, 1931, but an order was not passed by the District Magistrate till July 30, 1931 that the Magistrate concerned should proceed with the case :

Held, that the production of the certificate subsequently after the order of discharge had been passed in this case did not amount to a revival or continuation of the original proceedings. The trial, therefore, in this case was without jurisdiction having been commenced after one year from the date of the commission of the offence without the sanction of the Local Government. A I R (Vol 20) 1933 Lah 659 : 34 Cr L J 578 : 143 Ind Cas 341.

—S. 77.

——S. 77—Purchase of beer in excess of quantity allowed is no offence. A I R (Vol 29) 1942 Lah 134 : 44 P L R 112 : 43 Cr L J 703 : 200 Ind Cas 629.

——S. 78—Order of forfeiture, when passed — Contravention of rules as to keeping registers — No offence committed under S. 78—Order illegal.

An order of forfeiture of the liquor and empty bottles is illegal and cannot be passed under S. 78 when the offence committed is merely a contravention of a rule as to the keeping of the registers framed under Ss. 58 and 59, and when no offence is committed in respect of the liquor and of the empty bottles within the meaning of S. 78. A I R (Vol 8) 1921 Lah 105 : 3 L L J 195 : 67 Ind Cas 200.

PUNJAB EXCISE MANUAL

—Vol. II, R. 27.

——Exception under.

Under the exception to R. 27, it is permissible for the licensee of a bar to allow another person to conduct sales without previously submitting his name to the Collector for approval. Therefore, such a person as the contractor of the bar can sell liquor to persons visiting the bar, and it cannot be said that his contract for the purchase of liquor was unlawful on the ground that he did not hold a license to sell retail liquor. AIR (Vol 24) 1937 Lah 316 : 174 Ind Cas 65.

PUNJAB FOODGRAINS (MOVEMENT CONTROL) ORDER (1943)

—Cl. 3.

——Cl. 3—Offence, if cognizable.

An offence under cl. 3 as any other offence under R. 81, Defence of India Rules is both cognizable and non-bailable. Offender can be arrested by any person without a warrant if the offence has been committed in his presence. No warrant of arrest from a Magistrate is necessary. A I R (Vol 32) 1945 Lah 334 : 47 P L R 229 : I L R (1945) Lah 403.

——Cl. 3—Attempt to export.

Where the goods are in transit and are captured while still in the limits of the Punjab, there is not only a preparation to export but also an attempt to export in contravention to cl. 3. It is not necessary that the goods should have been actually exported.

An attempt to export foodgrains is punishable under cl. 3 by virtue of Defence of India Rules, R. 81 (4) read with R. 121. A I R (Vol 32) 1945 Lah 334 : 47 P L R 229 : ILR (1945) Lah 403.

—Cl. 6

——Cl. (6) as amended — Order of forfeiture — Legality.

It is clear from Cl. (6) of the Foodgrains (Movement Control) Order, as amended by the Notification dated 18-11-44, that in every case where the provisions of the order have been contravened, an order of forfeiture must be made as a matter of course unless for special reasons the Court is of the opinion that such order should not be made. AIR (Vol 33) 1946 Lah 199 : ILR (1945) Lah 408 : 48 P L R 515 : 48 Cr L J 62 : 227 Ind Cas 375.

——Cl. 6—Cl. 6 as amended by Notification No. 15576 St. (FG)44/100400, dated 18th November 1944—Order of confiscation should be passed in every case of contravention of Order unless special reasons exist.

In every case where the provisions of the Punjab Foodgrains (Movement Control) Order 1943 have been contravened, an order of forfeiture must be made under cl. 6 of the order as amended by Notification No. 15576 St (FG) 44/100400 dated 18th November 1944 as a matter of course unless for special reasons the Court is of the opinion that such order should not be made. AIR (Vol 33) 1946 Lah 199 : I L R (1945) Lah 408.

PUNJAB FRONTIER CRIMES (VALIDATION OF ACTS, ORDERS AND PROCEEDINGS) ACT (7 of 1944)

——Act whether ultra vires.

Both the Punjab Act 7 of 1944 and the Punjab Ordinance 1 of 1944 are intra vires the Punjab Legislature and the Governor of the Punjab respectively with the limitation that where, if at all, the exclusive jurisdiction of the Federal Legislature is encroached upon, the legislation is void to the extent of the encroachment.

Per Full Bench (Abdul Rashid Acting C. J. dissenting) — The Ordinance and the Act as worded do not validate the Orders, proceedings and acts therein referred to.

Per Abdul Rashid, Acting C. J.—The Ordinance and the Act validate all orders made, proceedings taken and acts done up to the 22nd December 1944, and do not validate any orders made, proceedings taken and acts done after the 22nd December 1944. AIR (Vol 35) 1948 Lah 33 : ILR (1947) Lah 274 (FB).

PUNJAB FRONTIER CRIMES (VALIDATION OF ACTS, ORDERS AND PROCEEDINGS) ORDINANCE (1 OF 1944) AND PUNJAB FRONTIER CRIMES (VALIDATION OF ACTS, ORDERS, AND PROCEEDINGS) ACT (7 OF 1944)

——Whether ultra vires — If validate orders and acts therein referred to.

Per Full Bench :—The Punjab Ordinance No. 1 of 1944 and the Punjab Act VII of 1944 are both intra vires the Governor of the Punjab and the Provincial Legislature respectively, except to the extent that where, if at all, the exclusive sphere of the Federal Legislature is encroached upon, the legislation is void to the extent of the encroachment.

Per Full Bench (Abdul Rashid, A. C. J., contra) :—The Ordinance and the Act as worded do not validate the orders, proceedings and Acts therein referred to.

Per Abdul Rashid, A. C. J.—The Ordinance and the Act validate all orders made, proceedings taken and acts done up to the 22nd December 1944. They do not validate any orders made, proceedings taken and acts done after the 22nd December 1944. AIR (Vol 35) 1948 Lah 33 : ILR (1947) Lah 274 : 48 Cr L J 984 (FB).

PUNJAB FRONTIER CRIMES (VALIDATION OF ACTS, ORDERS AND PROCEEDINGS) ORDINANCE (1 OF 1944)

—S. 2.

—S. 2—Retroactive effect of Ordinance.

The Ordinance has retroactive effect and its terms are wide enough to cover all pending cases. AIR (Vol 32) 1945 Lah 99 (DB).

——S. 2—Ordinance, whether ultra vires.

The power of the Governor to promulgate Ordinances is co-extensive with the power of the local Legislature. Items Nos. 1 and 2 of the Concurrent List in Sch. VII, Government of India Act, deal with criminal law and criminal procedure comprehensively and the Provincial Legislature was competent to enact a law which could embrace any or all the provisions in Frontier Crimes Regulation. As the Provincial Legislature could legislate the Ordinance, the

ordinance by the Governor is not ultra vires. AIR (Vol 32) 1945 Lah 99 (DB).

PUNJAB GENERAL CLAUSES ACT (1 OF 1898)

——S. 2

——S. 2—Standing trees — Are immovable property —Exempt from attachment in money decree.

Standing trees are included in the definition of immovable property within Cl. 26 of S. 2 and therefore are exempt from attachment and sale in execution of a money decree obtained against a deceased proprietor even though planted by him unless they are charged with the decretal amount. AIR (Vol 14) 1927 Lah 146 : 99 Ind Cas 445.

——S. 2 (23)—Agreement to supply electricity to the Government employees on special rates— Agreement with Provincial Government :

Held, on construction of the agreement that the word "Government" included both Central Government and the Provincial Government. (1940) 42 PLR 798.

——S. 2 (26)— Superstructure on land—Immoveable Property.

In the absence of any special definition in the Punjab Pre-emption Act a superstructure on land is immovable property under S. 2 (26) of the Punjab General Clauses Act I of 1898. (1909) 10 P R 1909 : 13 P W R 1909 : 24 P L R 1909 : 1 Ind Cas 397 (DB).

—S. 6

——S. 6 — Applicability — Enactments coming into existence after passing of repealing Act.

S. 6 of the Punjab General Clauses Act is not intended to apply to enactments and instruments coming into existence after the passing of the repealing and modifying Act. AIR (Vol 38) 1951 E P 216 : 52 P L R 60 (DB).

——S. 6—"Instrument" — Order of detention under Punjab Public Safety Act.

An order of detention or an order extending the period of detention under the Punjab Public Safety Act, is not an instrument within the meaning of S. 6 of the Punjab General Clauses Act. AIR (Vol 38) 1951 E P 216 : 52 P L R 60 (DB).

——S. 6—In view of S. 2 of the Punjab Municipal Act and S. 6, Punjab General Clauses Act, the public notice declaring certain areas as prohibited for prostitution, issued in 1929, before amendment of Punjab Muncipal Act in 1933, can be held to be in force even after the amendment and it is not necessary to issue a fresh public notice. (1935) 158 Ind Cas 527 : 36 Cr L J 1396.

—S. 8

——S. 8—Limitation expiring on holiday—Suit may be filed the next day.

Where the period of limitation prescribed by any Punjab Act for bringing any proceeding ends on a day on which the Court is closed, it shall be deemed within time if it is brought on the next working day.

Where a suit, which should have been brought on 14th June 1925 under S. 5, Act 3 of 1923, which is a Punjab Act, was brought on 15th of that month as 14th was a Sunday, the suit was within time under S. 8, Act 1 of 1898. AIR (Vol 17) 1930 Lah 127 : 30 P L R 720 : 10 Lah 681 : 122 Ind Cas 86 (DB).

PUNJAB GOVERNMENT TENANTS ACT (IMPERIAL 3 OF 1893)

——Transfer of Abadkari rights—Sanction obtained after transfer — Transfer not bad.

Abadkari rights in certain land were granted by Government to a person S. S afterwards relinquished his rights and got the land transferred to his grandson. The transfer was made first and then the application for its sanction was made to the Financial Commissioner and the sanction was acquired.

Held, that the transfer of the Abadkari rights must be deemed to have been completed and become absolute after the sanction of the Financial Commissioner was given. The transfer was not bad because the sanction was not acquired prior to the transfer. AIR (Vol 15) 1928 Lah 967 : 10 Lah 389 : 30 P L R 562 : 113 Ind Cas 298 (DB).

——Government grant of land — Abadkar—Widow enquiring proprietary rights in the holding—Self-acquired property.

In 1896 Government granted Abadkar rights in certain lands. The grantee died in 1898 leaving a widow and a daughter. In 1899 the widow's name was inserted and in 1903 she was granted occupancy rights. In 1912 she acquired full proprietary rights in these lands and made over the property to her daughter.

Held, that the land became the self-acquired property of the widow and the collaterals of her deceased husband cannot impeach an alienation by the widow. AIR (Vol 3) 1916 Lah 100 : 129 P R 1916 : 83 P L R 1917 : 36 Ind Cas 382 (DB).

——Lapsed occupancy tenancy — Re-grant.

The Civil Courts have no jurisdiction to interfere with a re-grant by the Revenue Authorities of a lapsed occupancy tenancy coming within the Government Tenants Act. AIR (Vol 2) 1915 Lah 274 : 38 P R 1915 : 102 P W R 1915 : 3 P L R 1916 : 29 Ind Cas 570.

——Illegal decree — Remedy.

One S. held a horse breeding colony which could devolve upon a single person as an impartible holding of which alienation was prohibited except with the previous sanction of the Financial Commissioner. S died without male issue leaving three brothers A, B and C. The Colonization Officer mutated the whole grant in favour of B only. On this A instituted a civil suit for possession of the land on the ground that he as eldest son of his father should succeed in preference to B. A compromise was entered into whereby they agreed to hold the land jointly in equal shares. The Court passed a decree in terms of the compromise.

Held, the decree in no way affected the right of the Government as landlord who were free to obtain ejectment or otherwise enforce the conditions of the tenancy; that as between A and B, there was a valid compromise to which the Court was bound to give effect in a decree, which was valid and binding on the parties. 7 P W R 1913 : 27 P L R 1913 : 18 P R 1913 : 17 Ind Cas 680 (DB):

—S. 7.

——Ss. 7 and 8—Transferability of rights of grantee —Cause of action.

The right of a grantee under S. 7 is not transferable under S. 8 unless it is consented to in writing by the Financial Commissioner. Transfer in any form even by conduct is prohibited and a cause of action arises by transfer of a share. AIR (Vol 7) 1920 Lah 247 : 2 Lah L J 597 : 58 Ind Cas 298 (DB).

—S. 8.

——S. 8—Agreement to share with brother —Agreement to share whatever might accrue if invalid — Subsequent accrual of proprietary rights—If agreement can be enforced.

Where the defendants, Government tenants, induced plaintiffs, their brothers to come to help them to re-claim the land and promised to give them one-half of whatever they might obtain, and after such reclamation proprietary rights were conferred on the tenants by Government.

Held, that though an agreement to share the tenancy might be invalid under S. 8 of the Act an agreement to share whatever they might obtain is not invalid and on the principle of S. 43 of the T. P. Act, and S. 18 of the Specific Relief Act can be en-

forced when the proprietary rights were subsequently conferred on the tenants. AIR (Vol 9) 1922 Lah 237 : 64 Ind Cas 18 : 3 Lah 92 : 3 L L J 505 (DB)

——S. 8—Transfer of tenancy right.

Where owing to a dispute between an occupancy tenant and his sub-lessee a compromise was arrived by which the former gave up a portion of the holding to the latter and the compromise acted on by the Court, it is effective to transfer title though not sanctioned by the Financial Commissioner. A I R (Vol 4) 1917 Lah 354 : 88 P R 1917 : 175 P W R 1917 : 42 Ind Cas 330 (DB).

——S. 8—Sub-letting if valid.

An agreement by which a Government tenant sublets a portion of Government grant to his three brothers, without the previous permission of Financial Commissioner is void. 3 P R 1915 Rev : 6 P W R 1915 Rev : 31 Ind Cas 400.

——S. 8—Cheenab—Canal— Capitalist grant — Private agreement with another.

An agreement among two applicants as capitalists grantees to share in the cultivation if one of them alone succeeds is not opposed to S. 8 of the Act. 48 P L R 1918 : 36 P W R 1913 : 58 P R 1913 : 18 Ind Cas 5.

——S. 8—Alienation by will.

Alienation by will is not prohibited by S. 8. A will by a tenant of the peasant class does not violate S. 8. 11 P W R 1911 : 97 P L R 1911 : 8 Ind Cas 869 (DB).

PUNJAB HIGH COURT RULES

See also (1) High Courts Rules (Lahore).
(2) High Court Rules (Punjab).

——Chief Court Circular — O. LVII, Rule II (i) — Execution of decree—Surety — Security given under Chief Court Circular O. LVII, Rule II. (i).

The rules contained in Chief Court Circular Order LVII as to the liability of persons who stand sureties for judgment-debtors applying for revision of orders of lower Courts must be strictly construed. The liability cannot be more extensive than the liability of the latter, no matter in what terms the security bond may be worded. Application was made for attachment and sale of the property of the judgment-debtor. Objection to the right of the person who claimed to execute decree as a transferee was disallowed. He applied for revision and gave the security required by the rules. His application was dismissed. The transferee did not proceed with his application to attach the property of the judgment-debtor but obtained orders for arrest and imprisonment of the surety.

Held, that until the transferee had failed to satisfy his decree by sale of the properties of the judgment-debtor he was not competent to proceed against the surety. 10 P L R 517 (520, 521).

PUNJAB JAIL MANUAL.

—Para. 813.

——Para. 813 Under-trial prisoner— Detention — Interference by Court, when justified.

Where a person is detained in prison, he is subject to the provisions of the Prisons Act and the rules thereunder and if it is found that the action taken by the jail authorities is in conformity with the law, the Court will have no power to interfere. But if it is found that the action is not warranted by the Prisons Act or the rules thereunder, the Court has power to give directions regarding the detention. AIR (Vol 18) 1931 Lah 562 : 32 P L R 586 : 32 Cr L J 988 : 133 Ind Cas 59 (DB).

PUNJAB LAMBARDARI RULES.

—R. 15.

——R. 15—The question of appointing a successor to a lambardar dying without issue should be decided under R. 15.

An officer acting under R. 15 should carefully consider all reasonable matters suitable to the appointment. He should decide between rival claimants looking to their claims and administrative advantages and disadvantages. If reasonable discretion has been used his decision should not be upset because the higher authority differs from his view. 1 P R 1918 Rev : 42 P W R 1918 Rev : 131 P L R 1918 : 45 Ind Cas 87.

PUNJAB LAND ALIENATION ACT (13 of 1900).

See Punjab Alienation of Land Act (13 of 1900).

PUNJAB LAND REVENUE ACT (1871).

——Rr. D-1, 3-1—Framed under— Muafidar—Right to share of produce.

Assignee of land revenue cannot claim share of the produce as of right though he may have taken it in the past, unless he has some title to proprietary rights as explained in Rr. D 1, 3-1. 1 P R 1885 (Rev), Dissent. 2 P R 1916 Rev : 38 Ind Cas 41.

PUNJAB LAND REVENUE ACT (18 of 1887).

——Interest in shamilat land — Must be expressly included in the conveyance.

Mere conveyance of land without expressly including an interest in the shamilat does not convey such an interest to purchaser of a land in a village.

But where the purchasers of some plot of land in a village, proved their title to such an interest by a copy of the deed of sale of 1849 and a fragment of the original deed, by a table of the proprietors of the village in question and by an entry in the record prepared at the Settlement of 1850 showing that the proprietors of the plots admittedly sold by the plaintiffs to the defendants in 1849 had attached to them a proportionate interest in the shamilat..

Held, the purchasers overwhelmingly proved that the sale to them in 1849 of the plots in question carried with it a proportionate share in the shamilat land. AIR (Vol 15) 1928 Lah 214 : 103 Ind Cas 182 : 29 P L R 675 (DB).

——Rules under Lambardari—Succession to office—Primogeniture — Adopted son.

The expression "nearest eligible heir according to the rule of primogeniture," in rule 17 (ii) of the rules under the Land Revenue Act, should be strictly construed ; it does not apply to an adopted son. The rule of primogeniture is by birth and does not embrace descent by adoption. Consequently, in the case of a vacancy in the office of headman an adopted son cannot succeed to or through his adoptive father under any rule of primogeniture. 2 P R Rev 1912 : 7 P W R Rev 1912 : 15 Ind Cas 925.

—S. 3.

——S. 3 — The money payable by a lambardar on account of land revenue demand becomes arrear of land revenue if it is not paid to the Government by the due date. The failure to deposit the land revenue on due date makes him a defaulter as contemplated by S. 3 (8), and the land revenue can be recovered from him as an arrear of land revenue under S. 3 (7) of the same Act by proceeding against his person and property. A I R (Vol 24) 1937 Pesh 35 : 1937 Pesh L J 35 : 38 Cr L J 530 : 168 Ind Cas 369.

——S. 3—Village cess —Haq bua.

"Haq bua" is a due coming within the definition of village cess as given in S. 3 and is, therefore, not recoverable as land revenue. A I R (Vol 22) 1935 Pesh 189 : 37 Cr L J 283 : 160 Ind Cas 193.

——Ss. 8 and 111 — Partition — Widow's right to — Suit to restrain partition of joint holding — Jurisdiction—Civil or Revenue Court.

Among agricultural classes in the Punjab, a widow has a clear, unequivocal statutory right under the Land Revenue Act to demand partition. A co-sharer may sue in a civil Court to prove that by custom, the widow cannot obtain partition of the joint holding in which she is a co-sharer for life. The burden of

proving the existence of such custom clearly lies upon him.

The only question to be considered in such cases is whether the plaintiff has succeeded in proving restraint imposed by custom. 70 P R 1912 : 124 P L R 1912 : 91 P W R 1912 : 14 Ind Cas 45 (DB).

—S. 6.

——Ss. 6 and 34— Whether Girdwar Kanungo is a Revenue Officer—Power to attest.

A Girdwar Kanungo is not a Revenue Officer under S. 6 and cannot attest mutation within the meaning of S. 34. AIR (Vol 7) 1920 Lah 248 : 57 Ind Cas 721.

—S. 13.

——Ss. 13 and 28—Appointment of additional zaildar —Right of appeal—Colony Manual S. 610—Validity.

Under S. 28 of the Punjab Land Revenue Act the Financial Commissioner may make rules, regulating the appointment and removal of zaildar ; but in view of S. 13 of the Act, such rules cannot remove the right of appeal. Accordingly, S. 610 of the Colony Manual which provides that there is no right of appeal to the Commissioner from an order appointing an additional zaildar as probationer, except in cases of disagreement between the colonization officer and the Deputy Commissioner, is ultra vires. (1947) 28 L L T 5.

——Ss. 13 (b) 14, 15 — Sanctions for sale of agricultural land in the possession of Court of Wards – Execution of sale deed — Review of Revenue Commissioner's order granting sanction — Cancellation of sale—Review, application for, and order.

In respect of an offer to purchase certain agricultural land forming part of an estate under the management of the Court of Wards, made by A, a non-agriculturist and a money-lender, the Deputy Commissioner wrote to the Revenue Commissioner recommending the proposed sale and asking for his sanction under S. 19 (viii) of Revenue Circular No. 39 and also under Notification No. 1708, cl. 13. This latter sanction was required from the Revenue Commissioner in his capacity of Court of Wards. The Revenue Commissioner wrote to the Deputy Commissioner on 7th January 1929, sanctioning the sale and on 14th January 1929, the latter made an order sanctioning the sale by registered sale-deed and the sale-deed was executed and registered. B who alleged that he had a right of pre-emption in respect of the lands appealed against the orders of 7th January-and 14th January on the ground of insufficient notice but the Revenue Commissioner dismissed the appeal on 2nd May 1929. On 25th July 1929, B applied for review of the Revenue Commissioner's orders dated 7th January and 2nd May. The Revenue Commissioner reviewed the order and cancelled the sale on 23rd February 1930. B contended that this order of the Revenue Commissioner was not competent on the ground that the order of 2nd May 1929, was a review of the Revenue Commissioner's order of 7th January 1929 and that any further review was incompetent :

Held, that this contention proceeded on an erroneous view of the Revenue Commissioner's sanction to the sale given on 7th January 1929 and that the right of appeal or review under the Land Revenue Act only affected the order made by the Deputy Commissioner on 14th January 1929, after he had obtained the permission of the Revenue Commissioner giving his sanction to the sale under S. 3 (2) of the Alienation of Land Act, and that B's application for review dated 25th July 1929 and the order made thereon dated 23rd February 1930, were perfectly competent and that although the application was made more than ninety days after the date of the order of which review was sought, it must be assumed that the Revenue Commissioner, before entertaining it was satisfied that there was sufficient cause for the delay. AIR (Vol 21) 1934 P C 93 : 66 M L J 328 : 15 Lah 216 : 39 L W 697 : 59 C L J 348 : 61 I A 138 : 36 P L R 433 : 147 Ind Cas 906.

—S. 14.

——S. 14 — Where there is a conflict between the settlement records of different dates the presumption of correctness attaches to the more recent records. A I R (Vol 19) 1932 Lah 278 : 33 P L R 220 : 138 Ind Cas 502 (DB).

—S. 15.

——S. 15 —Delegation —Review—Delegation to subordinate officer—Illegal.

Held, that an order on review should be made by the officer who passed the original order and that it was not open to him to send the file to a subordinate officer for passing orders. (1930) 9 Lah L T 15.

—— S. 15—Notice—Review—Notice necessary.

Held, that it is not open to the Revenue officer to pass an order on review without summoning the parties. (1930) 9 Lah L T 15.

——S. 15 — Order reviewed, passed by another — Ultra vires.

Where the order reviewed was not passed by the Collector himself his order on review is ultra vires in the absence of previous sanction ; nor is it the intention of the Act that the procedure for review should be used as an alternative to appeal or revision. (1930) 9 Lah L T 17.

——Ss. 15 (1) (a) and (3), 118 (3) and (4) — Review— Revision — Appeal—Partition – Discretion.

An order passed on review is appealable, if it does not merely confirm the previous order. A mere sanction, however, given to a subordinate Revenue Officer, to review an order is not in itself an "order," and is, therefore, not appealable, though it may be open to revision.

Held, that the Revenue Officer had exercised a sound discretion in allowing the withdrawal of an application for partition and that no action under S. 118 (4), Land Revenue Act was necessary, because there was no applicant other than the first party who had been permitted to withdraw his application. 3 P R Rev 1912 : 6 P W R Rev 1912 : 15 Ind Cas 937.

—S. 16.

——S. 16—Order of Revenue Court—Setting aside of.

A revenue Court's order re-opening a question which is res judicata between the parties is liable to be set aside. 4 P W R 1911 Rev : 10 Ind Cas 299.

—S. 17.

——Ss. 17, 110 and 117 — Partition — Irregularities committed—Power of Financial Commissioner.

Where, in a partition case, many share-holders were not consulted, possession was disturbed, and many other irregularities were committed, the Financial Commissioner could set aside those proceedings. 1 P W R 1912 Rev : 13 Ind Cas 815.

—S. 28.

——S. 28—Rules by Financial Commissioner, R. 20, sub-cl. (1) — "Same" in "pay the same" refers to all land revenue.

The word "same" in the expression "pay the same" in sub-cl. (1) of R. 20 of the Rules framed by the Financial Commissioner under S. 28 refers to all the land revenue and not merely to the land revenue which has been collected by the lambardar. A I R (Vol 25) 1938 Pesh 25 : 39 Cr L J 741 : 1938 Pesh L J 31 : 176 Ind Cas 406 (DB).

——S. 28—Succession to lambardar – Appointment of a member of junior branch—On death, successor did not revert to senior line.

Land Revenue R. No. 17 (ii) of the Rules under the Punjab Land Revenue Act must be construed strictly. Where on the death of a lambardar his successor was overlooked and a member of the junior branch was appointed and there was no office note in

respect of the person overlooked nor was there any mistake.

Held, that on the death of the succeeding lambardar the office should go by primogeniture to his successor and that it did not revert to the senior line. (1930) 9 Lah L T 11.

——S. 28 — Transfer of land to Patwari — Contract Act, S. 23—Opposed to public policy.

A transfer of land to a Patwari in contravention of rules framed by the Financial Commissioner under S. 28 of the Punjab Land Revenue Act 18 of 1887, is void under S. 23 of the Contract Act, being opposed to public policy. 39 All 51 (FB), Dissented from. AIR (Vol 14) 1927 Lah 18 : 7 Lah 463 : 27 P L R 740 : 98 Ind Cas 673 (DB).

—S. 34.

——S. 34—Mutation—Entry in—Value of.

A mere entry in the mutation register will not give any title. AIR (Vol 27) 1940 Lah 421 : 42 P L R 301: 191 Ind Cas 190 (DB).

——S. 34—Mutation—Value of.

The mutation in favour of a person is not conclusive evidence of the transfer of the land to him. AIR (Vol 27) 1944 Lah 311 : 42 P L R 294.

——S. 34—Mutation—Value of.

Mutation by itself does not confer any title and cannot affect the term of a written contract between the parties. (1934) 35 P L R 606 (DB).

——S. 36.

——S. 36—Attachment under S. 146 of the Criminal P. C.—Procedure.

Section 36 of the Act is not applicable to cases in which the property has been attached by a Magistrate under S. 146 of the Criminal P. C. If one of the parties after such attachment is put in possession of the property by a Revenue Officer under S. 36 of the Act the chief Court as a Criminal Court cannot interfere in revision. (A I R (Vol 5) 1918 Lah 390 : 46 P W R 1947 Cr : 19 Cr L J 261 : 44 Ind Cas 117.

——S. 36—Mutation — Revenue Officer — Power to put persons into possession.

Section 36, cl. (2) of the Act does not empower a Revenue Officer to eject a third party actually in possession of the land in dispute. The section applies only where the legal or constructive succession is vacant. 4 P W R 1917 Rev : 43 Ind Cas 216.

—S. 37.

——S. 37 (a) — Correcting entry in annual record — Revenue Officer.

A Revenue Officer in correcting entries in annual records caused by the mistake or fraud of a Patwari or Kanungo is not reviewing or revising an order of a predecessor of Revenue Officer. 4 P W R 1913 Rev : 4 P R 1913 Rev : 201 P L R 1913 : 19 Ind Cas 302.

—S. 42.

——S. 42 — Excavation of stones by non-proprietors of Village Paurmiana in Campbellpur district—Government's right to levy royalty—Wajib-ul-arz—Construction.

On a true construction of the Wajib-ul-arz prepared at three successive settlements, viz., those of 1884-88, 1902-03 and 1923-24, taken with the provisions of S. 42 of the Punjab Land Revenue Act, the Government have a right to levy royalty on stones excavated from khasra Nos. 591 and 1104 by the non-proprietors of Village Paurmiana in the Campbellpur district. A I R (Vol 36) 1949 Lah 124 ; Pak L R (1948) Lah 319.

—S. 44.

1. Settlement records.
2. Pedigree.
3. Record of rights.
4. Wajib-ul-arz.
5. Old and new entries.
6. Burden of proof.
7. Evidentiary value—Particular instances.
8. Appeal.

1. Settlement records.

——S. 44—Record of earlier statements.

The presumption of correctness of entries in revenue records has retrospective effect and this presumption applies equally to earlier settlements. (1940) 42 P L R 531 (DB).

——S. 44—Revenue entries.

When the defendants are shown as tenants-at-will in the revenue records, no presumption of correctness attaches to such entries. (1940) 42 P L R 497.

——S. 44—Records of current settlement.

The statutory presumption raised by S. 44 applies to the records of the current settlements where these differ from those of previous settlements which have been corrected. AIR (Vol 23) 1936 Lah 453 : 38 P L R 1086 : 167 Ind Cas 693 (DB).

——S. 44—Revenue records—Presumed correct.

Under S. 44 of the Act a presumption arises as to the correctness of Revenue Records. A I R (Vol 10) 1923 Lah 243 : 81 Ind Cas 336.

——S. 44 — Settlement records of 1868 and 1892 entries in—Presumption—Ownership—Grazing cattle and cutting grass.

After the settlement of 1852, the settlement records of 1868 and 1892, have been prepared with greater care and accuracy and consequently the presumption to be attached under S. 44 of the Act as to the correctness of the entries made therein cannot be rebutted by the provisions of the Rewaj-i-am prepared in the settlement of 1852. A I R (Vol 4) 1917 Lah 368 : 54 P W R 1917 : 41 Ind Cas 755.

——Ss. 44 and 46 — Correctness of entry — Entry of amount due on the mortgage—List of mortgages.

An entry of the amount of mortgage-money due set out in the statement of mortgages with possession prepared at the settlement of 1898, has the same presumption of correctness under S. 44 of the Punjab Land Revenue Act as all other entries in a Record of Right such statement being one under Statement H under No. 86 of the rules framed under S. 46 of the Act. A I R (Vol 2) 1915 Lah 98 : 55 P R 1915 : 50 P L R 1916 : 167 P W R 1915 : 30 Ind Cas 87 (DB).

2. Pedigree.

——S. 44—Pedigree-tables which appear in the revenue records under S. 44, Punjab Land Revenue Act, must be considered to be true unless the party contesting their truth is able to show that they are untrue. It is not correct to say that it is a matter of common knowledge that common ancestors shown in the pedigree-tables mentioned in the settlement records are more or less traditional persons introduced merely to show the common origin of the particular tribe inhabiting a particular village. AIR (Vol 31) 1944 Pesh 3 : 211 Ind Cas 633: 1944 Pesh L J 3 (DB).

——S. 44—A presumption of trust attaches to those pedigree tables which appear in the revenue records under S. 44, Punjab Land Revenue Act. AIR (Vol 31) 1944 Pesh 3 : 211 Ind Cas 633: 1944 Pesh L J 3 (DB).

——S. 44—Object—Evidentiary value.

A genealogical tree (pedigree-table) is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be recorded of the acquisition of every bit of land held by all persons whose names appear in it. AIR (Vol 28) 1941 P C 21 : 7 B R 665 : ILR (1941) Lah 154 : 68 I A 1 : 43 Bom L R 432 : 43 P L R 318: 1941 A L J 530 : ILR (1941) Kar (P C) 22 Sup : 1941 AWR 314 : 193 Ind Cas 436.

——S. 44—Entries made at the time of Settlement — Admissible.

Entries made in the pedigree table prepared at the time of the settlement giving the history of the land

are admissible in evidence. AIR (Vol 16) 1929 Lah 58 : 30 Pun L R 678.

——S. 44 — Devolution of land — Entry in pedigree table—No presumption as to correctness.

Although a presumption of correctness attaches to pedigree-table contained in the Record of Rights under S. 44 of the Land Revenue Act, that presumption does not extend to an entry made in the pedigree-table with respect to an extraneous matter entirely unconnected with the questions of the relationship, as for instance, devolution of lands in a village. If such entries appear on the face of them to be erroneous, a Court would be justified in not accepting them. AIR (Vol 11) 1924 Lah 444 : 5 Lah 84 : 80 Ind Cas 998 (DB).

——S. 44 —Onus.

The presumption of truth as to the entries in a Record of Rights under S. 44 extends also to a Settlement Pedigree Table forming part of the record. 215 P W R 1912 : 111 P L R 1913 : 18 Ind Cas 218 (DB).

3. Record of rights.

——Ss. 44, 31 — Surati dehi, if part of Record of Rights — If sufficient to rebut entry in Record of Rights.

The presumption of truth attaches to the entry in the Record of Rights and the annual record, and it lies heavily on the person who alleges that the entry is wrong, to prove that it is so.

Surati dehi is not a part of the Record of Rights and no presumption of correctness attaches to the entries made in it. AIR (Vol 29) 1942 Pesh 35 : 1942 Pesh L J 35 : 200 Ind Cas 299.

——S. 44—An entry in Record of Rights is presumed to be correct under S. 44, Punjab Land Revenue Act. AIR (Vol 26) 1939 P C 114 : 5 B R 534 : 1939 A W R 50 : 1939 O W N 461 : 1939 R D 339 . ILR (1939) Kar P C 160 Sup : 180 Ind Cas 770.

——S. 44 — Presumption of correctness under S. 44 attaches not only to Record of Rights prepared at the settlement, but to any entry made in Record of Rights in accordance with law. AIR (Vol 22) 1935 Lah 87 (DB).

——S. 44—Presumption—Rebuttal.

Under S. 44, there is a statutory presumption that the entries in the Record of Rights are correct, and the plaintiff, in order to succeed, must establish that the mutation order is a false document. The mere fact that the patwari has committed some irregularity in submitting the report on which the order of mutation is based is insufficient to displace the presumption which arises under S. 44 and in the absence of definite proof that the order of mutation is false, the onus cannot be held to be discharged. AIR (Vol 21) 1934 Lah 472 : 35 P L R 491 : 151 Ind Cas 884.

——S. 44 —Entry giving reasons for non-payment of rent—Presumption.

Per Bhide J.—It is true that the Punjab Land Revenue Act or the rules thereunder do not require any reasons for non-payment of rent or adverse title set up by the tenants to be recorded in the Record of Rights. But though the presumption under S. 44 may not, strictly speaking, apply to such an entry, there is no good reason why an entry of this kind in a public record made by a public servant in the discharge of his official duties should not be held to be relevant under S. 35 of the Evidence Act. AIR (Vol 19) 1932 Lah 586 : 33 P L R 771 : 13 I 482: 140 Ind Cas 474 (DB).

——S. 44—Entries in — Value of.

An entry that the land in question was a graveyard for Mahomedans is conclusive as to its character as waqf by user if not by dedication. (1913) 40 Cal 297: 40 I A 18 : 1 P W R 1913 : 17 C L J 360 : 27 P R 1913 : 83 P L R 1913 : 11 A L J 265 : 13 M L T 318 : (1913) M W N 270 : 15 Bom L R 438 : 25 M L J 61 : 17 Ind Cas 744 (P C).

4. Wajib-ul-arz.

——S. 44—Presumption of correctness attaches to the provisions of a village wajib-ul-arz even though its entries have not been repeated in later settlements. AIR (Vol 26) 1939 Lah 105 : 41 P L R 21 : 183 Ind Cas 794.

——S. 44 —Presumption of correctness.

The provisions of village wajib-ul-arz carry a presumption of correctness under S. 44 unless the entry was dictated by interested persons and was false. The mere fact that no instances are given in support of the wajib-ul-arz is not material. A I R (Vol 26) 1939 Lah 53 : 40 P L R 990 : ILR (1939) Lah 266 : 181 Ind Cas 436.

5. Old and new entries.

——S. 44—Preference to the later.

The presumption of correctness that attaches to revenue records must attach to the later record in preference to the earlier one unless it could be shown to be wrong. A I R (Vol 14) 1927 Lah 607 : 103 Ind Cas 266 (DB).

6. Burden of proof.

——S. 44—Mutation entries—Presumption.

The proceedings relating to a mutation are admittedly not covered by S. 44 and it is wrong to suppose that merely because there is a mention in the order of the attesting officer that the vendor has consented to a sale, the onus of proving that he did not do so lies originally on him, viz., the person who disclaims the sale. No such presumption arises as to justify the placing of the onus probandi on the party who impugns the existence of such transaction. The onus lies on the person who seeks to establish the genuineness of the transfer. A I R (Vol 23) 1936 Pesh 149 : 163 Ind Cas 594.

——S. 44—Mortgage — Redemption — Sale of equity of redemption — Burden of proof— Record of Rights, entry in—Presumption.

Under S. 44, there is a statutory presumption that the entries in the Record of Rights are correct, and that the plaintiffs, in order to succeed, must establish that the mutation order is a false document

The mere fact that the patwari had committed some irregularities in submitting the report on which the order of mutation was passed, is insufficient to displace the presumption under S. 44, and that in the absence of definite proof that the order of mutation itself is false, the plaintiffs cannot be held to have discharged the burden that lay upon them. (1929) 120 Ind Cas 789 (2), Reversed. AIR (Vol 21) 1934 P C 40: 65 M L J 866 : 58 C L J 492 : 36 Bom L R 132 : 38 C W N 173 : 146 Ind Cas 506.

——S. 44 — Burden of proving that entries are wrong —Later record to be preferred to earlier one.

Under S. 44, an entry made in a Record of Rights in accordance with the law for the time being in force must be presumed to be correct until the contrary is proved or a new entry is lawfully substituted therefor. Onus of proof to the contrary lies heavily on the party alleging it. The presumption of correctness that attaches to Revenue Records must attach to the later record in preference to the earlier one unless it could be shown to be wrong. AIR (Vol 21) 1934 Lah 309 : 151 Ind Cas 407.

——S. 44— Mutation entry — Onus of proving mistake.

The onus of proving that a mistake was made and that the intention of one of the parties was not correctly expressed in recording the mutation entries lies very heavily upon the party seeking to impugn the entries on that ground specially where it appears that the parties were present at the time of mutation the Revenue Officers made every effort to ascertain

what they wished to be done and mutation entries themselves are quite clear. AIR (Vol 5) 1918 Lah 321: 2 P W R 1918 : 153 P L R 1917 : 44 Ind Cas 277 (DB).

——S. 44—Presumption of entries—Onus of proof.

Where a mutation has been effected in favour of A as the legitimate son of B the burden of proving the illegitimacy of A will be on the person asserting it. AIR (Vol 2) 1915 Lah 77 : 255 P W R 1915 : 26 Ind Cas 969 (DB).

——S. 44—Entries in Revenue Record.

Entries in Revenue Records must be presumed to be correct until the contrary is proved. 160 P W R 1913 : 280 P L R 1913 : 20 Ind Cas 831.

7. Evidentiary value—Particular instances.

——Khasra Girdawaris—Khudh-kasht, meaning of—Entry in, if conclusive as to residence of owner.

The mere entry of khudkasht in Khasra Girdawaris of village in the name of a person is not conclusive that the person resides in that village for purposes of cultivation, as khudkasht does not only mean cultivation by the person himself but also includes cultivation through his servants and associates. AIR (Vol 29) 1942 Lah 19 : 44 P L R 21 : ILR (1942) Lah 217 : 199 Ind Cas 395 (FB).

——S. 44—Mutation carries presumption of truth.

Entries in mutation proceedings are admissible per se, Officials, making them need not be produced. AIR (Vol 27) 1940 Lah 118 : 41 P L R 308.

——S. 44 — Where plaintiff sues for declaration that he is the sole owner but, in the revenue papers, his brother is entered as owner of one-half, it is for the plaintiff to displace the presumption arising from this under the provisions of S. 44. (1936) 165 Ind Cas 586 : 38 P L R 1126 (DB).

——S. 44—Rebuttal.

Presumption that Revenue Records are true can be rebutted by suitable evidence. (1934) 36 P L R 323 (DB).

——S. 44—Where the descendants of the first Mahant of a Gurudwara succeeded him as Mahants and inherited certain property which was owned by the deceased Mahant, it was held that the property belonged to the institution and was not personal property. (1934) 36 P L R 323 (DB).

——S. 44 — In the case of an assignment of the proprietary rights in the land for the service and maintenance of a Gurudwara, the provisions of S. 18 (i) (b), Punjab Sikh Gurudwaras Act, are applicable and the presumption therein contained displaces the presumption which otherwise would arise under S. 44, Punjab Land Revenue Act. AIR (Vol 20) 1933 Lah 137 : 142 Ind Cas 530 (DB).

——S. 44—Ex parte entries value of.

A revenue entry based simply on the claim of the party in whose favour it is made and without concurrence and in absence of the party adversely affected, has little presumptive value. AIR (Vol 19) 1932 Lah 81 : 32 P L R 731 : 135 Ind Cas 501 (DB).

——S. 44 Evidentiary value — Record of Rights — Entry not conclusive of title

The entries in the Record-of-Rights are not the foundations of the title but are mere items of evidence to be adduced by a vendee to prove the sale. A I R (Vol 17) 1930 P C 91 : 1930 A L J 292 : 32 Bom L R 380 : 31 P L R 145 31 M L W 321 : 11 Lah 199 : 57 I A 86 : 122 Ind Cas 316.

——S. 44 — Entry in mutations — Presumption as to correctness— Rebuttal.

Under S. 44, there is a presumption of correctness of entries in the mutations. Unless rebutted by inherent evidence available from the entries themselves, the party challenging the correctness has to rebut this presumption. It is not necessary to prove that all the formalities were duly complied with in respect of the mutations. AIR (Vol 16) 1929 Lah 93 : 111 Ind Cas 357.

——S. 44 — Revenue records — Rebuttable presumption of correctness only.

Revenue records merely raise a presumption of correctness of entries therein and where they are challenged, finding given without considering evidence in rebuttal is liable to be set aside. (A I R (Vol 14) 1927 Lah 850 : 26 P L R 673 : 105 Ind Cas 562.

——S. 44— Long series of old entries to the contrary —Presumption sufficiently rebutted.

The presumption attaching to new entries regarding khewat is sufficiently rebutted by a long series of old contrary entries when it is not clear what influenced the revenue authorities in making the change. (1926) 95 Ind Cas 236 (Lah) (DB).

——S. 44— Revenue Records—Entry as to caste—No presumption of correctness— Caste has to be proved.

The mere fact that there is an entry as to the caste of a particular person in the Revenue Records does not in any way relieve him from the necessity of proving that he really belongs to that caste if the fact is contested by the opposite party. S. 44 of the Land Revenue Act merely provides that entries in the annual records shall be presumed to be true until the contrary is proved. The annual recor comprises the statements mentioned in sub-section 2 Cl. (a) of S. 31, and a statement as to the caste of a land-owner is not a statement covered by S. 31 (2) (a) and therefore no presumption of correctness attaches to such entry. A I R (Vol 11) 1924 Lah 151 : 4 Lah 327 : 5 L L J 462 : 76 Ind Cas 91 (DB).

——S. 44—Existence of custom.

The section is not much useful where the fact to be established is the existence of custom. 11 P R 1911 : 83 P L R 1911 : 57 P W R 1911 : 9 Ind Cas 683 (DB).

8. Appeal.

——S. 44— Current settlement — Disregard of presumption by lower Appellate Court—Effect.

A presumption of truth attaches to the record of the current settlement. Where the judgment of the lower Appellate Court proceeds upon a clear disregard of the provisions of S. 44, the finding is not binding on the High Court in second appeal. A I R (Vol 22) 1935 Lah 912: 37 P L R 570 & 653: 157 Ind Cas 561.

——S. 44 — Finding on wrong presumption contrary to S. 44—Whether can be upset in second appeal.

Where the finding of the District Judge, however, is vitiated by the fact that he did not take into account the presumption attaching to the current settlement record under S. 44, and he also gave his finding under the misapprehension that a settlement had been carried out in the year 1884, the finding can be upset in second appeal. AIR (Vol 21) 1934 Lah 309 : 151 Ind Cas 407.

—S. 45.

——S. 45 — Specific Relief Act, S. 42 — Scope — Suit for correction of revenue entries—Limitation.

Section 45 clearly empowers any person aggrieved by an entry in the Record of Rights to seek relief under S. 42, Specific Relief Act. It is for the plaintiffs to decide whether they feel aggrieved by any such entry and if the plaintiffs assert that they are so aggrieved, the defendants cannot be allowed to urge that the plaintiffs should not feel aggrieved and be not permitted to knock at the door of the Court.

A declaratory suit in respect of an entry made in Record of Rights filed under S 42, Specific Relief Act, read with S. 45, Punjab Land Revenue Act, is governed by Art. 120, Limitation Act, in all such cases, the cause of action accrues when the plaintiff feels aggrieved and not from the date of the entry.

A I R (Vol 23) 1936 Lah 37 : 38 P L R 748 : 165 Ind Cas 626 (DB).

——S. 45 —Scope.

Where the plaintiff was in possession of land which was the subject of alienation by will in defendant's favour, the mutation had been effected in favour: of defendant, and the plaintiff filed a suit for declaration of his title :

Held, that it was not necessary for the plaintiff to bring any suit to set aside the alienation by the will, as he was in possession and that his suit fell under S. 45 and was governed by Art. 1 of Sch., to Punjab Limitation (Custom) Act. A I R (Vol 21) 1934 Lah 134 : 15 Lah 469 : 36 P L R 357 : 152 Ind Cas 100.

——S. 45 — Suit under Specific Relief Act, S. 42 — No distinction between a suit under S. 45 and one under specific Relief Act, S. 42.

There is no distinction between a suit under S. 45, Punjab Land Revenue Act, and one under S. 42, Specific Relief Act, because S. 45, Punjab Land Revenue Act, also contemplates a declaratory suit with or without consequential relief under the provisions of the Specific Relief Act. It does not create a new description of suit but merely indicates the remedy of a person who may feel aggrieved by an adverse entry in the Record-of-Rights in other words, if specifies an occasion when a party may bring a declaratory suit under the provisions of the Specific Relief Act. A I R (Vol 15) 1928 Lah 516 : 9 Lah 428 : 119 Ind Cas 258 (DB).

——Ss. 45, 48 and 158 (1)—Jurisdiction — Civil and Revenue Courts — Suit by Jagirdar for declaration of right to receive rent in kind.

The plaintiff sued for a declaration that as jagirdar or assignee of land revenue, he was entitled to receive the revenue in kind out of the landlord's share of the produce which had to be paid by the tenants to proprietors, but which, as a matter of fact, had always been paid to him by the cultivators in the shape of one-fourths of the produce :

Held, that the suit involved the question as to whether in the village concerned the land revenue should be paid to the jagirdar in cash or in kind. This being a question, which under S. 48 of the Land Revenue Act can be decided only by the local Government, no civil Court can exercise jurisdiction in respect of it. The fact that the present suit was one for a declaration did not give the civil Courts jurisdiction to entertain it, notwithstanding S. 45 of the Act. AIR (Vol 5) 1918 Lah 191 : 110 P R 1918 : 48 Ind Cas 384.

——S. 45—Jurisdiction—Civil and Revenue Courts.

A suit by an occupancy tenant for a declaration that according to the Tenancy Act (1887) S. 5 they are not liable to pay enhancement according to a fresh entry into the Record of Rights is cognisable by civil and not by Revenue Court. 103 P W R 1910: 73 P R 1910 : 144 P L R 1910 : 7 Ind Cas 717.

—S. 70.

——S. 70 — Panchotra money — Not covered by the section.

The income of the Panchotra is not covered by S. 60, Civil P. C., nor by S. 70 of Act XVII of 1887. A I R (Vol 11) 1924 Lah 226 : 73 Ind Cas 928.

—S. 93.

——S. 93—Claim under, for recovery of purchase-money—Art. 120, Limitation Act, applies.

There is no specific article of the Limitation Act that would govern a claim for recovery of purchase price under the statutory provisions of S. 93, Punjab Land Revenue Act, and the only article that can be made applicable is Art. 120, Limitation Act. A I R (Vol 32) 1945 Lah 164 : 47 P L R 122 : 221 Ind Cas 524 (DB).

—S. 111.

——S. 111—'Land' — Well — Whether can be partitioned.

Under S. 111 of the Land Revenue Act, any joint owner of land may apply to a revenue officer for a partition of his share in the land. The word "land" is not defined in the Act. But the wording of S. 112 (2) (a) shows that the partition of a well is contemplated. It is obviously not possible to divide a well into separate physical parcels for allotment to each co-sharer. The intention of the Legislature must have been that where there is a large area to be partitioned containing one or more wells, partition may be effected by giving to one co-sharer one well and the land which depends for its supply of water on that well. When partition in some such manner is not possible, the well may be excluded from partition and retained as the joint property of co-sharers, it being left to the revenue officer to determine under S. 119 of the Act how the different co-sharers will irrigate their respective lands from that well and how the expenditure on the maintenance of the well will be divided among them. (1947) 26 L L T 16.

——S. 111 — "Land" — Masonry cylinder of well—Whether can be partitioned.

The masonry cylinder of a well is a structure and not land. A person who has a share in the masonry cylinder alone of a well and none in the land on which the well is sunk is not a "joint owner of land" within the meaning of S. 111 of the Land Revenue Act and has no "share in the land" which can be partitioned in accordance with the provisions of Ch. 9 of the Act. (1947) 26 L L T 16.

——S. 111—Mortgagee, if can claim partition.

Section 111 confers the right of partition only on joint owners or joint tenants and unless a person falls under either of these categories, he cannot claim partition of agricultural land as of right. And when once it is held that a mortgagee is not an owner of land, he cannot enforce partition under S. 111 in any manner. AIR (Vol 25) 1938 Lah 615 : 40 P L R 612 : I L R (1938) Lah 589 : 178 Ind Cas 64 (DB).

——S. 111 — Where an award does not partition any properties in the shape of agricultural land, the civil Court has jurisdiction to order that it might be filed. A I R (Vol 20) 1933 Lah 1034 : 147 Ind Cas 768.

——S. 111 — Scope of power under — Partition of immovables and movables — Award — Agricultural land incapable of being split up from the rest of the award decree cannot be passed.

Where there is no question of title between the parties but only one of partition by actual metes and bounds of the immovable property including agricultural land held jointly by them and of movables, an award partitioning the property, such that it cannot be split up so as to divorce the agricultural land from rest of the award, cannot be made rule of the Court so as to pass a decree enforcing the partition by metes and bounds. A I R (Vol 17) 1930 Lah 418 : 121 Ind Cas 300.

——S. 111 — Procedure — Question of title raised—Proceeding under S. 117—Proper.

Where a question of title is raised in proceedings under S. 111 the proper course for the Revenue Officer would be to proceed under S. 117 and to either stay the proceedings for the determination of the question by a competent Court or to determine the question himself as if he were a civil Court. AIR (Vol 10) 1923 Lah 81 : 19 P W R 1923 : 71 Ind Cas 28.

——S. 111—Jurisdiction of Civil Court—Widow applying for partition—Partition ordered—Question of title not decided — Subsequent civil suit to decide title—Maintainable.

Where in an application by a widow demanding partition the plaintiff co-sharer disputed her right to partition on the basis of a custom to the contrary,

but the Revenue Officer without deciding the question of title ordered partition :

Held, that S. 111 does not deal with questions of title or with questions relating to the right of a joint land owner to obtain or compel partition and the fact that partition had taken place is no sufficient reason for holding that a subsequent civil suit to decide question of title which has not been disposed of in the partition proceedings is barred. AIR (Vol 10) 1923 Lah 81 : 19 P W R 1923 : 71 Ind Cas 28 (DB).

——S. 111—Application by widow — Widow's right to partition.

A widow under S. 111 of the Act has a statutory right to demand a partition. But it may be proved that under a custom she has no such right. A I R (Vol 10) 1923 Lah 81 : 19 P W R 1923 : 71 Ind Cas 28 (DB).

——S. 111—Right to partition — Onus on the person denying.

As the Riwaj-i-am of Jullundar District recognises the right of a widow, governed by the agricultural custom, to claim partition of her husband's share of a joint estate, the burden of proof, that there is no such custom is on the collaterals who deny it. A I R (Vol 9) 1922 Lah 362 : 3 Lah 236 : 68 Ind Cas 553 (DB).

——S. 111 — Partition proceedings — Mortgagee of undivided share—Suit by.

A mortgagee of an undivided share in joint property, alleging injury to his interest by the collusive conduct of the mortgagor in partition proceedings, can claim his remedy by a regular suit in the civil Courts. A dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act. 2 P R 1918 Rev. : 3 P W R 1918 Rev. : 45 Ind Cas 405.

——Ss. 111, 115 and 117—Custom—Widow, right of to demand partition of joint holding—Procedure.

A widow in the enjoyment of a life-estate in an undivided holding can under S 111 apply to a Revenue Officer for partition which she may or may not be entitled to obtain in virtue of her life-estate.

Agricultural custom in the Punjab does not confer on such a widow the right to obtain partition. 70 P R 1912, Diss.

She can get separate possession of her share, as distinguished from a definite partition through a civil Court but not through a Revenue Officer under Chap. IX of the Act. The procedure, to be followed when a widow in possession of her life-estate in a joint holding applies for partition, discussed. 4 P R 1917 Rev. : 1 P W R 1917 Rev. : 41 Ind Cas 473.

——S. 111——Adhasalidar's right to partition.

Adhasalidar who gets part of profits for paying part of revenue is neither a joint owner nor a joint tenant. 191 P W R 1911 : 75 P R 1911 : 152 P L R 1911 : 10 Ind Cas 147.

——S. 111—Widow—Life-estate.

A widow who is enjoying under custom a life-estate in the landed property of her husband cannot claim by partition under S. 111 of the Act her husband's share though she can obtain a decree in a civil Court for separate possession, if she can show that she cannot otherwise obtain full enjoyment of that share. 100 P L R 1909 : 155 P W R 1909 : 4 Ind Cas 1016 (DB).

—S. 115.

——Ss. 115, 158 — Collector disallowing partition—Civil Court, powers of.

Where the Collector has chosen to disallow partition in the exercise of his discretion under S. 115, a civil Court has no jurisdiction to go into the question whether partition of the land in dispute was rightly dis-allowed by the Collector under that section. AIR (Vol 27) 1940 Lah 428 : 42 P L R 759 : I L R (1941) Lah 536 : 191 Ind Cas 268 (DB).

——S 115—Powers of Revenue Officer.

As S. 115 authorizes a Revenue Officer to disallow partition even of the whole of the land included in an application for partition, there is no bar to his disallowing partition of a part of it if he finds a 'good and sufficient' cause for doing so. A I R (Vol 27) 1940 Lah 428 : 42 P L R 759 : ILR (1941) Lah 536 : 191 Ind Cas 268 (DB).

——S. 115—Interpretation.

The expression "question as to the property to be divided" as used in S. 115 means a question other than that of title as to the property divided. AIR (Vol 17) 1930 Lah 513 : 31 P L R 484 (FB).

——S. 115 — Scope of power under — Discretion of Revenue Officer, very wide—Reasons for disallowing partition Civil Courts cannot question.

Section 115 gives the Revenue Officer a very wide discretion which is subject to control by the higher revenue authorities only and it is beyond dispute that civil Courts have no jurisdiction to question the reasons given by the Revenues Officer disallowing partition under the section. AIR (Vol 17) 1930 Lah 513 : 31 P L R 484 (FB).

——Ss. 115 and 116 — Wajib ul-arz — Partition of Shamilat Duty of Revenue Officer.

An entry in the Wajib-ul-arz prohibiting the partition of Shamilat lands does not necessarily operate as a bar to a partition, it being the duty of the Revenue Officer dealing with the partition to decide whether such a clause should prevail or not.

Held that as the conditions had changed and a large section of the community contested the Wajib-ul-arz the Revenue Officer was justified in sanctioning partition. 1 P R 1915 Rev : 32 P L R 1916 : 29 Ind Cas 498.

——S. 115 — Partition — Description of Revenue Officer.

Under S. 115 of the Punjab Land Revenue Act Revenue Officer has a discretionary authority to disallow an application for partition and ought to refuse it in every case in which the same question has been previously decided unless it is shown that the circumstances which made the previous order appropriate have changed. 5 P R 1914 Rev : 229 P L R 1915 : 27 Ind Cas 417.

—S. 116

——S. 116 — The question whether the garden and the kothas in the garden are the joint property of two brothers or the sole property of one of them is a question of title within the meaning of S. 116. AIR (Vol 22) 1935 Lah 175 : 36 P L R 497 : 155 Ind Cas 282 (DB).

——Ss. 116. 117 — Civil and Revenue Court—Suit for declaration—Partition of common land effected by Revenue Authorities.

A suit for a declaration that a certain partition of common land effected by the Revenue authorities is inoperative so far as plaintiff's interests are concerned, the partition having been affected in accordance with Khewat of 1880 settlement and not according to the Khewat of the 1909 settlement, is cognizable by civil Court.

The fact that the partition had actually been completed did not oust the jurisdiction of the civil Courts. AIR (Vol 6) 1919 Lah 9 : 112 P R 1919 : 53 Ind Cas 419 (DB).

—S. 117

——S. 117—Declaratory suit—Jurisdiction of Civil Court.

S. 117, Punjab Land Revenue Act does not deprive the Civil Court of its jurisdiction to decide a declaratory suit. A I R (Vol 37) 1950 Lah 126 : Pak L R (1950) Lah 201.

——S. 117—Question of title raised—Jurisdiction of Civil Court.

Where, in a proceeding for partition before a Revenue Officer, a question of title is raised, the Civil Courts have no jurisdiction as long as it is the intention of the Revenue Officer to determine the question of title himself. But if the Revenue Officer has no intention of determining the question or having had such an intention, has abandoned it then the jurisdiction of the Civil Courts will not be ousted. AIR (Vol 31) 1944 Pesh 24 : 214 Ind Cas 16 (DB).

——Ss. 117, 158 (1) — Once the Revenue Officer decides to determine the question of title himself under S. 117, the jurisdiction of the Civil Court is precluded by S. 158 (1). A I R (Vol 29) 1942 Pesh 16 : 198 Ind Cas 618.

— S. 117 — Question of title — Revenue Officer expressing opinion on question of title in summary manner—Civil Court, jurisdiction of.

The question whether the plaintiffs are exclusive owners of the land is one of "title" and where it has been raised before the Revenue Officer in the course of partition proceedings, that officer should follow the procedure prescribed in S. 117. He should either constitute himself into a Civil Court and try the question in accordance with the procedure laid down in sub-s. (2) of S. 117 or he should stay the partition proceedings and refer the parties to have this question also determined by a Civil Court. If, instead of adopting either of these courses he, in a summary manner, expresses the opinion that the objectors have failed to establish their title, his finding cannot bar the cognizance of the question by Civil Courts. AIR (Vol 28) 1941 Lah 144 : 43 P L R 41 : 195 Ind Cas 244 (DB).

——S. 117—Jurisdiction—Civil and Revenue Courts —Revenue Officer not deciding question of title as Civil Court but only expressing opinion on it—Party asked to establish title in Civil Court within 60 days of order—Civil Court, if has jurisdiction — Limitation for such suit.

When a question as to title of the land to be partitioned is raised during partition proceedings. the Revenue Officer may either decide the question of title himself as a Civil Court or refer the matter to a Civil Court for decision. If there was no plaint, there was no written statement, no issues were struck—in a word, there were no formal proceedings and the Revenue Officer expresses an opinion that the title of a party is ill-founded and orders that a suit in Civil Court for establishing title may be instituted within 60 days, the Revenue Officer does not proceed as a Civil Court and hence, his direction to lodge a civil suit still stands and the Civil Court has jurisdiction to decide the suit.

And even if such a suit to establish title is not filed within 60 days of the order of the Revenue Court, it may be lodged at any time within limitation, even after the partition is completed. A I R (Vol 24) 1937 Lah 315 : 174 Ind Cas 734 (DB)

——S. 117 — S. 117, if contemplates institution of suit in Revenue Court—Civil P. C. (Act V of 1908), S. 10—Applicability of.

Section 117 itself does not contemplate the institution of a suit in the Revenue Court. Where a direction had been given by the Revenue Court to the plaintiffs to institute a suit in his Court and as he had in the meantime consigned to the record room the proceedings relating to partition ,no proceedings were pending in his Court; S. 10, Civil P. C., does not govern the case. AIR (Vol 23) 1936 Lah 589 : 160 Ind Cas 953.

——S. 117—Action taken under S. 117 — Defendant referred to Civil Court — Refusal of High Court to grant declaration — Duty of Revenue Authorities— Subsequent denial of plaintiff's title — Time, when begins to run against plaintiff.

Where the Revenue Authorities took action under S. 117 and prima facie holding the claim of the plaintiff as valid in law, referred the defendant to a Civil Court to obtain a declaration in his favour, but the declaration was refused by the High Court and thereafter the plaintiff approached the Revenue Authorities to revive the partition proceedings :

Held, that the Revenue Authorities had no justification to refuse to correct their entries and bring them into accordance with the judgment of the High Court and that even if the defendant persisted in his denial of the title of the plaintiff in spite of the adverse decision of the High Court, time began to run against the plaintiff from the date of his subsequent denial. AIR (Vol 22) 1935 Lah 63 : 152 Ind Cas 821 (DB).

——S. 117—Dispute as to title—Suit for declaration of title—Jurisdiction.

Section 117 does not expressly deprive the ordinary Courts of jurisdiction to decide a suit for declaration of title arising out of partition proceedings, but only confers such jurisdiction on Revenue Courts. A I R (Vol 20) 1933 Lah 412 : 34 P L R 115 : 142 Ind Cas 606 (DB).

——S. 117 — Stay of proceedings — Stayed by High Court—Section inapplicable.

— S. 117 (2) (d) of the Punjab Land Revenue Act is inapplicable to a case of injunction by the High Court to the Revenue Officer before whom partition proceedings are pending. A I R (Vol 18) 1931 Lah 176 : 123 Ind Cas 82.

——S. 117—Scope of power—Revenue Officer's right to decide title—Limited to partition proceedings.

Under S. 117, Revenue Officer can decide question of title only when that question arises in partition proceedings. Revenue Officer has no power to entertain any other suit simply because one of the issues involved therein relates to title. A I R (Vol 14) 1927 Lah 412 : 28 P L R 197 : 102 Ind Cas 33 (DB).

——S. 117 — Question of title determined by Civil Court — Appeal in High Court pending — Revenue Officer cannot be restrained by injunction.

Where the question of title is determined by the Revenue Officer himself, and an appeal from his order is pending in the District Court or High Court, that Court is empowered by cl. (d) of Sub-S. (2) of S. 117 to issue an injunction to the Revenue Officer requiring him to stay proceedings pending the disposal of the appeal, but no such power is given either to the High Court or the District Court in a case where the question of title is enquired into and determined by a Civil Court. A I R (Vol 13) 1926 Lah 284 : 27 P L R 11 : 96 Ind Cas 540.

——S. 117—Title disputed—Decree for possession— If Revenue Officer can pass.

The only power which S. 117 of the Land Revenne Act gives to a Revenue Officer acting as a Court is to determine the question of title arising in the partition proceedings, and he has no power under that section to pass a decree for possession of the land of which the title is in dispute A I R (Vol 13) 1926 Lah 238 : 27 P L R 65 : 92 Ind Cas 980.

——S. 117—Forum of appeal — Depends on value of subject-matter.

The value of the subject-matter determines whether an appeal from an order passed by a Revenue Officer acting under S. 117 (2) lies to the District Judge or to the High Court. AIR (Vol 12) 1925 Lah 136 : 82 Ind Cas 243.

——S. 117—Partition proceedings—Revenue Officer Rights in Shamilat—Decision—Effect of — Subsequent civil suit—Res judicata.

The question raised in the suit, viz., whether the Shamilat should be partitioned in accordance with the

ancestral shares or hasab rasad khewat, being a question of title is not res judicata by reason of the decision on this point by the Revenue Officer in partition proceedings, the officer not having decided it in accordance with the procedure laid down in S. 117 of the Act. A I R (Vol 5) 1918 Lah 186 : 105 P R 1918 : 48 Ind Cas 365 (DB).

——S. 117—Partition—Question of title—Application by third person not in possession—Onus.

Where an applicant for partition is recorded as a co-sharer, the presumption is that he is a co-sharer of the land of which he seeks partition. When a question of title is raised by the respondent, the Revenue Officer himself should try it. 6 P R 1918 Rev : 48 Ind Cas 788.

——S. 117—Suit under—Mere declaration competent—Partition proceedings.

A suit on title arising out of partition proceedings under S. 117 of Act XVII of 1887 is not an ordinary declaratory suit under S. 42 of the Specific Relief Act and no other relief except declaration of title can be obtained in it.

A party to partition proceedings can ignore them and bring a possession suit for land not in possession but he is not bound to do so. A I R (Vol 1) 1914 Lah 61 : 100 P R 1913 : 7 P L R 1914 : 14 P W R 1914 : 21 Ind Cas 719 (DB).

——Ss. 117 and 158—Partition—Completion—Question of title not raised—Subsequent suit for declaration that certain persons were not entitled to Shamilat—Suit, if cognisable by civil Court — Questions of title—Revenue Officer.

If a party to a partition proceeding allows a Rev. Officer to effect a partition without raising any objection and thereafter institutes a suit averring that deft. who was a party to those proceedings had no title under his deed of purchase to various portions of the Shamilat land which had been allotted to him by partition the suit is cognizable by a civil Court. If in defence to a suit of the above kind, the deft. raises the plea of estoppel or waiver there is no a priori objection to the Court entertaining and deciding such plea on the facts of the case, and the longer the silence of the plaintiff the more strongly would it tell against his claim. A Rev. Officer as such is not empowered to dispose of questions of title raised under S. 117 of the Act when he proceeds to determine such questions he acts either as a Revenue Court under sub-sec. 2 (a) or as a civil Court under sub-sec. 2 (b) of the said section 8 P R 1910 Overruled. 28 P R 1913 : 10 P L R 1913 : 275 P W R 1912 : 16 Ind Cas 967 (DB).

——Ss. 117 and 158 — Jurisdiction of Civil or Rev. Courts.

A suit for partition must first be instituted in the Rev. Court and if that Court in taking the pleas of the deft., finds a question of title involved, it may refer a party to the civil Court for a decision on the question of title or it may resolve itself into a civil Court and hear and decide that question. Civil Court in partition cases can simply decide the question of title pure and simple. 181 P W R 1911:10 Ind Cas 902.

——S. 117—Civil Court's Jurisdiction.

Civil Courts cannot take cognisance of a suit filed by a co-sharer for a declaration that he was entitled to retain certain plot of land, which he was already in possession of, and which had fallen to the lot of another co-sharer. 3 P L R 1910 : 16 P W R 1910 : 6 Ind Cas 486 (DB).

——S. 117 (1)—Plaintiff suing for declaration of title —No application for partition to revenue authorities — No direction by revenue authorities to bring civil suit —Previous admission by plaintiff that suit property was already partitioned :

Held, that the suit being for a declaration of title, was maintainable under S. 117 (1), Punjab Land Revenue Act.

Held, also that the principle of estoppel did not apply. A I R (Vol 25) 1938 Lah 202 : 40 P L R 524 : 181 Ind Cas 357 (DB).

——S. 117 (1)—Revenue Officer, when can exercise jurisdiction of Civil Court.

Before a Revenue Officer can exercise the jurisdiction of a Civil Court, there must be an application for the partition of the property pending in his Court with regard to the title of which he can undertake to adjudicate as a Civil Court and; if there is no such application pending, he has no jurisdiction to usurp the function of a Civil Court and to adjudicate on the question of title relating to any property whatsoever. A I R (Vol 22) 1935 Lah 269 : 16 Lah 592 : 37 P L R 752 : 158 Ind Cas 1113 (2) (DB).

——Ss. 117 (2), 158—Partition proceedings — Question of title — Order for partition without deciding title—Suit in Civil Courts.

An application for partition filed by a widow before the revenue authorities was resisted by her husband's brothers on the question of title. They were directed by the Revenue Officer to file a suit in his Court and on their failing to do this, the partition was carried out. They then brought the present suit for a declaration that the widow was entitled only to maintenance and could not claim partition. This suit was dismissed on the ground that plaintiffs having failed to bring a suit in the Court of the Revenue Officer as directed by him, a suit in a Civil Court was not competent :

Held, that the action of the Revenue Officer in proceeding with the partition without any decision on the question of title was opposed to the provisions of S. 117 and the jurisdiction of the Civil Court to entertain the suit was not barred under S. 158 of the said Act. AIR (Vol 18) 1931 Lah 664 : 32 P L R 434: 12 Lah 688 : 134 Ind Cas 299 (DB).

——S. 117 (2) (c) — Question of title — Decision by Revenue Officer — Appeal — Amending Act (III of 1914), S. 49.

An appeal from the decision of Revenue Court in its civil capacity lies to the District Court and not the High Court.

In a Letters Patent Appeal a Division Bench can reverse a Judgment of a single Judge which ignored the amendment of the law not brought to his notice.

A Revenue Officer deciding a question of title as though he were a civil Court is to be deemed a Subordinate Judge for the purpose of determining the forum competent to hear an appeal from a decree passed by him. The Assistant Collector in the matter of determination of the question of title is acting as Subordinate Judge and the appellant can appeal to the Court of the District Judge. AIR (Vol 7) 1920 Lah 287 : 1 Lah 387 : 2 Lah L J 269 : 58 Ind Cas 768 (DB).

—S. 123.

——S. 123—Conduct of arbitrators—Presumption.

Where the arbitrators were not mere strangers to the family and their services had been secured in spite of their unwillingness to involve themselves in the matter and every one of the disputants was asked to sign the day to day minutes of their proceedings and they did not reduce any suggestion to writing unless they had secured the consent of all the persons concerned, and the parties had acknowledged the arbitrators' services in no unmistakable terms of thankfulness and gratitude, it is not unreasonable to conclude that the parties were satisfied that the arbitrators' dealings were fair and square to them all. (1935) 158 I C 510 (Lah) (DB).

—S. 141.

——S. 141—Scope.

Section 141 simply lays down a direction to a Civil Court as to how it should ordinarily act when it has to effect attachment of revenue paying land or has to

sell it or to deliver possession of it. Any departure from the procedure prescribed in this section or non-observance of the directions contained therein is, at best, an irregularity of a grave character by a Court, but it cannot be said to amount to an illegality vitiating the sale or attachment altogether or leading to the result that the delivery of possession made except through the agency of the Collector was, in fact, no such delivery. The section does not oust the jurisdiction of the Civil Court in all the matters mentioned in it, though it gives specific directions to it in such matters. A I R (Vol 31) 1944 Lah 455: 46 P L R 303: 218 Ind Cas 429 (DB).

——S. 141—Meaning of.

It was not intended to confer power on the Collector to sell house and shop property worth lacs of rupees constructed on a site paying an insignificant sum of money as revenue to Government. A Civil Court is, therefore, not required by the provisions of S. 141 to address its orders for attachment, sale or delivery of possession of shop and house property to the Collector. A I R (Vol 31) 1944 Lah 455: 46 P L R 303: 218 Ind Cas 429 (DB).

——S. 141 —Alienation by Collector acting as Ministerial Officer of executing Coust—Executing Court, if should decide the objections.

Where the Collector is acting as a Ministerial Officer of the executing Court, the objections to the manner in which the temporary alienation is to be made should be heard and decided by the Court although the arrangements for putting the temporary alienee in possession and collecting the lease money and remitting it to the Court would be the duty of the Collector. A I R (Vol 21) 1934 Lah 407 : 150 Ind Cas 652.

——S. 141—Position of Collector.

The Collector, in pursuance of an order of a Civil Court under S. 141, Land Revenue Act, is merely a ministerial officer of the Court and does not perform any judicial functions. Objections with regard to proceedings connected with the sale of land under the section must be made to the Court and not to the Collector. A I R (Vol 15) 1928 Lah 475 : 110 Ind Cas 173.

—S. 144.

——S. 144 — Questions of title — Not excluded from cognisance of Civil Courts.

Where the plaintiffs, after making an unsuccessful attempt to get redress from the revenue authorities by whom on the application of the defendant for a division or appraisement of the produce of a holding in which they were co-sharers with the plaintiffs, a referee was appointed, brought an action for the recovery of the price of the produce alleging that it belonged to them exclusively and that the Referee had no right to deliver it to the defendants.

Held, neither the language of the statute nor the general principles of law lend any support to the contention that the Revenue Officer and not the Civil Court should determine whether the produce belongs exclusively to one party or whether it is a joint property of both the parties. The complicated question of determining title cannot be delegated to a Referee or a Revenue Officer. A I R (Vol 9) 1922 Lah 157: 65 Ind Cas 256 : 28 P L R 1922 : 2 Lah 302 : 115 P L R 1921 (DB).

——S. 144 — Punjab Tenancy Act, Ss. 17 and 19 — Division of produce—Power of referee.

S. 44 of the Act gives a Revenue Officer power to compulsorily effect a division of the produce in spite of the adjustment between interested parties. 9 P R 1917 Rev : 43 Ind Cas 495.

—S. 145.

——S. 145—Entry about ownership — Entry in later regular settlement — More valuable than that in a previous summary settlement.

In deciding the question whether a particular person is an owner or occupancy tenant of certain land, the entries of the summary settlement of 1847 in Punjab in regard to rights in land cannot have the same force as those of the subsequent regular settlement at which a detailed record-of-rights was prepared after full inquiry. A I R (Vol 10) 1923 Lah 12 (DB).

—S. 150.

——S. 150 — The definition of land in the Punjab Tenancy Act should not be applied to the Land Revenue Act. (1936) 38 P L R 428.

——S. 150 — Applicability — Nature of land altered long before action—Section does not apply.

S. 150 is not intended to apply to cases where the original nature of the land has been altered long before action is taken. A I R (Vol 14) 1927 Lah 615 : 103 Ind Cas 511.

—S. 151.

——S. 151—Fards bachh are records of the acts of the public officers as under S. 151 of the Punjab Land Revenue Act, a patwari shall be deemed, for the purposes of the Evidence Act, to be a public officer having the custody of a public document which any person has a right to inspect. A I R (Vol 18) 1931 Lah 605; 32 P L R 503: 131 Ind Cas 638.

—S. 158.

1. Jurisdiction of Civil Court not barred.
2. Jurisdiction of Civil Court barred.
3. Competent Revenue Officer.
4. Remedy for party.
5. Scope.

1. Jurisdiction of Civil Court not barred.

——S. 158 — Where the Collector, in exercise of discretion under S. 115, has disallowed the partition, a Civil Court has no jurisdiction to go into the question whether the partition was rightly disallowed. A I R (Vol 27) 1940 Lah 428 : 42 P L R 759 : I L R (1941) Lah 536: 191 Ind Cas 268 (DB).

——S. 158 (14)—Lambardar paying land revenue on behalf of defaulting proprietor — Suit to recover the amount—Jurisdiction.

A suit by a village lambardar for recovery of a certain sum which had been paid by him to Government as land revenue on behalf of a defaulting proprietor, is clearly excluded from the jurisdiction of a Civil Court by S. 158, cl. 14. But where the parties have not been prejudiced owing to the trial of the suit by the Civil Court, the decree passed by that Court may be ordered to be registered as a decree of an Assistant Collector. A I R (Vol 21) 1934 Lah 157 : 149 Ind Cas 1061 (2).

——S. 158—Partition proceedings started by a widow resisted by her husband's brothers on the question of title—Brothers directed by the Revenue Officer to file a suit in his Court —On their failure to do this partition carried out — Brothers' suit for declaration that the widow was entitled only to maintenance and could not claim partition — Suit dismissed on the ground that Civil Court had no jurisdiction:

Held, that the action of the Revenue Officer in proceeding with the partition without deciding the question of title was opposed to the provisions of S. 117 and the jurisdiction of the Civil Court to entertain suit was not barred. AIR (Vol 18) 1931 Lah 664: 32 P L R 434: 12 Lah 688: 134 Ind Cas 299 (DB).

——S. 158—Suit for declaration that piece of shamilat land is not partible.

A suit for declaration that a piece of shamilat land is not partible is cognizable by the Civil Court as the question involved in such a suit is not merely as regards the mode of partition but one of title. A I R (Vol 18) 1931 Lah 654 : 32 P L R 545 : 133 Ind Cas 893 (DB).

——S. 158 — Arbitration — Revenue paying land — Question of title—Jurisdiction of Civil Court to refer to arbitration.

Though Civil Courts have no jurisdiction to divide revenue paying land by metes and bounds, the jurisdiction of the Civil Court to decide question of title is not affected by it and it is competent for the Court to refer such questions to arbitration. A I R (Vol 17) 1930 Lah 836: 122 Ind Cas 724 (DB).

——S. 158 — Agreement to refer to arbitration — Civil Court filing it and making reference — Decree on award as to agricultural land—If Civil Court can pass.

Per Jai Lal J. — There should be no objection to Civil Court pronouncing judgment with regard to partition of revenue-paying land as Court merely files award by arbitrators and does not adjudicate upon merits. Where an agreement to refer authorises the arbitrators to decide the question of title and also to make a partition of joint agricultural land along with other joint property, the Court can allow the agreement to be filed and make a reference to the arbitrators. Upon receipt of the award, it may be that the Court can, however, only pass a decree with regard to non-agricultural property and can grant only a declaration of title with regard to the agricultural land, as determined by the award, leaving it to the parties to enforce partition in accordance with the award in revenue Court. AIR (Vol 17) 1930 Lah 836: 122 Ind Cas 724 (DB).

——S. 158 — Question if prior agreement to keep property joint is operative or not —Question of title.

A question whether a certain prior agreement between two or more co-owners to keep their property joint is still operative or has ceased to be so is essentially one of title and is not excluded from the jurisdiction of the Civil Courts by S. 158 (2) (17), but whether at a given moment partition is or is not to be allowed is one within the discretion of the Revenue Officer. A. I. R. 1922 Lah 88, Overruled. A I R (Vol 17) 1930 Lah 513: 31 P L R 434 (FB).

——S. 158—Suit for possession—Allotment of excess land in partition—Question of title.

The question in a suit for possession of excess land allotted in a partition of Shamilat land is one of title, and Civil Court can try the suit. A I R (Vol 12) 1925 Lah 97 : 78 Ind Cas 1029.

——S. 158—Partition—Lesser area than due allotted —Suit for making up deficiency by allotting area omitted in partition—Question of title—Civil Court can try.

The plaintiffs who were co-sharers in the Shamilat of the village were allotted on partition a certain area to which they were entitled in accordance with their share in the joint holding. It was, however, subsequently discovered that one of the holdings awarded to the plaintiffs was wrongly assumed to contain more area than it actually did, the result being that there was a shortage in the plaintiff's share. After the discovery of this shortage it was found that a certain field had been omitted from the partition as indeed nobody knew of the existence of this field. The plaintiffs brought an action claiming that on a partition of the aforesaid field they were entitled not only to an area corresponding to their recorded share but also to the area that fell short in the previous partition in order that they may be compensated for the deficiency.

Held that a question of title was raised and the suit was therefore triable by a Civil Court. A I R (Vol 11) 1924 Lah 324 : 69 Ind Cas 501 (DB).

——S. 158 — Agreement to continue shamilat land joint entered in Wajib-ul-arz — Partition by the Collector—Civil Suit, challenging it does not lie.

The terms of an agreement at the time of the settlement of 1897 entered into by the co-sharers that a piece of Shamilat land would not be divided and would continue joint, were entered into Wajib-ul-arz. The Collector having directed its partition by pannas, some of the proprietors thereupon instituted in the Civil Court a suit that the land was not subject to partition.

Held, Section 158 (2), Clause 17 exempted the suit from the jurisdiction of the Civil Court as no question of title was involved. A I R (ol 9) 1922 Lah 88 : 67 Ind Cas 240 : 3 Lah 4 : 63 P L R 1922 : 70 P L R 1922 (DB).

——S 158, 111 and 121 — Suit for declaration — Partition by Revenue Officer

The Civil Court has no jurisdiction to entertain any question as regards procedure when there is no dispute about title to the land. The facts that the Revenue Officer, did not specifically refer to the trees in his method of partition, that he did not carry out the partition in the manner prescribed by himself in his order, that he did not expressly give sanction as provided for in O. 32, R. 7, C. P. C., to the agreement between the minor's representative and defendant to take shares by selection instead of by drawing of the lots; and that the agreement was not sanctioned by the District Judge under S. 29 of the Guardians and Wards Act, do not give the Civil Court jurisdiction in face of the clear prohibition in S. 158 of the Land Revenue Act. A I R (Vol 7) 1920 Lah 336 : 1 Lah 298 : 2 Lah L J 192 : 58 Ind Cas 19 (D B).

——S. 158 (2), (xvii) — Partition — Suit for declaration of right to—Civil Court—Jurisdiction.

A Civil Court has jurisdiction to entertain and decide a suit for a declaration that the plaintiff is entitled to have a certain land partitioned. A I R (Vol 6) 1919 Lah 332 : 123 P W R 1918 : 7 P R 1919: 46 Ind Cas 11.

——S. 158 (2), (xvii) —Suit for partition—Tenant for a fixed term—Jurisdiction.

A suit for partition of agricultural land brought by a tenant for a fixed term of the share of one of the joint owners is not cognizable by a Civil Court. AIR (Vol 6) 1919 Lah 131 : 55 P R 1919 : 51 Ind Cas 645 (D B).

——S. 158 (2)—Declaration under S. 45.

Suit for declaration that entries in the Record of Rights are wrong and that the land in suit was Shamilat is not for actual correction within the meaning of S. 158 but only to obtain a declaration under S. 45. A I R (Vol 4) 1917 Lah 411 : 102 P W R 1917 : 64 P R 1917 : 41 Ind Cas 895.

——S. 158—Jurisdiction — Civil and Revenue Court —Muafi.

Civil Courts have no jurisdiction to question the authority of Revenue Officers to settle in case of resumption of muafi, the land with the heirs of the last muafidar ignoring the representatives of another joint muafidar who died earlier. A I R (Vol 1) 1914 Lah 334 : 96 P W R 1914 : 198 P L R 1914 : 25 Ind Cas 622.

——S. 158 (2) (xvii) — Partition, collusive — Widow and co-sharers—Suit by reversioners—Jurisdiction — Civil or Revenue Court.

Section 158 (2), sub-cl. (xvii) only debars persons who were or should have been parties to partition proceedings from going to the civil Court and the proceedings are final as between them alone. A reversioner of a childless proprietor is not his representative and a suit by him to avoid a partition between the widow and the co-sharers on the ground of collusion is cognisable by a civil Court. 37 P W R 1913 : 93 P L R 1913 : 74 P R 1913 : 18 Ind Cas 452 (D B).

——S. 158 (1) (2)—Jurisdiction — Civil and Revenue Court—Question of title—Partition of Shamilat.

A suit for partition of Shamilat in which the dispute was as to the nature of the alienations to the parties and as to the title to the suit properties is cognisable by a civil Court and is not barred by S. 158 of the Act.

A suit for partition of common land will lie in a civil Court so far as it seeks the determination of the plaintiff's share and a finding that his right to partition is in accordance with such share. 88 P L R 1913: 58 P W R 1913 : 18 Ind Cas 356.

——S. 158 (1) and (2), cl. (17)—Partition.

Section 158 (1) of the Act bars a suit in civil Court for re-partition of property which was partitioned by Revenue Court, without objection by the plaintiff. 8 P R 1910 : 6 P W R 1910 : 165 P L R 1910 : 5 Ind Cas 253.

2. Jurisdiction of Civil Court barred.

——S. 158 (1) and (2) (xv) — Sale of plaintiff's properties by Collector for arrears of land revenue — Suit for declaration that plaintiff is owner of such properties on ground that sale was without jurisdiction—Whether can be entertained by Civil Court.

A suit brought by the plaintiff for a declaration that he is the owner of the properties sold by the Collector for the recovery of arrears of land revenue, on the ground that the Collector had acted without jurisdiction in ordering the sale of the properties and that the sales were irregular and invalid is in reality and substance a suit to set aside the order of the Collector under which the properties were sold, as unless these orders are set aside, the plaintiff cannot obtain the declaration asked for, and it makes no difference that prayer to that effect is not expressly made in the plaints. The Civil Court has, therefore, no jurisdiction to entertain such a suit in view of S. 158 (1) and (2) (xv), Punjab Land Revenue Act. A I R (Vol 32) 1945 Pesh 3 : 218 Ind Cas 195 : 1945 Pesh L J 3 (DB).

——S. 158 — Once the Revenue Officer decides to determine the question of title himself under S. 117, the jurisdiction of Civil Court is precluded by S. 158 (1). AIR (Vol 29) 1942 Pesh 16 : 198 Ind Cas 618.

——S. 158 — Where the only dispute between the parties is as to whether the defendants are entitled to compound interest or not, the Revenue Authorities act rightly in declining to decide the dispute. A I R (Vol 21) 1934 Lah 543 : 35 P L R 469 : 152 Ind Cas 697 (D B).

——S. 158—Partition by Revenue Officer—Civil suit by minors on the ground that their interests were not properly safeguarded, maintainability of.

Where there was a partition by a Revenue Officer under the Act, and certain minor co-sharers instituted a civil suit for a declaration that there had been no legal partition on the ground that their interests were not properly safeguarded by those who represented them before the Revenue Officer :

Held, that the claim of the plaintiffs regarding the previous order of partition was a matter which a Revenue Officer was empowered to dispose of within the meaning of S. 158 (1) and the Civil Court was debarred by S. 158, sub-s. (2), cls. (xvii) and (xviii) from entertaining the suit. A I R (Vol 19) 1932 Lah 236 : 13 Lah 471 : 33 P L R 103 : 139 Ind Cas 635 (D B).

——S. 158 — Disputes between Government and owner as to assessment—Jurisdiction of Civil Courts ousted—When not ousted.

Clauses 8, 13 and 14, S. 158, are intended to oust the jurisdiction of the Civil Court to determine disputes between the Government and the owner connected with the assessment and recovery of land revenue. They do not prevent disputes between persons to whom such land revenue may have been assigned and others who dispute the right of such persons to the exclusive enjoyment of such rights. AIR (Vol 15) 1928 Lah 713 : 111 Ind Cas 528.

——S. 158— Suit for declaration — That land should be partitioned as shamilat—Not covered.

A suit for declaration that a certain land should be partitioned as being Shamilat is not a suit contesting a mode of partition and is not covered by Cls. 17 and 18 of Section 158 (2). A I R (Vol 12) 1925 Lah 172 : 78 Ind Cas 68 (D B).

——S. 158—Suit for land wrongly allotted—Covered by Cl. 18 (2)—Not cognisable by Civil Court.

A suit for possession of a certain area of land on the allegation that that area should on a revenue partition have fallen to the share of their vendors but had, by mistake been allotted to the defendants, falls within the purview of Cl. (xviii) of sub-s. (2) of S. 158 and is not therefore cognisable by a Civil Court. AIR (Vol 12) 1925 Lah 37: 76 Ind Cas 6 (DB).

——S. 158 — Declaratory suit—That rent is payable in kind and not in cash—Not triable by Civil Courts.

A suit for a declaration that the plaintiffs are entitled to receive rent in kind and not in cash, is not triable by the Civil Courts and is covered by S. 77 (3) (1). But even if the contention that the suit is one for the correction of a revenue entry be sound, it would be triable by a Revenue Court alone, and the jurisdiction of the Civil Courts would be barred under S. 158 (2) (vi) of the Land Revenue Act. A I R (Vol 10) 1923 Lah 405 : 73 Ind Cas 673 : 4 Lah 127 : 5 L L J 335 (DB).

3. Competent Revenue Officer

——S. 158 — Partition Proceedings before inferior officer— Mutation Proceedings before second grade Assistant Collector — Not partition proceedings.

Under S. 126 the only Revenue Officer who can hold proceedings for partition must be of a class not below that of an Assistant Collector of the first grade and therefore mutation proceedings before an Assistant Collector of the second grade cannot be deemed to be partition proceedings within the meaning of S. 158. 8 L L J 389: 27 P L R 596:96 Ind Cas 70 (DB).

4. Remedy for party

——S. 158 (2) (xiv) — Revenue suit tried by civil Court—Objection by the defendant — Remedy.

Where a revenue suit not cognisable by the civil Court is tried by the civil Court, and the defendant objects all along the decree should not be registered as a revenue decree his remedy in such a case is to set aside the whole proceedings and return the plaint for presentation to the Revenue Court. 45 P W R 1912 : 73 P L R 1912 : 13 Ind Cas 401.

5. Scope

——S. 158 (2) — Construction — Jurisdiction of Civil Courts.

Sub-section (2) of S. 158 is an independent subsection and is in no way controlled by sub-s. (1) and, therefore, by virtue of cl. (xvii), the Civil Courts have jurisdiction to try questions of title to the property of which partition is sought in spite of a determination by the Revenue Officer to decide the question himself. Section 10, Civil P. C., will apply only if a suit as directed by the Revenue Officer, had been instituted in his Court. A I R (Vol 23) 1936 Lah 589 : 160 Ind Cas 953.

——S. 158 — Quaere.

Whether the exclusion of civil jurisdiction provided in S. 158, Land Revenue Act, as regards partition is intended to apply where the partition is done by private agency. AIR (Vol 3) 1916 Lah 89: 107 P W R 1916:117 PR 1916: 70 PLR 1917: 34 Ind Cas 192 (DB).

PUNJAB LAND REVENUE RULES

——R. 17.

——R. 17 (ii) (a) — Application of—Adoptive ties — Whether can be imported.

No adoptive ties can be allowed to be imported in the application of R. 17 (ii) (a) of the Land Revenue Rules, under which a person who claims lambardari solely on the ground of inheritance must be descendant in the male line of the paternal great-grandfather of the last incumbent. In applying this rule the paternal great-grandfather must be traced in the natural line of ascent by birth. (1947) 26 L L T 14.

PUNJAB LAWS ACT (4 of 1872)

——Insolvency Proceedings—Vesting of property in Receiver — If affected by Punjab Laws Act.

Where proceedings in insolvency are taken under the C. P. Code of 1882 the whole property of the insolvent vests in the Receiver under S. 354 of the Code whether it be mentioned in the application or not and the Punjab Laws Act is inapplicable. AIR (Vol 9) 1922 Lah 103 : 4 L L J 164 : 62 Ind Cas 929 (DB).

——Nature of insolvency proceedings under Punjab Laws Act—Order releasing property from attachment — If appealable.

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a suit and therefore an order releasing from attachment the insolvent's residential house in accordance with a trust-deed, under the provisions of Punjab Laws Act (4 of 1872) is not a decree and therefore no appeal lies. 3 L L J 338 : 67 Ind Cas 794.

——S. 5

——S. 5—Marriage between Arya Samajists — Rule of decision.

Per Cornelius, J.—There can be no doubt that Arya Samajists are Hindus, and therefore, if no custom be pleaded, the rule of decision in relation to a marriage or divorce where both parties are Arya Samajists must be the Hindu Law. AIR (Vol 35) 1948 Lah 126 and 129 : 49 P L R 147 : ILR (1947) Lah 621 (FB).

——S. 5—Adoption by Hindu convert to Christianity —Custom must be alleged and proved.

So far as the Province of Punjab is concerned, under S. 5, the primary rule for decision in matters of succession is custom, which may be found to govern the parties but it is for those who allege that there is such a custom to establish it. Thus, it is at least necessary for a Hindu convert to Christianity to allege and to prove that there is any custom of adoption among the Christian community in the Punjab, or in any section of that community, before any question as to whether any such adoption confers on the alleged adopted boy the same rights as an adoption in Hindu Law confers on him, can be considered. AIR (Vol 27) 1940 All 134 : 1940 A L J 1 : 1940 A W R 34 : ILR (1940) All 100 : 187 Ind Cas 170 (DB).

——S. 5—Custom — Burden of proof.

Where judgment-debtors are Indian Christians and there is evidence on the record to show that their father was doing missionary work, that he had cut off his connection with the parent family and did not follow their customs, the burden to prove custom admittedly lies heavily on the decree-holder and it is for him to prove by clear and indisputable evidence firstly that the judgment-debtors were governed by custom and secondly the rule of custom on the point at issue. AIR (Vol 26) 1939 Lah 161 : 41 P L R 661.

——S. 5—Custom—Burden of proof.

In all cases under the Punjab Laws Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by S. 5 in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. AIR (Vol 25) 1938 Lah 166 : 40 P L R 565 : 178 Ind Cas 74.

——S. 5—Custom, presumption.

Under the Punjab Laws Act, there is no presumption in favour of custom, and where a party alleges custom, the onus lies on him to prove it. If no custom is proved, personal law applies. AIR (Vol 23) 1936 Lah 627 : 168 Ind Cas 591 (DB).

——S. 5—Jat not member of village community and not following agriculture — Absence of proof of custom—Alienation, if governed by personal law.

The alienor who was a Jat of Kalsia State and who, in addition to having received a jagir from the State, was related to the ruler and claimed descent from persons who were independent rulers at one time, owned a village in entirety in Ferozepore District but as his visits to that village were few and far between, was not a member of any village community and did not follow agriculture as a profession. He mortgaged agricultural land and houses in the District and his grandson filed a suit for declaration impeaching the alienation on the ground of want of necessity and consideration. No evidence was led to show the existence of custom in the state restraining a jat of that state from transferring his ancestral property :

Held, that as the plaintiff who was bound to establish the custom set up by him failed to prove it, the validity of the transaction must be judged by the Hindu Law which was the personal law of the mortgagor and as there was no evidence of illegality or immorality, the transfer did not violate the rule of Hindu Law and was binding on the plaintiff. AIR (Vol 21) 1934 Lah 296 : 35 P L R 215 : 15 Lah 715 : 153 Ind Cas 862 (DB).

——S. 5—Applicability and scope.

Section 5 provides that custom in the Punjab is the first rule of decision in all questions specified therein. But it is nowhere laid down that a presumption arises in favour of the existence of custom to the exclusion of personal law. The section merely prescribes that custom shall govern the party in certain matters in the first instance but it is for the person relying on a rule of custom contrary to his personal law to allege and prove it. AIR (Vol 21) 1934 Lah 296 : 35 P L R 215 : 15 Lah 715 : 153 Ind Cas 862 (DB).

——S. 5—Burden of proof of custom.

When either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so, cl. (b) of S. 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause. AIR (Vol 21) 1934 Lah 296 : 35 P L R 215 : 15 Lah 715 : 153 Ind Cas 862 (DB).

——S. 5—Arains, law applicable to—Onus of proof.

Under the Act, in all cases it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law and further to prove what the particular custom is.

Where the main occupation of the members of a family for generations, has been service and not agriculture, the mere fact that the parties are Arains is insufficient to establish that they follow custom and not. AIR (Vol 18) 1931 Lah 446 : 32 P L R 146 : 13 Lah 119 : 131 Ind Cas 230 (DB).

——S. 5—Personal law and custom—Applicability.

In the cases of Hindus and Mahomedans it is scarcely correct to speak of customary law as a personal law distinct from Hindu and Mahomedan law. The so-called customary law means a set of customs which have been found generally to govern a large number of tribes Hindu as well as Mahomedan in the province of (Punjab) in certain matters in supersession of their personal law. AIR (Vol 17) 1930 Lah 764 (FB).

——S. 5—Evidence to disprove custom — Absence of instances—If sufficient.

Even though there be no evidence of instances, still if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary Law of the district, there is sufficient prima facie evidence of the existence of the custom, subject, of course, to rel uttal, and the evidence ought not to be held insufficient merely for want of instances. A I R (Vol 15) 1928 P C 294 : 113 Ind Cas 1 : 55 I A 407 : 49 C L J 38 : 29 P L R 654 : 28 M L W 908 : 10 Lah 86 : 1929 M W N 5 : 55 M L J 746.

——S. 5—Rules of succession.

In putting custom in the forefront, as the rule of succession, the Legislature intended to recognize the fact that in the Punjab and N.-W. F. P. inheritance and the other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mahomedan law. AIR (Vol 15) 1928 P C 294 : 113 Ind Cas 1 : 10 Lah 86 : 55 I A 407 : 1929 M W N 5 : 49 C L J 38 : 29 P L R 654 : 28 M L W 908 : 55 M L J 746.

——S. 5—Evidence of custom not satisfactory — Applicability of personal law.

Although plaintiffs themselves rely in their plaint on Customary Law, the Court should fall back upon the personal law of the parties where evidence as to custom on both sides is unsatisfactory. AIR (Vol 8) 1921 Lah 180 : 60 Ind Cas 509 : 2 Lah 98 : 3 L L J 152 : 97 P L R 1921 (DB).

——S. 5—Applicability.

It is the duty of Courts to decide questions of succession on personal law unless a custom had been established which modifies that law. A I R (Vol 8) 1921 Lah 176 : 95 Ind Cas 413 : 4 L L J 336 (DB).

——S. 5—Scope of — Custom—Applicability of.

No presumption in favour of a custom against the general or personal law is created by S. 5 of the Act ; it is only when a custom is proved as required by law, that it is made the rule of decision. AIR (Vol 4) 1917 P C 181 : 45 Cal 415 : 16 A L J 17 : 4 Pat L W 27 : 34 M L J 48 : 22 C W N 353 : 23 M L T 117 : 27 C L J 240 : 1 P L R 1918 : 20 Bom L R 528 : 12 S L R 104 : 45 I A 10 : 43 Ind Cas 306.

——S. 5—Custom—Proof of.

The primary rule of decision in cases where a plea of custom is raised, is custom and the custom ought to be adjudicated upon. AIR (Vol 4) 1917 Lah 169 : 156 P W R 1917 : 42 Ind Cas 193.

——S. 5—Residents in town — Personal law — Presumption.

A non-agricultural tribe residing in a town and living on Government service, are presumed to follow their personal law in matters of inheritance, and the onus of proving any particular custom lies on the person asserting it. Instances of exclusion of daughters by sons, of sisters by brothers and of succession of widows in the absence of sons, do not raise the presumption that in all matters, their personal law has been superseded. AIR (Vol 2) 1915 Lah 184 : 3 P W R 1915 : 32 P L R 1915 : 53 P R 1915 : 27 Ind Cas 542 (DB).

——S 5 (a)—Conversion to Christianity.

According to S. 5 (a) custom overrides nationality and religion but if there be no special custom the Succession Act governs Hindu converts to Christianity and the custom adopted by the convert since conversion would determine the succession. Hindu converts to Christianity do not come within the scope of S. 5 (b). 36 P R 1909 : 1 Ind Cas 697 (DB).

—S. 8-A.

——S. 8-A (b) — Punjab Descent of Jagirs Act (IV of 1900) — Successor to jagir, cannot by his own ipse dixit, curtail amount of maintenance payable to other members of family under orders of Government. AIR (Vol 24) 1937 Lah 825 : 39 P L R 758 : 170 Ind Cas 42 (DB).

—S. 9.

——S. 9 — Hindu marriage — Decree for nullity or dissolution Courts competent to grant.

Per Cornelius J.—Both by reason of its subject-matter being special, and because it is of later date, the provisions of S. 9 of the Punjab Laws Act prevail as against the Indian Divorce Act. Therefore, a decree for nullity in respect of a Hindu marriage cannot be granted by the High Court under the Divorce Act, but can only be granted by the Courts administering the Hindu Law, i.e., the ordinary civil Courts, while a decree for the dissolution may be granted either by these Courts or by a Court acting under the Native Converts' Marriage Dissolution Act, 1866. AIR (Vol 35) 1948 Lah 126 and 129 : ILR 1947 Lah 621 : 49 P L R 147 (FB).

——S. 9 — Pre-emption — Partly sale and partly exchange.

Where transaction is partly a sale and partly an exchange and both are inseparably connected. There can be no pre-emption.

The parties could effect their purpose so to avoid the right of pre-emption. AIR (Vol 2) 1915 Lah 218 : 82 P R 1915 : 172 P W R 1915 : 31 Ind Cas 221 (DB).

—S. 10.

——S. 10—Kangra District — Custom—Pre-emption of one cu tom in all villages.

In the Kangra District the custom of pre-emption is different from elsewhere and is only allowed in the case of ancestral land and to a person descended from common ancestor. The presumption of the custom of pre-emption being the same in all villages, the person setting up a contrary custom must prove it. 42 P W R 1909 : 1 Ind Cas 477.

——Ss. 10 and 12 — As amended by Punjab Laws (Amendment) Act 14 of 1878—Right of pre-emption —Occupancy tenants and other of inferior pos tion—Member's connection with land not necessary.

The expression "Village Communities" in Punjab Act XII of 1878, is not used to denote a Village Community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village, but is used to denote a body of persons bound together by the tie of residence in one and the same village amenable to the village customs and subject to the administrative control of the village officers. Occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village though not connected with the land and not entitled to any right of pre emption under the Act. (1903) 7 C W N 498 : 30 C 635 : 30 I A 89 (PC).

—S. 12.

——S. 12 — Pre-emption — Custom — Mouza Toki, Tahsil Nurpur, District Kangra.

The defendants in a pre-emption suit pleaded that plaintiff was not an agnate of the vendors and relied upon Government letter, No. 323 dated 22nd April 1862. providing that the custom of pre-emption is not to be presumed in villages of Kangra District, but must be proved in each village and that it applied to ancestral land and in favour of collaterals. At the time of attestation of the Wajib-ul-arz a land-holder of the village was also given the right to pre-empt.

Held : (1) that there was no general custom of the Kangra District as to pre-emption and the Government letter could not establish any such custom and prevail over statute law ; and (2) that the verified and attested entry as to custom in the Wajib-ul-arz must be accepted as reliable. 44 P W R 1909 : 3 Ind Cas 973 (DB).

——S. 12—Pre-emption—Wajib-ul-arz providing for pre-emption in favour of 'yak jaddi' only — "Yak jaddi," meaning of — Onus of proof.

Plaintiffs claimed pre-emption on two grounds : (1) that the land in suit was ancestral qua themselves as it descended to the vendors from a common ancestor and that consequently they as yak jaddis were entitled to pre-empt according to the Wajib-ul-arz and (2) that they were land owners of the village whereas the vendee was a mere stranger.

Held. (1) that the land was not "ancestral," (2) that the term of "yak jaddis" means persons descended from ancestor who once held the land and not merely vendor's agnates, (3) the wajib-ul-arz in this case declaring that there was no general custom of pre-emption with only one exception in case yak jaddi is exhaustive and according to 98 P R 1894 (FB) the plaintiffs must prove that the custom was different from what it was stated to be in the wajib-ul-arz and that (4) S. 12 applied only in the absence of custom but in this case as the Wajib-ul-arz laid down a particular custom in favour of Yak Jaddis only, S. 12 does not apply. 45 P W R 1909 : 3 Ind Cas 668 (DB).

——S. 12 (a) and (b)—Wajib-ul-arz allowing right in case of ancestral land.

Where wajib-ul arz restricted pre-emption to Yak jaddin and plaintiff had no common ancestor with the vendor, mere jointness would not give a right of pre-emption. 43 P W R 1909 : 1 Ind Cas 478 (DB).

——S. 12 — As amended by Punjab Laws (Amendment Act (XII of 1878), Ss. 10 and 12—Right of pre-emption — Occupancy tenants and others of interior position — Member's connection with land not necessary :

The expression "Village Communities" in Punjab Act XII of 1878, is not used to denote a Village Community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultral according to the custom of the village, but is used to denote a body of persons bound together by the tie of residence in one and the same village amenable to the village customs and subject to the administrative control of the village officers. Occupancy tenants are members of a village community within the meaning of the Act. and so are all persons in an interior position who belong to the village though not connected with the land and not entitled to any right of pre-emption under the Act. (1903) 7 C W N 498 : 30 Cal 635 (642) : 30 I A 89 (P C).

—S. 24.

——S. 24—High Court's jurisdiction under it—Insolvency jurisdiction under it—S. 24 of Act IV of 1872 —Power of the Court under it — Order of a Court in the Punjab declaring debtors insolvent —Effect of such an order — Civil Procedure Code (Act XIV of 1882), Ch. 20 — Receiver — Transfer of debtor's property — Subsequent order of the High Court adjudicating the debtors insolvent — Vesting order made by the High Court — Its effect on the debtor's estate—Official Assignee :

The Imperial Act, the Indian Insolvent Act (II and 12 Vict. C. 21), of Parliament conferred upon what are now the High Courts in the Presidency towns in India, jurisdiction for Insolvency purposes, extending over the whole of India, and for many purposes over much wider limits. The system of insolvency created under the Punjab Laws Act (IV of 1872) in a series of sections beginning with S. 22, was effective only within the Punjab. The Insolvent Court at Amritsar in the Punjab, in the presence of four out of the five members of a debtor firm, made an order declaring them insolvent and requiring them to furnish security and to put in lists of property, creditors and debtors. Subsequently the High Court of Bombay in its insolvency jurisdiction made an order adjudicating all the members of the said firm insolvent under 11 and 12 Vict. C. 21 and at the same time a vesting order, vesting the property of the debtors in the Official Assignee of Bombay.

Held that the Civil Procedure Code (Act XIV of 1882), Chap. 20, had no application and that the property of the debtors in the Punjab had not vested in the Receiver appointed by the Court at Amritsar. Held, also, that under the insolvency system established by 11 and 12 Vict. C 21 the High Court unimpeded by any other Court, could effectually administer the estate of the insolvents, including that in the Punjab and when an adjudication was made by the High Court the estate of the debtors vested in the Official Assignee, and he was to administer it. Held that under the Punjab Laws Act (IV of 1872), S. 24, on which the power of the Court at Amritsar depended what was merely administration ; that under that Act no transfer of property took place; and that the property of the debtors in the Punjab had not vested in that Court so as to exclude the operation of the Bombay vesting order. (1910) 20 M L J 432 : 12 Bom L R 395 : 11 C L J 443 : 5 Ind Cas 273 (275) (P C).

——Ss. 24, 27 and 31 — Civil P. C. (1882), Ss. 351 and 354—Insolvent Debtors Act (11 and 12 Victoria, Ch. 21)—Insolvency—Vesting order—Effect of—One insolvency Court declaring a debtor insolvent—Bars further action by another Court—Mixed jurisdiction under two enactments—Procedure.

An order under S. 24 of Act IV (1872) makes the debtor insolvent from the date it was passed, and one of the consequences of the order is to vest the property of the debtor in the Court under S. 27 of the Act. On a declaration of insolvency, the insolvent's property ceases to be his property and becomes the property of the Court or of some one appointed by the Court, for the benefit of the creditors, and no subsequent declaration of insolvency under S. 1 of Act 11 and 12 Vic., Ch. 21 can affect the property. The principle that a prior attachment confers no right does not apply to such a case.

Obiter—An officer having jurisdiction in insolvency matters both under Act IV of 1872 and Act XIV of 1882 should not mix up the two jurisdictions together and proceedings commenced under either of them must be finished separately. 6 P L R 1909 : 5 P W R 1909 : 1 Ind Cas 55 (DB).

—S. 25.

——S. 25—Order under, refusing to discharge insolvent—Appeal.

An order under S. 25 of the Act refusing to discharge an insolvent before the estate is fully administered is not a decree and hence not appealable. 85 P R 1911 : 209 P W R 1911 : 13 Ind Cas 808 (DB).

——Ss. 25 and 31 — Order under S. 25 — Appeal — Failure to comply with Rules under S. 31—Effect.

An order of the Judge of an Insolvency Court under S. 25 is not appealable. Failure to comply with R. 30 of the rules under S. 31 of the Act is not a material irregularity. The dischage of the burden of proof on the creditor under R. 30 is not a condition precedent to proceedings against the insolvent under S. 25. S. 25 is not confined to conduct in contracting debts. It covers concealment of account books and false allegations which go to constitute gross misconduct in reference to debts. 64 P R 1911 : 187 P W R 1911 : 12 Ind Cas 867 (DB).

—S. 31.

——S. 31—Rules under if ultra vires.

The rules under S. 31 of the Act allowing appeal to the chief Court from an order refusing to discharge an insolvent are ultra vires of the Government. 85 P R 1911 : 209 P W R 1911 : 13 Ind Cas 808 (DB).

—S. 43.

——S. 43 — Applicability and scope — Prohibition against slaughter of cows — Nature and effect of —

Slaughter of cow in place not governed by rules for religious purpose—Legality— Taking of beef for use of owners—Offence.

The prohibition in S. 43 of the Punjab Laws Act against the slaughter of cows, except such of the rules prescribed, applies to the slaughter of cows for religious purposes; the prohibition is absolute and extends to the whole province, and therefore the slaughter of cows even in a village to which the rules under the Act have not been extended would be illegal. S. 43 would not, however, apply if the beef is taken not for sale but for use by the owner or owners of the slaughtered animal. (1947) 230 Ind Cas 124 : 48 Cr L J 522 (DB) (Lah).

——S. 43—Interpretation—'Slaughter of kine.'

The words "slaughter of kine" in S. 43 of the Punjab Laws Act mean slaughter of kine not only for commercial but also for religious purposes. 96 Ind Cas 152 : 7 Lah 507 : 27 Cr L J 888 : 27 P L R 791 : AIR (Vol 13) 1926 Lah 447 (DB).

—S. 47.

——Ss. 47 and 50 (b)—Possession of buoy.

The possession of a buoy for use in crossing a river is not a punishable offence. 18 P R 1911 Cr: 13 Cr L J 185 : 13 Ind Cas 1001.

—S. 51.

——S. 51 — Failure to republish — If invalidates the rules.

The obligation upon the Local Government to republish the rules under S. 51 is directory and not mandatory, and accordingly a failure on the part of the Local Government to carry out that obligation does not invalidate the statutory rules. Moreover, it is republication which repeals the rules and not the failure to republish. The rules are only required to be republished when they have been amended or altered. S. 51, as it stood originally, has to be read with Ss. 43 and 50 of the original Act. 96 Ind Cas 152 : 7 Lah 507 : 27 Cr L J 888 : 27 P L R 791 : AIR (Vol 13) 1926 Lah 447 (DB).

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (1 of 1900)

——Starting point — Suit by reversioner—Surrender by widow.

Where it was contended that the succession did not open to the reversioners because of the intervention of K, who held widow's estate, and where the trial Judge found as a fact that if K had any interest in the estate, she surrendered it in favour of the reversioners in lieu of Rs. 2 p. m. which completely effaced her.

Held : that K's existence did not prevent the reversioners from inheriting the estate and that the rule of law prescribed by the Punjab Limitation Act governed the suit and the claim was barred by time. 120 Ind Cas 598 : AIR (Vol 17) 1930 Lah 9 (DB).

——Collaterals—Basis of right to sue.

A collateral governed by the customary law of the Punjab does not derive his right to sue from or through his father, but from or through the common ancestor who owned the land. 73 Ind Cas 357 : A I R (Vol 10) 1923 Lah 642 (DB).

——Retrospective effect.

The Punjab Limitation Act (I of 1900) does not affect any prescriptive right or title which had accrued or had been acquired before the Act came into operation. A I R (Vol 10) 1923 Lah 642 : 73 Ind Cas 357 (DB).

—— Suit to set aside alienations by male proprietor.

Where the transactions were alienations of ancestral land by a male proprietor and as alienations whether they be regarded as mortgages or as sales, time begins to run from the date of the attestation of the alienations. Even if Article 144 were held to apply, the suits would still be barred as time would begin to run from the date when the alienees came into possession as owners and under Section 9 of the Limitation Act would continue to run not only as against the original alienors but against all the world. AIR (Vol 10) 1923 Lah 133 (DB).

——Applicability — Suit for possession of ancestral land, alienated by ancestor.

An action to recover possession of ancestral land alienated by a male proprietor subject to the Customary Law of the Punjab is governed by the provisions of the Punjab Limitation Act (1900), if the death of the alienor, which gives rise to the cause of action for a suit for possession, takes place after the Act came into force. A I R (Vol 9) 1922 Lah 380 : 67 Ind Cas 388 : 3 Lah 188 (DB).

——Limitation Act, Art. 140—Land sold under Sections 87, 88, 81, Cr. P. C. — Suit for possession.

If an absconder's land is sold by order of the Magistrate under Sections 87 and 88 of the Criminal Procedure Code a suit for its possession is governed by Art. 140 of the Limitation Act, under which the starting point is from the time when the estate falls into possession, which means from the date of absconder's death. If the plaintiff is not able to show that his suit is brought within 12 years of the absconder's death the suit must fail. As is clear from the schedule to the Punjab Act I of 1900, limitation, under the Act is meant for voluntary alienations and cannot apply to a sale by order of a Magistrate in the absence of the proprietor under certain sections of the Criminal Law. A I R (Vol 9) 1922 Lah 124 : 4 L L J 59 : 66 Ind Cas 1 (DB).

——Compromise between vendor, vendee and pre-emptor to the effect that pre-emptor should take over property — Mutation attested by Revenue officer—Suit by reversioner to set aside sale.

A sold certain properties to B and on C threatening to pre-empt B, a compromise was effected by which it was agreed that C was to pay off B and take over the sale. The matter was reported to the patwari and the Revenue Officer attested the mutation in favour of C. In a suit by the reversioners of A to set aside the sale on the ground of no necessity, held that the mutation was really a combined one covering both the alienations namely that of A to B and of B to C, and that therefore the plaintiff's suit must be brought within the period of limitation commencing from the date of attestation. A I R (Vol 9) 1922 Lah 57 : 4 Lah L J 178 : 31 P W R 1922: 77 Ind Cas 274.

——Applicability of — Alienor's death leaving a widow.

The Act is not applicable where the alienor died leaving a widow during whose life-time the reversioner could not obtain possession of the property alienated and it is immaterial whether the alienor died before or after the Act came into force. A I R (Vol 7) 1920 Lah 435 : 139 P R 1919: 54 Ind Cas 964 (DB).

——Applicability of — Death of alienor after the commencement of the Act.

The Punjab Limitation Act, 1900, is applicable to suits, whether for declaration or for possession, provided that the alienor has died after the commencement of the Act. AIR (Vol 6) 1919 Lah 374 : 18 P R 1919 : 49 Ind Cas 703.

——Suit for recovery of land alienated — Starting point.

Limitation for a suit to recover possession of ancestral land alienated by a male proprietor during his life-time, runs primarily from the date on which the alienation is attested. The proprietary title of a mortgagee arises only when the right of redemption is extinguished and when .mutation is sanctioned. AIR (Vol 4) 1917 Lah 205 : 40 Ind Cas 446.

——Scope of.

The Act is confined to alienations by male pro-

prietors only. A I R (Vol 3) 1919 Lah 144 : 15 P R 1916 : 198 P W R 1915 : 33 Ind Cas 161 (DB).

——Scope of.

If a person's right to sue subsists when the new Act came into force, he is entitled to its benefit. The Punjab Limitation Act applies also to a sale of the equity of redemption by sonless male proprietor whose reversioner, can maintain a suit that the sale is not binding on him. AIR (Vol 2) 1915 Lah 73 : 61 P L R 1915 : 11 P W R 1915 : 27 Ind Cas 607.

——Suit by a plaintiff who was a minor on date of mutation—Limitation Act, S. 6.

Under the Punjab Limitation Act time runs from the date of mutation and where the plaintiff in a suit governed by that Act was a minor on that date, he can under S. 6 of the Indian Limitation Act, bring his claim within 3 years of his attaining majority. AIR (Vol 1) 1914 Lah 87 : 84 P L R 1914 : 47 P W R 1914 : 22 Ind Cas 637 (DB).

——Knowledge of alienation, if necessary.

In the case of alienations governed by the Act, time runs from the date of the alienee's getting into possession, and a reversioner's knowledge of alienation is immaterial. A I R (Vol 1) 1914 Lah 50 : 66 P W R 1914 : 159 P L R 1914 : 25 Ind Cas 724.

——Alienation—Suit by sons or reversioners to contest—Limitation.

A claim for possession of ancestral property by a reversioner on the ground that donee's line being extinct, the property reverts to the family of the donor, is barred by the Punjab Act (I of 1900), if no suit to contest it was brought within 12 years from the date on which the mutation was effected in favour of the donee. 300 P L R 1913 : 154 P W R 1913 : 20 Ind Cas 567.

——Applicability of.

A suit by the sons of B to set aside his alienation is governed by the Punjab Limitation Act (I of 1900) where B died after the Act came into force. 126 P L R 1913 : 93 P W R 1913 : 18 Ind Cas 445 (DB).

——Applicability — Alienation by sonless proprietor —Setting aside.

An alienation was openly made and mutation published. There had been two settlements giving effect to the alienation.

Held, that the alienation was not kept from the knowledge of the plaintiff by fraud. Where an alienation by a sonless male proprietor took place in 1888, and mutation was effected at the same time, a suit filed in 1909 by the reversionary heirs repudiating the alienation is time-barred. 177 P L R 1912 : 236 P W R 1912 : 16 Ind Cas 844 (DB).

——Applicability—Alienation by the last male owner — Suit for possession by collaterals after widow's death.

A person gifted some land to the defendants in 1881 and mutation was effected in 1883. The donor died in 1886, leaving behind a widow and plaintiffs his collaterals, the widow died 7 months before the institution of suit by plaintiffs for possession of the gifted land.

Held, that the suit was not governed by Puniab Limitation Act. 62 P R 1910 : 98 P W R 1910 : 111 P L R 1910 : 7 Ind Cas 476 (DB).

——Suit for possession of ancestral land by reversioner — Death of alienor before the Act came into force—Scope.

If the alienor's death has taken place after it has come into force, a suit by a reversioner of a male proprietor for possession of land, sold by such proprietor without any legal necessity or consideration, is governed by Act I of 1900. Where the date of the alienor's death is uncertain the plaintiff must establish that the alienor died before the Act came into force, and hence the Act does not apply to the case. The Punjab Act has had the effect of shifting the burden of proof, which, under Art. 144 of the Limitation Act, 1877, is on the person setting up adverse possession as his title. 51 PLR 1909 : 11 P R 1909 : 12 P W R 1909 : 1 Ind Cas 397.

—Sch. 1.

——Sch. 1—'Heir', meaning—Suit by remote reversioner for possession—Applicability of Act.

The word "heir" in the Schedule to the Punjab Limitation Act includes only the next heir after the death of the alienor and not a remote reversioner. A suit for possession by a remote reversioner of the last male holder, whose right to possession did not arise till the death of the intervening reversioner is not governed by the Act. AIR (Vol 9) 1922 Lah 380 : 64 Ind Cas 67.

—Art. 1.

——Art. 1—Starting point—Suit to avoid sale within 12 years of mutation—If barred.

A suit for a declaration to avoid a sale instituted within 12 years from the date of the attestation of the mutation is in time. The fact that subsequent to the sale, pre-emptors were substituted for the original vendees does not affect the question. A I R (Vol 12) 1925 Lah 309 : 7 L L J 82 : 26 P L R 453 : 88 Ind Cas 80.

——Art. 1 — Right under Old Act — Article applicable.

Where the period of limitation had not expired against the alienations contested when the Punjab Limitation Act came into operation.

Held, the suit was governed by Article 1 of that Act and not by Article 120 of the Indian Limitation Act. AIR (Vol 9) 1922 Lah 398 : 4 Lah L J 248 (DB).

——Art. 1 — Applicability.

A suit for a declaration that a certain sale-deed does not affect the reversionary rights of the plaintiff is governed by Art. 1. 69 P R 1909 : 103 P W R 1909 : 2 Ind Cas 981.

——Art. 1—Alienation—Limitation.

Where an alienation took place, a suit brought within twelve years of the alienation and its mutation is within time. 64 P R 1909 : 62 P W R 1909 : 56 P L R 1909 : 2 Ind Cas 962 (DB).

—Art. 2

——Art. 2—'Heir', meaning—"Son and reversioner" is not an "heir" until the death of the proprietor—Son or reversionor before death of proprietor — If 'heir'.

Article 2, which deals with a suit for possession, should be read with Art. 1 which deals with a suit for a declaratory decree and the word "heir" used in the former Article connotes the same person or persons as the expressions "son or reversioner" in the latter article. The word "heir" denotes a person who succeeds by descent, and as long as a proprietor is living he has no heir. The person impeaching his alienation and seeking a declaratory decree cannot, therefore, be designated by the term "heir" and is consequently described as "son or reversioner." It is only after the death of the proprietor that the "son or reversioner" becomes his heir. A I R (Vol 9) 1922 Lah 380 : 3 Lah 188 : 67 Ind Cas 388 (DB).

——Art. 2—Reversioner.

Suit for recovery of ancestral land after alienor's widow. A suit by reversioners for recovery of ancestral land after the death of the alienor's widows is not governed by the Punjab Limitation Act, but by Art. 141 of the Limitation Act, notwithstanding that the alienor died after the former Act came into force. AIR (Vol 6) 1919 Lah 448 : 95 P R 1918 : 128 P L R 1918 : 174 P W R 1918 : 47 Ind Cas 977.

——Art. 2 — Suit for possession by customary heir—Starting point — Attestation of mutation — Date of taking physical possession.

A mortgaged certain land to B, by duly registered deed on the 16th June 1893; subsequently, B sold his mortgage rights to C, by deed of sale, dated 25th January 1898. B never obtained mutation of names but on the 18th August 1898, C had mutation effected in his favour. A died in 1906. On the 9th March 1908, A's minor son, aged six years, sued for possession of the land on the ground that the land was ancestral, that C took possession under the pretence that he was the mortgagee, that no mortgage existed in fact and that even if there was any such mortgage, it was invalid as being neither for consideration nor or necessity.

Held, that the suit is not one for redemption of the mortgage of 1893 and that the defendants who pleaded the mortgage must establish that fact and that the suit was instituted within twelve years from the date of the mortgage and was not barred. Under the Act the Court before deciding whether a suit is barred, has to look, in a case in which at the time of alienation, possession is given or agreed to be given, first to the date (if any) of the attestation by the Revenue Officer in the Register of Mutations, and in the absence only of such attestation, to the date of alienee's physical possession of the land alienated. A suit which would fall under Art. 2 is in time, if brought within 12 years from the date of such attestation though attestation actually took place 12 years after the alienee had taken possession. 48 P R 1911 : 237 P L R 1911 : 141 P W R 1911 : 11 Ind Cas 765.

PUNJAB LIMITATION (CUSTOM) ACT (1 of 1920)

——Applicability — Alienation by female—Suit to challenge by cognate relations or collaterals.

A suit to challenge alienation of a female by daughters or their sons or sisters or their sons or other cognate relations or even by collaterals qua whom the property is not ancestral is outside the four corners of the Punjab Limitation (Custom) Act. AIR (Vol 36) 1949 E P 109 : 51 P L R 16 (FB).

——Scope and applicability—"Ancestral immovable property" — Meaning of — Property of maternal grandfather in hands of daughter or grandso — Whether ancestral qua his descendants — Suit by such persons to challenge alienation by female owners.

The property of a maternal grandfather in the hands of a daughter or of a grandson is not ancestral qua his descendants and therefore the Punjab Limitation (Custom) Act has no application to suits brought by such persons to challenge alienations by female owners. Further the scope of the Act is limited only to those kinds of suits which are brought to safeguard rights by collaterals in respect of ancestral immovable property on the rule laid down in Art. 59 of Rattigan's Digest of Customary Law. The definition of "ancestral property" given in Expl. I of Art. 59 of Rattigan's Digest of Customary Law is the definition in which that expression is used in the Act. That definition is in these terms. "Ancestral property means as regards sons, property inherited from a direct male ancestor, and, as regards collaterals, property inherited from a common ancestor". 32 P R 1895 & 5 Lah 356, Overruled. A I R (Vol 36) 1949 E P 109 : 51 P L R 16 (FB).

——Scope of—Provisions in schedule not to be read subject to provisions of Punjab Custom (Power to Contest) Act 2 [II] of 1920.

Provisions of the various articles contained in the schedule to the Act are not to be read subject to the provisions contained in Punjab Custom (Power to Contest) Act, 2 [II] of 1920. A I R (Vol 33) 1946 Lah 272 : 48 Pun L R 45 : 222 Ind Cas 162.

——Scope and applicability.

The Act relates only to ancestral immovable property and the appointment of heirs by persons who follow custom in the Punjab. In order to make it applicable, it must be shown that the property in suit was ancestral qua the plaintiffs, and until that has been shown, the ordinary rules of limitation as laid down in the Indian Limitation Act would apply. AIR (Vol 20) 1933 Lah 369 : 143 Ind Cas 422 (DB).

——Whether retrospective.

The Act has no application to the case where the alienor had died before the Act came into force and rights had already accrued upon his death. A I R (Vol 19) 1932 Lah 330 : 33 P L R 193 : 13 Lah 589 : 137 Ind Cas 236 (DB).

——Applicability — Forfeiture and sale of soldier's property by Government — Suit by reversioners — Law applicable.

Where the property of a person governed by custom is forfeited and sold by the Government, a suit for recovery of the same by his reversioners is governed by Art. 144, Limitation Act and not by the Punjab Limitation Act, 1920. The latter Act applies only to alienations by the owner himself.

Where the properties of a soldier who had deserted were sold by the Government in 1923 and the reversioner instituted a suit for possession in 1929 alleging that the soldier had not been heard of since 1915 and the property being ancestral, only his life estate could be sold :

Held, that the suit was governed by the ordinary rule of limitation contained in Art. 144, Limitation Act. AIR (Vol 19) 1932 Lah 45 : 33 P L R 237 : 134 Ind Cas 97.

——Applicability to alienations by females.

When the land is admittedly ancestral the Act applies even if it is an alienation made by a female. 32 PLR 621 : (1932) 135 Ind Cas 505 (DB).

——Applicability—Parties governed by Hindu Law.

The Act applies exclusively to cases of reversioners suing to contest alienations which are invalid under the Punjab Customary Law. Where therefore the parties are governed by Hindu Law, the provisions of the Act are inapplicable. A I R (Vol 17) 1930 Lah 294 : 120 Ind Cas 610 (DB).

——Setting aside gift—Limitation for suit.

B gifted certain land to his daughter S who in turn sold it to R. B's reversioner instituted a suit to contest the gift against B and S. The suit was decreed; R was not made a party to the suit. Later on, the reversioner instituted a second suit against B; S and R for declaration that the sale by S to R was invalid.

Held, that the suit was in effect to set aside the gift made by B in favour of S and being brought after the period of limitation had expired was time-barred. The reversioner was in fact challenging the gift by B. The decree in former suit was of no avail to the reversioner and R not being made a party to the suit, the decree was not binding on R. A I R (Vol 17) 1930 Lah 129.

——Suit by minor—Limitation.

Suit by minor reversioner to contest unnecessary alienation, brought at a time, when if brought by minor's father it would be barred, under Punjab Limitation Act, I of 1920 is also barred. A I R (Vol 12) 1925 Lah 24 : 82 Ind Cas 626 : 5 Lah 389 : 6 L L J 334 (DB).

—S. 2

——S. 2—Effect — Extension of period of limitation.

Section 6 really gives an additional period of one year to those who were at the time, when the Act came into force, entitled to institute suits for declaration but could be successfully met by a plea of limitation owing to the repeal of the Act of 1900 and the consequent reduction of the limitation by the new Act. AIR (Vol 13) 1926 Lah 188 : 92 Ind Cas 294.

—S. 6

——S. 6—Alienation includes testamentary disposition of property.

Where a suit, in substance, is a suit attacking a will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit. A I R (Vol 25) 1938 Lah 158 : 40 P L R 126 : I L R (1938) Lah 332 : 178 Ind Cas 285 (DB).

——S 6 — Interpretation — "Notwithstanding anything herein contained".

The words "notwithstanding anything herein contained" do not repeal S. 5 in so far as the applicability of the provisions of Ss. 4 to 25 to suits governed by S. 6 is concerned. They are intended to govern the period of limitation prescribed by the Act, and the object of section was to prescribe a maximum period of one year after the commencement of the Act for a suit for which the period of limitation had commenced to run before the enforcement of the Act. A I R (Vol 14) 1927 Lah 348 : 8 Lah 711 : 9 L L J 420 : 29 P L R 148 (DB).

—S. 7

——S. 7—Applicability.

A person governed by custom made a disposition of ancestral immovable property by a written will on 31st August 1925 which was registered on 2nd September 1925 but his reversioner did not have knowledge of the execution or contents of the will till after the death of the testator in 1935. In 1937, the reversioner brought a suit for possession:

Held, that the suit was not barred under S. 7 merely because the reversioner had failed to sue for declaration within six years of the registration of the will under Art. 1. A I R (Vol 29) 1942 Lah 114 : 44 P L R 178 : I L R (1942) Lah 364 : 200 Ind Cas 131 (F B).

——S. 7 — Question, if mixed of law and fact.

Per Dalip Singh J. — Article 2 as well as S. 7 (a) refer to a suit for possession brought on the ground that an alienation of such property is not binding on the plaintiff according to custom and, therefore, it is limited in its scope and does not apply to all suits for possession but only to those suits for possession which challenge the alienation in question directly. It would be a question of mixed fact and law in each case to determine whether the suit as framed should either directly, or of necessary construction, be held to be a suit for possession on the ground that an alienation of the property in suit was not binding on the plaintiff according to custom or whether it should be held not to be such a suit. A I R (Vol 29) 1942 Lah 114 : 44 P L R 178: I L R (1942) Lah 864: 200 Ind Cas 131 (F B).

——S. 7, Art. 2—Limitation Act, Art. 141.

Sale by a widow governed by custom — Suit for possession by collaterals after widow's death:

Held, that the suit was governed, not by Art. 141, Limitation Act but by S. 7 Art. 2, Punjab Limitation Act. ILR (1942) Lah 41: 43 P L R 181.

——S. 7 — Where there is right of inheriting, mere failure to sue for declaration does not create prescriptive title. AIR (Vol 22) 1935 Lah 313 (DB).

S. 7 — Suit based on inheritance alone — Applicability.

A suit which is based purely on the right of inheritance and in which the alienation is set up and relied on by the defendant, cannot be considered to be a suit on the ground that the alienation is not binding on the plaintiff so as to bring it within the provisions of S. 7. AIR (Vol 22) 1935 Lah 313 (DB).

——S 7—Applicability.

Section 7 applies to suits for possession which are not time barred but which are instituted at a time when a suit for declaration has already been barred by time. AIR (Vol 22) 1935 Lah 313 (DB).

——S. 7—Scope.

The suit contemplated under Art. 1 is one instituted during the life time of the alienor. If no such suit is instituted during the life time of the alienor, the only result is that a suit for possession will not be maintainable according to S. 7 (b). AIR (Vol 22) 1935 Lah 87 (DB).

——Ss. 7, 8, Art. 2 (b) — Daughter's suit contesting father's alienation—Limitation.

A daughter derives her right to succeed from her father and not from the common ancestor and hence she cannot be considered to be an "agnate." Not being an agnate, she cannot contest the alienations of her father from whom she derives her title; where the collaterals get a declaratory decree that the alienation by the father shall not affect their reversionary rights, such a decree cannot enure for the benefit of the daughter she being not one of the reversioners on whose behalf the representative declaratory suit is deemed to be instituted. But assuming that she can take advantage under the decree, then her suit for possession would be governed by Art. 2 (b). That article prescribes a period of three years for such a suit and in view of the provisions of S. 7 of the Act, the suit should be instituted within one year after the Act came into force, i.e., before 28th May 1921. A I R (Vol 21) 1934 Lah 725 : 16 Lah 237 : 37 P L R 353 and 461: 154 Ind Cas 988 (DB).

——S. 7 — Ancestral land — Widow, alienation by— Suit by reversioner—Limitation.

In case of an alienation by a widow, if the property alienated is ancestral property of the husband and the contesting reversioner, the latter's suit for declaration challenging the alienation is governed for purposes of limitation by Punjab Limitation (Custom) Act and the period for it is 6 years. A I R (Vol 20) 1933 Lah 945: 34 P L R 929: 146 Ind Cas 350.

—— S. 7, Sch. I, Art. 2 (b)—Applicability.

A sonless Jat adopted a boy and made a gift of his landed property in his favour. The collaterals instituted a suit for declaration that the adoption was invalid, and that the gift was of no effect as far as their interest as reversioners was concerned. In second appeal, the High Court held that the gift was not valid under the Customary Law applicable to the parties but declined to go into the question of adoption as the defendants did not produce a certificate regarding the question of adoption from the District Judge, as required by S. 41 (3), Punjab Courts Act. On the death of the proprietor, the reversioners sued for possession of the preperties and were met by the plea that they had to file a suit for declaration before suing for possession:

Held, that as the plaintiffs had already got a declaration in their favour, both on the question of adoption as on that of the gift, it was futile to argue that under the provisions of S. 7, it was incumbent upon the plaintiffs to bring a suit for a declaration and, after obtaining that declaration, to file a suit for possession and that the suit was certainly within the period prescribed by Art. 2 (b). A I R (Vol 20) 1933 Lah 824: 147 Ind Cas 270 (DB).

—— S. 7 — Declaration of invalidity of alienation — Subsequent adoption — Suit for posse sion without getting rid of adoption, competency of.

Under S. 7, where a declaratory decree has been obtained as to the invalidity of certain alienations and an adoption or appointment of an heir subsequently takes place and is set up as a defence to the suit for possession based on the declaratory decree, such suit is not barred merely because plaintiff has not obtained a further declaratory decree that the adoption or appointment is also not binding on him. AIR (Vol 19) 1932 Lah 17: 32 P L R 689: 133 Ind Cas 868 (DB).

——S. 7 (a) — Unless the reversioners succeed in getting a declaration that the mortgage is null and void and is not binding on them, they cannot take possession of the land on the death of the widow

without paying off the mortgage charge. AIR (Vol 21) 1934 Lah 229: 149 Ind Cas 1049 (DB).

——S. 7 (b) — Widow in possession after husband's death—Alleged adopted son applying for mutation—Application dismissed — No suit for possession — Widow remarrying—Mutation in favour of collateral — On appeal mutation in favour of alleged adoptee and possession given to him — Suit by collateral for declaration that mutation is ineffectual but beyond six years after he knew about adoption:

Held, that suit could not be regarded as one to set aside the alleged appointment of heir. As the alleged appointed heir failed to sue for possession within six years when his right as alleged adopted son was interfered with, his right became extinct, and as such, the collateral's suit was not barred. A I R (Vol 22) 1935 Lah 787: ILR (1937) Lah 517: 39 PLR 982: 36 Cr L Jour 1161: 160 Ind Cas 1000 (DB).

—S. 8.

——S. 8 — Scope and effect of—Declaratory decree obtained by one of the reversioners—If enures for the benefit of other reversioners whose right to impeach the alienation has become barred.

Where a declaratory decree is once obtained by a reversioner, that will enure for the benefit of even the reversioners whose right to impeach the alienation has become barred. AIR (Vol 35) 1948 E P 5: 50 P L R 61.

——S. 8—Object.

The whole object of S. 8 is to give the benefit of a declaratory decree to those descendants of the common ancestors who would eventually inherit his estate when succession opens out. It may be that that person who inherits is a very remote reversioner and was not in existence at all within even 20 years of the decree, yet he is entitled to the benefit of that decree because the suit brought by the presumptive reversioner is to be considered to have been brought in a representative capacity and not for his own benefit. AIR (Vol 32) 1945 Lah 76: 47 PLR 65 (FB).

——S. 8—Words "all persons entitled to impeach the alienation" are descriptive of the word "reversioner" as understood in customary law.

The phrase "All persons entitled to impeach the alienation" as used in S. 8, is not synonymous with the phrase "persons who successfully could institute a suit to impeach the alienation." The words used are descriptive of all persons who have, in law, a substantive right to question alienation of ancestral property by its holder for the time being and this phraseology seems to have been employed so as to exclude those who, under custom, have no such power to contest alienation, that is, female heirs, and they were excluded on the ground that though they had a right to inherit, they had no right to impeach alienation of a male proprietor. These words were intended to be descriptive of the words "reversioner" as understood in customary law meaning all these males who claim through male and can say that the land is ancestral qua them. AIR (Vol 32) 1945 Lah 76: 47 P L R 65 (FB).

——S. 8—Scope.

Section 8 does not lay down any new rule. It merely gives statutory recognition to the long settled rule of custom that the right to control an alienation is not co-extensive with the right to succeed and that a declaratory decree enures for the benefit of those persons only who themselves have the right to control the alienor's alienations of ancestral property. A declaratory decree setting aside alienation obtained long before 1920 by the male collateral of a person governed by Customary law would not enure for the benefit of his widow, who, though entitled to succeed, is herself not entitled to challenge the alienation. A I R (Vol 24) 1937 Lah 636 : 39 P L R 577 : I L R (1939) Lah 331: 173 Ind Cas 529 (DB).

——S. 8 — 'Entitled to impeach the alienation,' meaning of.

From the words "entitled to impeach the alienation" used in S. 8, the Legislature intended to include those persons only who possessed in praesenti any right to challenge the alienation and to exclude those who either possessed no such title or having possessed it, had lost it by their own act or by the operation of law. A right once lost cannot be regained and any decree obtained by those whose right subsists cannot entitle those who have lost their right to obtain possession on the basis of that decree. By no stretch of language, therefore, can the word "entitled" be taken to include those whose title is not alive. In its ordinary grammatical sense also, the word "entitled" is not equivalent to "were entitled" or 'had been entitled" or "may have been entitled." AIR (Vol 22) 1935 Lah 391: 38 P L R 252: 17 Lah 20: 161 Ind Cas 369 (DB).

—Sch.

——Sch.—Article contained in — If to be read subject to Punjab Custom (Power to Contest) Act II of 1920.

The contention that the provisions of the Schedule to Act I of 1920 have to be read along with the provisions of Act II of 1920 or that Act I of 1920 would have no application where Act II of 1920 has no application, cannot be accepted. A I R (Vol 33) 1946 Lah 272 : 48 P L R 43 : 222 Ind Cas 162.

—Art. 1.

See also S. 7 and Art. 2.

——Arts. 1, 2—Sansi Jat—Gujranwala District—Suit to set aside alienation by ancestor—Act, if applies—Terminus a quo explained — After-born reversioner, suit by, not in conjunction with existing reversioner, to challenge alienation.

Ordinarily Punjab Limitation (Custom) Act governs a suit by a Sansi Jat of Gujranwala District challenging the alienation by his ancestor. Article 1 comes into play if a suit is for a declaration and Art. 2 if it is for possession. The terminus a quo in both cases is the same, i. e., if the alienation is by a registered deed, the date of registration of such deed and if the alienation is not by a registered deed, the date on which an entry in the Register of Mutations is attested if any such entry is made or the date on which the alienee takes physical possession of the whole or any part of the property alienated, if no such entry is made, and in all other cases, the date on which the alienation comes to the knowledge of the plaintiff.

[The rules of interpretation of statutes and terminus a quo explained.]

To every suit instituted in a Court of Law, the proper article of limitation no doubt applies but in the suit of an after born reversioner, limitation would be judged from the point of view of the rightful claimant, whose existence at the material time enables him to raise the suit. The existence of a reversioner with a subsisting right does affect the question of limitation and the limitation for an after-born son suing under the Punjab Customary Law on his own account and not in conjunction with any existing reversioner to challenge an alienation made by his father or a previous male-holder is the same as laid down in Art. 1 or Art. 2, Punjab Limitation (Custom) Act as the case may be, for the reversioner in existence at the time of the alienation. A I R (Vol 30) 1943 Lah 281 : I L R (1944) Lah 287 : 45 P L R 345 : 209 Ind Cas 257 (FB).

——Art. 1—Per Full Bench — The word "deed" in Art. 1 (Firstly), Punjab Limitation (Custom) Act—Art. 1 is not synonymous with the word "document" and does not include will.

In ordinary language, 'deed' and 'document' are not synonymous terms. 'Document' is much wider in scope and means "something written, inscribed,

etc., which furnishes evidence or information upon any subject." "Deed," on the other hand, is a formal document of a non-testamentary character, capable of delivery, which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. Thus, while every "deed" is a 'document', every 'document' is not a 'deed'. A I R (Vol 24) 1937 Lah 798 : 175 Ind Cas 577, Overruled; A I R (Vol 29) 1942 Lah 114 : 44 P L R 178 : I L R (1942) Lah 364 : 200 Ind Cas 131 (FB).

——Art. 1—Applicability of, to suits against subsequent transferees.

Article 1 is obviously intended to apply only to suits brought by a reversioner against the original alienor and not to suits against subsequent transferees. A claim against the subsequent transferee is governed by Art. 120, Limitation Act, 1901, and the time begins to run only from the date of the subsequent transfer. A I R (Vol 31) 1944 Lah 214 : 213 Ind Cas 165 (FB), Overruled ; A I R (Vol 28) 1941 Lah 304 : 43 P L R 419 : 195 Ind Cas 592.

——Art. 1—An alienation of ancestral property cannot be challenged by a descendant who did not exist on the date of the alienation. A I R (Vol 26) 1939 Lah 290 : 42 P L R 237 : 183 Ind Cas 451 (DB).

——Art. 1—Scope.

The suit contemplated under Art. 1 is one instituted during the life-time of the alienor. If no suit is instituted during the life-fime of the alienor, a suit for possession will not be maintainabte according to S. 7, cl. (b).

Plaintiffs were in possession of the property and the vendees were never in possession of the same. When an order of the mutation in favour of the vendees was passed, plaintiffs filed a suit for declaration that they were owners :

Held, that Art. 1 did not bar their suit. A I R (Vol 22) 1935 Lah 87 (DB).

——Arts. 1, 2—Transfer by widow not merely of her life estate but the absolute estate with concurrence of next reversioner—Suit to set aside transter—Law applicable.

When a widow under Punjab Customary Law transferred not only her life interest but made over the properties themselves with the undisputed concurrence of the next reversioner, the transfer is an 'alienation' within the meaning of Arts. 1 and 2 and a suit to set aside the transfer must be brought within the special period of limitation provided in the Act, even with the assumption that a mere transfer by the widow of her life-estate in ancestral property would not be within the purview of this enactment. AIR (Vol 21) 1934 PC 43: 66 MLJ 61: 1934 MWN 1 : 38 CWN 235 : 59 CLJ 1 : 148 Ind Cas 551.

——Art. 1—Scope of—Suit instituted after death of alienor—Applicability of the article.

Under the Act, an 'alienation includes a testamentary disposition of property and Art. 1 lays down that a suit for a declaration that an alienation of ancestral immovable property shall not be binding on the plaintiff after the death of the alienor must be instituted within six years of the date of registration when the alienation is made by a registered deed. The article applies even if the suit is instituted after the death of the alienor. A I R (Vol 20) 1933 Lah 686 : 34 P L R 261 : 146 Ind Cas 1069.

——Art. 1—Will—Suit to declare it inoperative.

H made a will in 1911 by which he left his land in three equal shares to his widows, his widowed daughter-in-law and his brother-in-law. He also provided that N should succeed the widows, who were only to have a life-interest in their respective thirds. H died in 1924. In 1925, the plaintiffs, who were the reversioners, of H, brought a suit for a declaration that the will could not affect their reversionary rights after the death of the two widows :

Held, that the suit was in reality a suit for declaration that the will was wholly inoperative and could not affect the reversioners after the death of the alienor ; it was, therefore, governed by Punjab Act (I of 1920) and was time-barred. A I R (Vol 18) 1931 Lah 702 : 32 P L R 556 : 13 Lah 22 : 134 Ind Cas 1040 (DB).

——Art. 1 — Starting point — Gift of ancestral property by widow—Suit by collaterals—Limitation.

On June 1916, S applied to patwari to make an entry of oral gift of land by her in favour of her adopted son. In November, 1916 the gift was so entered into patwari's register and on 28th December 1916 mutation in respect thereof was sanctioned by the Assistant Collector. Later on the Collector passed an order authorising the Assistant Collector to review his order and the latter recorded an order refusing sanction. S thereupon appealed from the order which was restored. On 28th August 1923 the collaterals of S's husband brought a suit challenging the alienation.

Held, that the suit was barred by limitation. The period of limitation began to run from 28th December 1916 when the mutation was effected though the gift was made earlier. The period having once begun to run, the subsequent infructuous proceedings taken by the Collector could not have the effect of stopping. AIR (Vol 17) 1930 Lah 632 : 31 P L R 281 (DB).

——Art. 1—Unregistered will—Limitation.

Where the will is unregistered the starting point of limitation is the date of mutation. (A I R (Vol 16) 1929 Lah 819 : 30 P L R 443 : 11 L L J 295 : 11 L L J 487.

——Art. 1—Applicability — Suit by heirs of testator for declaration that mutation on the basis of will is wrong.

The question of the particular law of limitation applicable to the case must depend on the form of the suit and the relief claimed and not on what might be ultimate effect of the relief claimed if it is granted by the Court.

A person bequeathed his ancestral immoveable property and mutation of names in the revenue records was made after testator's death. Heirs of the testator sued for declaration that the mutation on the basis of the will was wrong and the same did not affect their rights.

Held, that Art. 1 would not govern the case inasmuch as the relief claimed was not declaration that the alienation was not binding. A I R (Vol 16) 1929 Lah 208 : 114 Ind Cas 437 : 30 P L R 27.

——Art. 1 — Article 1 applies only to suits instituted during the life time of the alienor. AIR (Vol 16) 1929 Lah 208 : 114 Ind Cas 437 : 30 P L R 27.

——Art. 1 — Suit for declaration of invalidity of alienation by widow—Limitation.

A widow made an oral gift of her deceased husband's property. The gift was recorded by a mutation order sanctioned by the Assistant Collector on the 28th December 1916. On the 3rd March 1917 the Collector passed an order authorizing the Assistant Collector to review his sanctioning order and on the 6th March 1917 the latter recorded an order refusing to sanction the mutation. The widow and the donee appealed, and on the 27th September 1917 the Commissioner reversed the order dated the 3rd March 1917 and restored the original order of the Assistant Collector dated the 28th December 1916.

Held, that the time for declaratory suit began to run from the original attestation and subsequent executive action by the revenue authorities could not suspend plaintiff's rights. A I R (Vol 13) 1926 Lah 572 : 95 Ind Cas 609 : 8 L L J 327 : 27 P L R 702.

——Art. 1 (c) — Alienation, if includes testamentary disposition—No mutation on its basis — Time, when begins to run.

Under the Act, "alienation" includes any testamentary disposition of property. When alienation is not made by means of a registered deed, and no mutation on the basis of the will is entered in the register of mutation, the time begins to run from the date on which the alienation came to the knowledge of the plaintiffs. Where, therefore, the plaintiffs came to know of the existence of the wills on 17th February 1916, a suit instituted in 1926 is barred by time. AIR (Vol 21) 1934 Lah 913 : 155 Ind Cas 1104 (DB).

—Art. 2.

See also Punjab Limitation (Custom) Act, 1920, S. 7 and Art. 1.

——Art. 2 — Applicability—Suit for possession by reversioners against transferees from original alienees from last male holder.

Article 2 applies to suits for possession of ancestral immovable property on the ground that the alienation is not binding on the plaintiff according to custom. It prescribes a period of three years if a declaratory decree has been obtained, the time runs from the date on which the right to sue accrues. The words "original alienees" or subsequent transferees" do not occur in the article. The subsequent transferees from the original alienees stand or fall with the alienees. If the original alienation cannot be attacked by the plaintiff, the subsequent transfers will stand. If, however, the original alienation can be attacked, the subsequent transfers will be invalidated.

In other words, whenever the subsequent transferees are sued, the original alienation has got to be attacked by the plaintiff. The suit against the subsequent transferees, therefore, is in effect a suit for possession of immovable property on the ground that original alienation, and in consequence, the subsequent transfer, is not binding on the plaintiff according to custom. Such a case clearly falls within the express wording of Art. 2.

Where the subsequent transferees were not made parties to the suit by the reversioners against the original donees the finding in that suit that the alienation was invalid cannot bind the subsequent transferees and in the subsequent suit for possession by the reversioners against the subsequent transferees, it would be incumbent upon the reversioners again to establish the invalidity of the original alienation. The limitation for such suit would be governed by Art. 2, the basic cause of action being the original alienation and not the subsequent transfer by the original donees : A I R 1941 Lah 304 : 195 Ind Cas 592, Overruled. A I R (Vol 31) 1944 Lah 214 : ILR (1944) Lah 55 : 213 Ind Cas 165 (FB).

——Art. 2 — Will by widow of last male holder in favour of daughter—Suit for possession by collaterals of last male-holder on ground that will according to custom was invalid :

Held, that the suit was governed by Art. 2 A I R 1942 Lah 114 : 200 Ind Cas 131 (F B), Overruled. A I R (Vol 24) 1937 Lah 798 : 40 P L R 35 : 175 Ind Cas 577.

——Art 2—Sale of right to succeed to childless male proprietor—Validity — Suit to set aside sale—Limitation.

A reversioner entitled to succeed to the property of a childless male-proprietor on the death of the latter cannot, during the latter's life-time, transfer his right to succeed so as to invest the transferee with a right to sue. Such a right to succeed is not immovable property within the meaning of the Punjab Lim. (Custom) Act. AIR (Vol 18) 1931 Lah 375 : 32 P L R 301 : 131 Ind Cas 91 (DB).

——Art. 2 — Suit by collateral for recovery of property—Limitation—Starting point.

The right to ue for the recovery of possession of the property belonging to a collateral accrues upon the latter's death and the period of limitation begins to run from the date of his death and not from the date on which the plaintiff comes to know of the death. The interpretation to be placed on the expression 'when the right to sue accrues' in Art. 120, Limitation Act, depends, to a great extent, on the particular class of cases to which the article is sought to be applied. AIR (Vol 18) 1931 Lah 238 : 12 L 13 : 32 P L R 219 : 131 Ind Cas 298 (DB).

——Art. 2—Applicability—Assignee from alienee.

Article (2) applies even where the suit is brought not by the alienee but by the assignee from him. AIR (Vol 17) 1930 Lah 747 (DB).

——Art. 2 — Allegation of wrongful possession — Reversioners in suit for possession, alleging wrongful possession only—Article applicable.

Where in a suit for possession, the reversioners do not, in the plaint, admit or seek to set aside any alienation made by the deceased Mahomedan widow in favour of the alienee, but simply allege wrongful possession by him. Art. 2 of the Schedule annexed to the Punjab Limitation (Custom) Act (1920) does not govern limitation. The general rule of limitation contained in Limitation Act, Art. 141, applies. A I R (Vol 17) 1930 Lah 111 : 11 L L J 465 : 1930 Cr C 95.

——Art. 2—Death of vendor—Suit for possession by collateral of vendor — Limitation—Burden of proof.

Where in a suit for possession by the collateral of a vendor on the ground that sale was invalid. the plaintiffi alleges the death of the vendor giving him cause of action it is for him to show that his suit is within three years of the vendor's death : it is not enough to prove that the vendor is dead. AIR (Vol 14) 1927 Lah 284 : 100 Ind Cas 833.

——Art. 2—Suit for possession—Alienation of ancestral property—Limitation.

In the case of an alienation of ancestral immovable property, a suit for possession on the ground that the alienation is not binding on the plaintiff, must be brought within three years from the death of the alienor where a declaratory decree has already been obtained and the alienor has not left a widow surviving him. The fact, that the plaintiff had no right to sue beeause some of the nearer reversioners were alive, will not stop time from running against him. AIR (Vol 13) 1926 Lah 599 : 95 Ind Cas 739.

——Art. 2 (b)—Alienation by two or more persons—Right to sue When arises.

Article 2 (b) of the Punlab Limitation (Custom) Act treats the entire property as one entity and the alienation as a single cause of action and where the alienor or alienors, if there were more than one, have died, a right to sue for the pessession of the entire property in terms of the declaratory decree arises for the first time only when the last of the alienors has died. Till then the suit for the whole of the property could not be maintained and consequently the right to sue could not be said to have arisen. AIR (Vol 35) 1948 Lah 159.

——Art. 2 (b) — Alienation of ancestral property — Suit for possession —Limitation.

The limitation allowed by the Act for the possession of ancestral property, which has been alienated, and the alienation of which is challenged as not binding on the plaintiff according to custom is three years from the date on which the right to sue accrues. AIR (Vol 20) 1933 Lah 845 : 35 P L R 85 : 147 Ind Cas 260 (DB).

—Art. 3.

——Art. 3 — Suit to declare invalidity of adoption—Adoption deed registered—Limitation — Terminus a quo— Plaintiff's knowledge or adoption—Onus.

Under Art. 3 of the Punjab Limitation (Custom) Act, the date of registration of a deed of adoption

cannot be regarded as the terminus a quo for the purpose of limitation for a suit for a declaration that an alleged adoption is invalid, as the mere fact of registration of a deed of adoption cannot be held to be constructive notice to the plaintiff. If the suit is not prima facie barred by time, the onus is upon the defendant to prove that the plaintiff had knowledge of the adoption more than six years before the suit. AIR (Vol 36) 1949 E P 156.

——Art. 3—Suit for declaration that alleged appointment is invalid must be brought within six years from the date of knowle lge of alleged appointment. AIR (Vol 22) 1935 Lah 83 (DB).

—Art. 4.

——Art. 4—Suit by collateral for possession against adopted son after death of nearer collateral.

A person died in 1919 and his ancestral property was mutated in favour of the defendant as his adopted son in July, 1922. A collateral instituted a suit for possession of this land in October, 1929 alleging that there was a nearer collateral on the death of the owner and that he died only within 6 years of the suit :

Held, that the suit was governed by Art. 4 under which time began to run against all the reversioners when the land was mutated in favour of the adopted son when presumably the collaterals must be deemed to have knowledge of the adoption and the suit was, therefore, barred. A I R (Vol 19) 1932 Lah 457 : 33 P L R 949 : 137 Ind Cas 844.

——Art. 4 (b)—Applicability.

Article 4 (b) does not apply to property which is not ancestral as it deals exclusively with suits for possession of ancestral immovable property. A I R (Vol 22) 1935 Lah 662 : 159 Ind Cas 1030 (DB).

—Art. 6

——Art. 6 — Scope of—Failure to sue within time—Effect—Right if extinguishe l—Limitation Act, S. 28. See AIR (Vol 36) 1949 E P 414.

——Art. 6 — Suit by adopted son of occupancy tenant, K, for possession of occupancy rights — Mutation effected on K's death in name of J, widow of K's predeceased son — Plaintiff keeping silent for over six years — Mutation thereafter effected in favour of landlord-defendants on J's re-marriage — Suit filed within one year of such mutation—If barred by limitation.

On the death of an occupancy tenant, K, in 1929, the plaintiff claiming to be his adopted son asked for a mutation of these rights to be effected in his favour. This was opposed by J, the widow of a predeceased son of K, and the revenue authorities ordered mutation to be effected in her favour in 1930, disregarding the provisions of S. 59 of the Punjab Tenancy Act. The plaintiff took no steps to have the mistake rectified. The landlord-defendants were not parties to this dispute between J and the plaintiff. J re-married in 1939 and mutation was effected in favour of the landlords in September 1939, in spite of the plaintiff's opposition. The plaintiff thereupon brought a suit in May 1940, for the recovery of possession of the occupancy rights, as well as for a declaration that he was entitled to recover this property as an adopted son and that the occupancy rights had not been extinguished under S. 59 of the Punjab Tenancy Act.

Held, that no fresh tenancy could be held to have come into existence in 1930, and that the effect of the decision of the revenue authorities in ordering mutation in favour of J was not that the occupancy rights were extinguished but that the plaintiff's right was although wrongly, postponed to that of J, who must be deemed to have continued the occupancy rights in the land in suit as an heir of K. But when she re-married and transferred them to the defendant-landlords and thus tried to extinguish them altogether, the position became an entirely different one. Had she been in possession of any other immovable property belonging to K legally, his reversioners would have been entitled to oust her on her remarriage. And there is no reason why the plaintiff should not be able so to do on the assumption that he was K's adopted son under the Hindu Law and thus his nearest reversioner, being a lineal descendant within the meaning of S. 59 of the Punjab Tenancy Act. On J's re-marriage, her rights ceased to exist and the plaintiff's suit to recover them from the landlord-defendants is based on a fresh cause of action which accrued to him on a mutation having been effected in their favour in 1939. As the suit was instituted within a year of the transfer to the defendant-landlords, it cannot be held to have been barred by limitation under Art. 6 of the Punjab Limitation (Custom) Act. AIR (Vol 33) 1946 Lah 272 : 48 P L R 45 : 222 Ind Cas 162.

——Art. 6—Ancestral property—Meaning of.

The word ancestral property has not been defined in the Act and in the absence of any definition the ordinary dictionary meaning is to be given to it. If the rights on the basis of which the plaintiff was bringing the suit happened to belong to his father, they would be ancestral qua him and would, therefore, come within the ambit of Col. 1 of Art. 6. AIR (Vol 33) 1946 Lah 272 : 48 Pun L R 45 : 222 Ind Cas 162.

——Art. 6 — Applicability—Article applies to plaintiff's and not to defendants—Defendant not to prove ancestral nature of property.

If Art. 6 has to be applied, the property must be found to be ancestral property before the provisions of the article can be attracted. Obviously the article can apply only to plaintiffs and not to defendants. Therefore, it cannot be contended that the article will not apply as long as the property was not proved to have been the ancestral property of the defendant. AIR (Vol 33) 1946 Lah 272 : 48 Pun L R 45 : 222 Ind Cas 162.

PUNJAB LOANS LIMITATION ACT (1 of 1904)

——Single bond — Limitation Act, Art. 66 — Bond executed by two promisors—Limitation.

A suit was instituted on 26th May 1919 for money due on a bond dated the 10th May 1913. The plaint alleged that the bond had been executed by K as principal and by G as surety and the prayer was for a decree against K and the property of G in the hands of S, son of G. The trial Court decreed the suit but in appeal the point of limitation was decided against plaintiff and the suit dismissed as against S. Second appeal was preferred from the decision. The terms of the bond were rather obscure and the lower Appellate Court having given no finding on the interpretation of the instrument, the High Court in Second Appeal assumed that the bond was signed by both K and G as principal debtor and surety.

Held, that the Article applicable was Art. 66, the suit being certainly one on a single bond executed by two persons with a day specified for payment and that the suit was in time as the period of three years under Art. 66 is extended to six years by the Punjab Loans Limitation Act. AIR (Vol 11) 1924 Lah 534 : 76 Ind Cas 150 (DB).

—Art. 16

——Art. 16—Instalment bond—Applicability.

In Punjab a suit on a bond payable by instalments and containing a clause that on default on two instalments the whole should be due is governed by Art. 16 of the Punjab Loans Limitation Act (1904) and not Art. 75 of the Limitation Act of 1908. AIR (Vol 8) 1921 Lah 280 : 3 L L J 522 (DB).

—Art. 57

——Art. 57 — Mutual account — What is — Article applicable.

The plaintiffs sued the defendants on accounts, claiming Rs. 1,450. The suit was instituted on the 30th of August 1918. The accounts showed a balance struck of Rs. 361-6-0 in favour of the plaintiffs on the 20th May 1913. Thereafter the accounts continued for another year and ended with a total in favour of the plaintiffs of Rs. 832-9-0. No second balance was struck formally. Interest at 1 per cent. per mensem was claimed bringing the amount in suit up to Rs. 1,450 :

Held, that the article applicable was Art. 57 for which the period is six years under the Punjab Loans Limitation Act of 1904, the balance being an acknowledgment starting fresh period of limitation under S. 19 of Act IX of 1908. An account is mutual when there are transactions on each side creating independent obligations on the other, and, where the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual. AIR (Vol 10) 1923 Lah 636 : 79 Ind Cas 998 (DB).

——Art. 57 — Balance due on mutual, open and current account—Article applicable.

Where the balance claimed is due on a mutual, open and current account and there have been reciprocal demands between the parties, the suit is governed by Article 85 of the First Schedule of the Limitation Act and not by Article 57 of the Punjab Loans Limitation Act. In order to bring the case within the latter article the plaintiffs have to make out that the claim was for money payable for money lent. A mere striking of balance is no evidence of a new contract. A I R (Vol 9) 1922 Lah 188 : 4 L L J 217 : 62 Ind Cas 898 (DB).

PUNJAB LOANS LIMITATION REPEALING ACT (3 of 1923)

—S. 5

——S. 5—Effect—Effect on S. 19, Limitation Act.

The period of two years within which a suit can be instituted under S. 5 of the Punjab Act III of 1923 is the period prescribed for the suit within the meaning of S. 19 of the Limitation Act. The effect of S. 5 is to extend the period by two years if the suit is within time or the date the Act came into force. AIR (Vol 17) 1930 Lah 978.

——S. 5 — "Period prescribed for the suits", meaning of.

The period within which a suit could be instituted if the "period prescribed for the suit" within the meaning of S. 19, Lim. Act. Therefore the period of two years within which a suit could be filed under S. 5, Punjab Act 3 of 1923 is the "period prescribed for the suit" within the meaning of S. 19, Lim. Act.

On 17th May 1921 A signed a balance in favour of B for an amount due and on 7th June 1924 he acknowledged his liability under that balance. B instituted a suit for recovery of the amount on 9th March 1927 :

Held, that the suit was within time. S. 5, Punjab Act 3 of 1923, prevented the suit from being barred by time for two years from the date on which the Act came into force and therefore the right to sue being alive on 7th June 1924, when the liability was acknowledged, the acknowledgment extended the time by virtue of S. 19, Lim. Act, by three years from its date. AIR (Vol 17) 1930 Lah 978.

——S. 5—The effect of the Loan Limitation Repealing Act (3 of 1923) is to fix the period of limitation for suits falling within the purview of the Punjab Loan Limitation Act, 1904, and the Repealing Act, 1923, and the last date on which the suit could have been instituted was 15th June 1925 and not 15th June 1923. AIR 1929 Lah 877 (2), Reversed. AIR (Vol 17) 1930 Lah 503 (DB).

PUNJAB MINOR CANALS ACT (3 of 1905)

—S. 10.

——S. 10 — Setting fire to reeds — Authority of Collector.

Section 10 of the Act does not authorize the Collector to enter upon the property of private individuals and to set fire to plants or trees growing thereon in order to facilitate the deposit of soil or silt excavated from the canal bed. Therefore, an officer doing any of the above acts cannot be said to be acting in the discharge of his duty as a public servant within S. 332, Penal Code. A I R (Vol 14) 1927 Lah 706 : 9 Lah L J 424 : 28 Cri L J 993 : 105 Ind Cas 817.

—S. 43.

——S. 43 — Mortgage with possession of right in channel included in Sch. I — Suit for redemption — Applicability — Defendant must prove that civil Courts have no jurisdiction

In a suit by the mortgagor for the redemption of his right in certain water channel included in Sch. I of the Punjab Minor Canals Act, mortgaged with possession with the mortgagee, dispute is not essentially one regarding the mutual rights of the plaintiffs and defendants to the ownership or to the use of the water of the canal. The dispute is not such as is contemplated by S. 43. It is for the defendants to establish that the case is taken out of the cognizance of the civil Courts by a special Act for all cases of the civil nature are triable by the ordinary civil Courts unless a special Act bars the jurisdiction of the civil Courts. A I R (Vol 30) 1943 Pesh 86 : 210 Ind Cas 137.

——Ss. 43, 70 — Suit for damages for wrongful conversion of water :

Held, that the civil Court cannot take cognizance of the question even incidentally though the claim as laid in the plaint is within its cognizance. Such a suit comes under S. 43 and the jurisdiction of the civil Court is excluded by S. 60. In such a case, the civil Court should return the plaint to the plaintiff for presentation to Collector who alone has jurisdiction to try it. A I R (Vol 23) 1936 Pesh 136 (DB).

——Ss. 43, 60—Dispute regarding rights and liabilities in respect of ownership, etc., of scheduled canal —Procedure—Jurisdiction.

The procedure to be adopted in case of disputes regarding rights and liabilities in respect of the ownership, construction, use or maintenance of a scheduled canal or watercourse is given in S. 43 and jurisdiction of a civil Court in connection with such matters is excluded by S. 60. AIR (Vol 23) 1936 Pesh 74 : 161 Ind Cas 874.

——Ss. 43, 60—Applicability — Considerations—Enquiry as to source of water in watercourse.

In order to discover whether a watercourse is covered by the Act, all that is necessary is to ascertain from whence the water comes and whether that source has been scheduled as a canal. The question whether it is covered by the Act is one not affected by any recognition or mention of it in the Settlement Records but is one to be determined solely by ascertaining whence the water in this channel comes.

There is no legal bar to the inquiry, as to the source from which the water of a particular watercourse is derived, being made by either a Revenue or a civil Court. A I R (Vol 23) 1936 Pesh 74 : 161 Ind Cas 874.

—S. 60.

——Ss. 60 and 67—Order of Collector granting permission for construction of water mill — Appeal to Revenue and Divisional Commissioner—Latter forwarding it to Revenue Minister—Order by Revenue Minister revoking Collector's order—Whether order of Provincial Government—Suit challenging legality of order — Jurisdiction of civil Court — Civil P. C., S. 9.

The Collector granted permission to a certain person to construct a water mill. Some residents of the village filed an appeal against the order of the Collector to the Revenue and Divisional Commissioner who forwarded the case to the Revenue Minister. The latter revoked the permission granted by the Collector. Challenging the legality of the order of revocation, the plaintiff sued for a declaration that he was not bound by it and also sought a perpetual injunction to be issued to restrain the Provincial Government demolishing the mill :

Held, (1) that there was no law authorising an appeal to the Revenue and Divisional Commissioner in cases like this nor was the latter authorised to send appeals to the Provincial Government for orders;

(2) that even if the order of the Collector could be cancelled by the Provincial Government, there was as a matter of fact no such order in this case as the Minister as such was not the Provincial Government and that the functions of the Minister were confined under S. 50 of the Government of India Act to aiding and advising the Governor, and the Minister himself could issue no order under his own authority;

(3) that the case was governed by S. 9, Civil P. C., and the civil Court had jurisdiction to take cognizance of the suit. A I R (Vol 36) 1949 Pesh 4.

PUNJAB MUNICIPAL ACCOUNT CODE

——Servant holding substantive appointment.

Under the Punjab Municipal Account Code, every servant who holds a substantive appointment is entitled to the benefit of the Provident Fund and every person who holds a substantive appointment comes within the letter of that rule even though he is appointed on probation. A I R (Vol 25) 1938 Lah 282 : 178 Ind Cas 153 (DB).

—S. 72.

——S. 72—Octroi.

Under S. 72 of the Municipal Accounts Code rebates for octroi paying goods are recoverable though octroi dues have not been paid thereon. 2 P R 1910 Cr : 11 Cri L J 87 : 23 P W R 1919 Cr : 109 P L R 1909 : 4 Ind Cas 951 (DB).

PUNJAB MUNICIPAL ACT (20 of 1891)

——Committee's powers—Construction.

The powers conferred on the Municipal Committees ought to be strictly construed as they are an interference for the public good with the ordinary rights and privileges of the public. The Committee therefore ought to exercise these extraordinary powers strictly in accordance with law and procedure. 130 P L R 1911 : 91 P W R 1911 : 56 P R 1911 : 9 Ind Cas 889 (DB).

—S. 2.

——S. 2 (2)—Rules under S. 154 (j) of Act XIII of 1884.

Rules made under S. 154 (j) of Act XIII of 1884 by the Lieutenant Governor are still in force by virtue of S. 2 (2). 118 P L R 1911 : 38 P R 1911 : 97 P W R 1911 : 9 Ind Cas 1000 (DB).

—S. 38.

——S. 38—Notice—Declaratory suit against Municipal Committee, if necessary.

No notice of one month under S. 38 is necessary for bringing against a Municipal Committee a suit for declaration as to ownership of a plot of land. AIR (Vol 1) 1914 Lah 271 : 1 P W R 1914: 24 P L R 1914: 32 P R 1914 : 23 Ind Cas 317.

——S. 38—Notice—Purpose of the law.

The purpose of the law is that a Municipal Committee should have reasonable time to answer claims made against it, and so the date of the presentation of a plaint in its final amended stage may be looked to, if it satisfies the provision of S. 38. 110 P L R 1911 : 9 Ind Cas 844 (DB).

—S. 42.

——S. 42—Water-tax—Liability.

Under S. 44 water-tax is liable to be levied on buildings and lands so situated as to derive benefit from the works as they stand and not on lands which may be benefited if further connections were made. A notification sanctioned the imposition of water-tax on the rents of all houses and buildings "500 ft. from the public water-main":

Held, that the expression referred to the public water-mains from which water can be drawn and not public water-mains absolutely closed and from which no one can benefit as it stands. 266 P W R 1912 : 15 P L R 1913 : 42 P R 1913 : 17 Ind Cas 149 (DB).

——S. 42—Octroi duty—Power to levy.

It is beyond the power of a Committee to levy octroi duty upon goods which were already outside the octroi zone, but were brought after extension of the "octroi" limits within the zone. Such goods cannot be said to have been brought within the octroi limits for consumption or use therein" within the meaning of S. 42 of the Act. 2 P R 1910 Cr : 11 Cri L J 87 : 23 P W R 1909 Cr : 109 P L R 1909 : 4 Ind Cas 951 (DB).

——S. 42 (1) (A) (a) (i)—Where under a contract between owner and occupier a sum of Rs. 1000 was payable by the latter for use and occupation of a house for a year and Rs. 900 out of it were described as rent and Rs. 100 as recouping the owner for the house-tax payable by the Municipality :

Held, that the annual value on which house-tax was recoverable was Rs. 1,000.

When Municipal taxes are payable by tenants to landlord, the Municipal Committee will levy house-tax of 10 per cent. on the gross annual rent or annual value. 46 P R 1910: 154 P L R 1910: 76 P W R 1910: 6 Ind Cas 725 (DB).

—S 52.

——Ss. 52 and 201—Claimable.

On an application by a Municipal Committee under S. 201 for the recovery of any arrears of any tax, the Magistrate, must satisfy himself, that the said Committee is legally constituted and that the amount is "claimable" as a tax or assessment; the word "due" is distinguishable from "Claimable". 2 P R 1910 Cr : 11 Cri L J 87 : 23 P W R 1909 : 109 P L R 1909 : 4 Ind Cas 951 (DB).

—S. 56.

——S. 56 (g)—Scope—Trees not provided by Municipality—Municipality, power.

Section 56 (g) does not apply to trees not provided by the Municipality itself. A Municipality can remove or plant trees; because it has full control over the sanitation and general management of the Municipal area, but cannot sell to make profit out of the trees which do not belong to it. AIR (Vol 4) 1917 Lah 45 : 39 P W R 1917 : 38 Ind Cas 93.

—S. 92.

——S. 92—Punjab Municipal Act (3 of 1911), Ss. 189 and 193—Sanction.

If no reply is given to a notice given to a Municipality for erecting, re-erecting or repairing a house within six weeks from the date of service such silence amounts to an irrevocable sanction of the Municipality. 52 P W R 1913 : 122 P L R 1913 : 19 Ind Cas 781.

——Ss. 92 and 95—Municipal Committee's powers.

A Municipal Committee can order the removal of a building or a portion thereof only under Ss. 92 and

95, under the former when the building is new, under the latter when it is desired to remove projections or structures overhanging, projecting into, or encroaching on the street. 130 P L R 1911 : 91 P W R 1911 : 56 P R 1911 : 9 Ind Cas 889 (DB).

——Ss. 92 (4), 145 — S. 92 is not to be read into the bye laws framed under it.

Failure to comply with the first part of sub-s. (4) of S. 92 of the Act does not of itself make a person criminally liable for the infringement of any bye-law framed by the Municipal Committee, under S. 92; the Committee can only issue a notice calling upon him to alter or demolish the building. 13 P R 1909 Cr : 11 Cri L J 63 : 4 Ind Cas 861 (DB).

—S. 94.

——S 94 (a) and (e) — Superstructure on old Chatta —Material alteration.

The replacing of an old by a new superstructure, upon an old chatta or bridge over a lane is a material alteration within cl. (a) of S. 94 of the Act and affects the security of the old building within cl. (e) of the section. The Committee acts intra vires if it requires the removal of such new superstructure erected without its permission. 178 P L R 1912: 210 P W R 1912 : 15 Ind Cas 658.

—S. 120.

——Ss. 120 (a) and 120 (c)—Notice.

Where the construction of a drainage system is authorised by S. 120 (a) of the Act, the omission to give notice as prescribed by S. 120 (c) does not affect the applicability of Art. 2, Limitation Act (1877). 72 P R 1909 : 112 P W R 1909 : 108 P L R 1909 : 2 Ind Cas 819 (DB).

—S. 153.

——S. 153 (b) (ii)—By-law 18 — Construction —Appointment of agent without notification.

Under bye-law 18, the agent shall be held to be appointed when the owner has duly notified the same in writing to the Engineer Secretary and no agent can be recognised as an agent unless and until his appointment is so notified. Failure to notify renders the owner liable to the penalty provided in cl. (4) of the bye-law. 21 P R (Cr) 1911 : 51 P W R (Cr) 1911 : 13 Cri L J 193 : 14 Ind Cas 193.

—S. 195.

——S. 195—Erection of building — Notice to demolish—Injunction.

Plaintiff constructed a Chabutra in contravention of the sanction of the Municipality and the Municipality ordered its demolition. Plaintiff sued for an injunction urging that his plan was more advantageous to the public than would be the building as sanctioned, but this was negatived :

Held, that no second appeal lay in the case. The Court could not go into the question of advantage to the public. A I R (Vol 2) 1915 Lah 119 : 107 P L R 1915 : 67 P W R 1915 : 29 Ind Cas 766.

—S. 201.

——S. 201—Arrears of rent not recoverable through a Magistrate.

The claims for arrears of rent which are not for any arrears of tax, fee, or money claimable under the Act, cannot be realized through a Magistrate under S. 201 9 P W R 1909 (Cr) : 10 Cri L J 353 : 3 Ind Cas 638.

—S. 204.

——S. 204 — Discretion of Magistrate — Complaint not addressed to Magistrate.

The discretion of a Magistrate, in charge of a district, which he can exercise under S. 204 is not fettered by the manner in which his predecessors have in the past exercised that discretion. A petition presented to the District Magistrate, and acted upon by him, is a complaint within S. 204 though it may not be addressed to him. 28 P L R 1910 : 11 Cri L J 596 : 8 Ind Cas 223.

PUNJAB MUNICIPAL ACT (3 of 1911)

—S. 3.

——S. 3 (2)—Wall detached from house—If a 'building."

A wall would fall within the definition of "building" whether it forms part of a house or is detached from it. A I R (Vol 34) 1947 Lah 256 : 231 Ind Cas 20 : 49 P L R 32.

——S. 3 (2)—Building—Movable wooden shed.

A wooden shed of dimensions 10 ft. x 8 ft. x 8 ft. roofed by tin sheeting and used for sleeping purposes at night was held to be a "building" though mounted on wheels and permitted it to be moved from one part of the site, on which it stood, to another. A I R (Vol 12) 1925 Lah 252 : 5 Lah 543 : 26 Cr L J 539 : 85 Ind Cas 379.

——S. 3 (5) — Re-erection of building — Change in nature or dimension or form of building — Whether necessary.

No change in the nature or dimension or form of the building is necessary to bring it within the definition of re-erection of a building. The use of a new material is not necessary to bring it within the purview of that definition. AIR (Vol 34) 1947 Lah 256 : 231 Ind Cas 20 : 49 P L R 32.

——S. 3 (5) — "Erect or re-erect" —Re-roofing — If amounts to.

Section 3 (5) of the Punjab Municipal Act is not exhaustive of the various forms of erecting and re-erecting and some constructions not expressly mentioned in the definition may be covered by the expression "erect or re-erect any building," mere re-roofing would not amount to erecting or re-erecting as defined in S. 3 (5) except when the premises are materially altered or enlarged. A I R (Vol 34) 1947 Lah 172 : 226 Ind Cas 425.

——S. 3 (5)— The term "erection" implies causing to stand upright. Repairing the walls of a shed and putting thereon iron corrugated roof prima facie does not come within the words "begun, erected or re-erected." Nor does it amount to material alteration within the meaning of S. 3 (5) (a). AIR (Vol 23) 1936 Lah 702 : 37 Cr L J 935 (2) : 38 P L R 886 : 164 Ind Cas 368.

——S. 3 (5)—Act XX of 1891—S. 92—Building without Municipal sanction—Notice of demolition — Addition.

Plaintiff asked permission to build a saiban, the plan showing light gaps between the supports of the roof. The plaintiff subsequently made additions by filling these gaps with doors and windows. The Municipality gave notice to demolish the additions. In a suit for an injunction restraining the Municipality from demolishing the additions. Held, that the notice was not illegal, as the opening of doors and windows constituted a material alteration of the building within S. 3 (5) (a) of the Act. A I R (Vol 2) 1915 Lah 452 : 58 P L R 1915 : 49 P W R 1915 : 28 Ind Cas 341.

—— S. 3 (5) (a)—Sanction for studio— Wooden partitions constructed dividing it into three portions and let out as shops.

The petitioner obtained the sanction of the Municipal Committee, to erect a building. An agreement was executed by him with the Municipal Committee that he would use the building as a studio and for no other purpose. As originally constructed, the building was in accordance with the sanction. Subsequently, however, the petitioner put in wooden partitions which divided it into three portions which were let out as shops :

Held, that they were not merely temporary erections and fell within S 3 (5) (a) as being a material alteration to the building. A I R (Vol 22) 1935 Lah 445 : 37 P L R 173 : 37 Cr L J 72 : 159 Ind Cas 369.

——Ss. 3 (13) (a), (b), 175 —Lease of public street — Lessee allowed to build chabutra thereon — Site, if still a public street.

Where the Municipal Committee leases out a portion of the public street and allows the lessee to build a chabutra thereon, the site under the chabutra ceases to be a portion of the public street and the Municipal Committee has no power to issue notice under S. 175 for demolishing the chabutra. A I R (Vol 27) 1940 Lah 261 : 42 P L R 690 : 190 Ind Cas 531.

——S. 3 (13) (a), Proviso — Site in dispute, held "street"—Proviso, held did not apply.

Where the site in dispute had always been in use of the residents of the mohalla as an open space or a common courtyard and the members of the public have been passing through it without let or hindrance by the owner thereof, the site is a "street" as defined in S. 3 (13), cl. (a). In such a case when there is no evidence to show that the owners of the site or their predecessors-in-interest have ever excluded any person from having ingress or egress from the site proviso to S. 3 (13), cl. (a) has no application. A I R (Vol 25) 1938 Lah 619 : 40 P L R 477 : 181 Ind Cas 151.

——S. 3 (13) (a)— Passage not accessible — No street or lane.

It is expressly laid down by the legislature that a street shall not include any part of a vacant space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid. Where therefore the occupiers of a building can by shutting the gate prevent all persons from having access to a passage, the passage cannot be held to be a street, nor can it be called a lane. AIR (Vol 17) 1930 Lah 547 : 31 P L R 193 : 122 Ind Cas 564 (DB).

——S. 3 (13) (a)—'Lane'—Meaning.

The word "lane" is not defined in the Punjab Municipal Act but it signifies a narrow road or street. AIR (Vol 17) 1930 Lah 547 : 31 P L R 193 : 122 Ind Cas 564 (DB).

——S. 3 (13) (a)—Accessible to public—'Meaning.'

"Accessible to the public" does not mean merely physical access apart from right of access. A I R (Vol 11) 1924 Lah 393 : 71 Ind Cas 775.

——S. 3 (13) (a) — "Accessible to the public" means open to all the public in fact, whether by right or permission. AIR (Vol 10) 1923 Lah 417 : 73 Ind Cas 725 (DB).

——S. 3 (13) (a)—Lane— Meaning — Projection over street—Permission of Committee.

A lane which is accessible to the public, whether permanently or temporarily, is a street.

Section 193 refers only to buildings to be erected on private property.

It is clear from S. 172 that a person is not entitled to build the balcony without the permission of the Committee. The Committee has full power to withhold permission for the building of a structure that will project over a street, and a Civil Court has no jurisdiction to interfere in such a matter. AIR (Vol 9) 1922 Lah 41 : 68 Ind Cas 675.

——Ss. 3 (13) (a), 175 and 219—Street — Obstruction —Old Latrine—Conviction for keeping.

Unless it is proved that the site on which the projection or obstruction stands is part of a street within S. 13 (a) of the Act, Section 175 of the Act will not justify the Municipal Committee in calling upon a person to remove a latrine. Where, the petitioner was convicted under S. 219 of the Act and ordered to demolish a latrine which had stood for 65 years situated in a street close to the house and it appeared that the latrine had been all along treated as private property, the conviction could not stand. AIR (Vol 5) 1918 Lah 328 : 60 P L R 1918 : 15 P W R 1918 Cr : 19 Cr L J 254 : 44 Ind Cas 46.

——S. 3 (13) (b)—Public street built and maintained by Municipality — No agreement that street should not become a public street — Right of use by public.

Where the pavement of the street is carried out with the express consent of the alleged proprietors and there is no agreement that the street should not thereby become a public street and where it has been levelled, paved, metalled, channelled, sewered and repaired out of Municipal funds, such street comes within the purview of the definition of a public street. This being so, one member of the public cannot prevent the other member from having a right of way over it. The ownership of the soil may possibly remain in some members but they have no right to prevent the others from using the street as such. AIR (Vol 21) 1934 Lah 936 : 151 Ind Cas 150.

——S. 3 (13) (b)—"Public street"— Dedication—Evidence of user — Road through private market — License to trading public.

In determining the question whether a road through a private property is a public highway, though not expressly dedicated to the public, it is of crucial importance to distinguish between evidence showing an intention to dedicate to the public generally and evidence showing that visitors to or traders with tenants whose shops abut on the road, have by permission, a right of passage. The Privy Council held that having regard to the evidence in the case and the previous conduct of the Municipality, the road in question was not a public street within S. 3, sub-section (13) of the Punjab Municipal Act. AIR (Vol 7) 1920 P C 43 : 1 Lah 117 : 1 P W R 1920 : 13 P L R 1920 : 38 M L J 455 : 11 L W 579 : 18 A L J 468 : 22 Bom L R 563 : U P L R (P C) 87 : 28 M L T 1 : 56 Ind Cas 1.

——S. 3 (13) (b)—Public Street.

Where plaintiff's predecessors built a market on a plot of land, and let it out to shoopkeepers and left an open space between the shops to be used as thoroughfare, this open space is a public place within S. 3 (13) (b). A I R (Vol 3) 1916 Lah 223 : 108 P R 1916 : 146 P W R 1916 : 35 Ind Cas 458 (DB).

——S. 3 (13) (b)— Public Street — Limited access of public to a private place—Effect of.

A limited access by the public to a private place does not operate to convert it into a public street.

A private sarai let to tenants had its gateways broken down. The Municipality cannot interfere with the proprietor's setting them up. A I R (Vol 3) 1916 Lah 214 : 109 P R 1916 : 145 P W R 1916 : 136 P L R 1916 : 35 Ind Cas 355 (DB).

—S. 12.

——Ss. 12 and 24 and S. 240, Rules under, notified by Government of Delhi, Part VIII, R. 3 and Part XIII — Term "election"—Meaning of — Words and phrases.

The term "election" in Ss. 12 and 24 embraces the whole procedure whereby an "elected member" is returned whether or not it be found necessary to take a poll. Hence, the rejection of a nomination paper even in a case where a candidate is elected without contest is a matter arising in the course of an election within the meaning of Part XIII. AIR (Vol 33) 1946 Lah 85 : 47 Pun L R 94 (DB).

—S. 13.

——Ss. 13 (2), (3), 14 (c) — Members continuing in office after three years under S. 13 (3) — Validity of acts of Committee.

Where the period of three years from the last general election of members expired on 19th March 1921, but under the provisions of S. 13 (3) the elected and nominated members remained in office till 17th May 1921, on which date the Chief Commissioner published under S. 14 (c), the names of the persons appointed to fill the vacated seats :

Held, that there was nothing in the subject or context of the Municipal Act repugnant to the application of the provisions in S. 13 (3) to more than one outgoing member, and the procedure was not illegal or against the spirit of the Act. A I R (Vol 19) 1932 Lah 26 : 33 P L R 83 : 134 Ind Cas 113 (DB).

—S. 18.

——S. 18—Construction — Person competent to take proceedings.

Section 18 must be read subject to the provisions of S. 238 (2), Government of India Act. When a Municipal Committee has been superseded, the person competent to take proceedings is the administrator. He should take the proceedings in the name of the committee but the defect in this respect is one of formal character which can be cured by amendment. A I R (Vol 29) 1942 F C 14 : 23 P L T 304 : 8 B R 586 : 1942 O W N 297 : 44 P L R 284 : (1944) 2 M L J 1 : 1942 M W N 393 : I L R (1942) Kar (F C) 34 Sup : 46 C W N F C 69 : 55 L W 765 : 1942 A W R 7 : 76 C L J 286 : ILR (1944) Lah 373 : (1942) F C R 31 : 199 Ind Cas 331.

——Ss. 18, 56 (g), 169 (g) — Powers of disposal of Municipality.

Municipalities can exercise no powers but those conferred on them by the Act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association.

There is no provision in the Act other than in Ss. 18, 56 (g), 169 (g) giving the Committee other powers of disposal in respect of a public street or allowing it to contract with respect to its rights in public streets.

Where, by an agreement, the Committee acknowledged the maliks to be the owners of the land adjacent to the public streets and that they would have rights to recover customary dues called "haq buha" (door tax) and it was further stipulated that if the Municipal Committee leased a portion of a public street or in any other way transferred it for consideration, the maliks would be entitled to a half share of the proceeds and that the Committee would have no power to transfer any part of the public streets or thoroughfares without consideration unless the maliks agreed, etc. :

Held, that the agreement in question was null and void and ultra vires of the powers of the Committee. AIR (Vol 23) 1936 Lah 296 : 163 Ind Cas 372.

—S. 19.

——S. 19 — Under S. 19, every officer or servant employed by the Committee is deemed to be a public servant within meaning of S. 21, Penal Code. A I R (Vol 25) 1938 Lah 440 : 40 P L R 693 : 181 Ind Cas 52 (DB).

—S. 33.

——S. 33 — Notified Area Committee delegating power to Secretary by general resolution to institute suit—Act, if ultra vires—Ratification.

A Notified Area Committee cannot delegate its powers to its Secretary by a general resolution without reference to any particular case to institute Civil Suits on its behalf. The Committee is controlled by the statute and cannot exercise any function which it is not authorized to do under the statute and as the Act does not empower it to do so, its action will be ultra vires. It being an illegal act it cannot be legalised subsequently as ratification is of no avail in those cases where the original act was ab initio illegal. AIR (Vol 22) 1935 Lah 345 : 17 Lah 35 : 38 P L R 394 : 158 Ind Cas 346 (DB).

——S. 33—Powers under S. 152—If can be delegated.

According to S. 33 of the Act the committee cannot delegate its powers under S. 152 of the Municipal Act. Over and above this the second class Committee cannot delegate any of its powers to the President without the previous sanction of the Commissioner, and similarly the first class Committee without the sanction of the Local Government. Where no such sanction is ever obtained for delegating such powers to the President a notice issued by the latter cannot be held as legal. AIR (Vol 11) 1924 Lah 80 : 74 Ind Cas 433 : 4 Lah 120 : 5 L L J 522 : 24 Cr L J 769.

—S. 35.

——S. 35—The filing of an appeal cannot fall within S. 35. A I R (Vol 30) 1943 Lah 318 : 45 P L R 365 : 211 Ind Cas 353 (DB).

—S. 37.

——Ss. 37 and 171 (4)—Applicability of S. 37.

The act under S. 37 must be that of the committee or after its supersession, that of the Administrator but if no act had been done by the committee or the Administrator and no notice had been issued under their orders, S. 37 can have no application. Hence, when no resolution was passed or decision made by the Municipal Committee or the Administrator under S. 171 (4) and no notice was issued under their orders under S. 171 (4) and the notice under S. 171 (4) was issued by the Executive Officer on his own initiative, S. 37 cannot apply. A I R (Vol 31) 1944 Lah 56 : 45 P L R 405 : 211 Ind Cas 510.

—S. 41.

——S. 41—"Unfit", meaning of.

The word 'unfit' in S. 41 does not refer to the absence of professional qualifications. A I R (Vol 25) 1938 Lah 282 : 178 Ind Cas 153 (DB).

—S. 46.

——Ss. 46 and 56—Leasing public street for private purpose—Authority of Municipality.

The Municipal Committee cannot give any person permission to deposit goods for sale on any public street. It cannot lease any portion of a public street. When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority, the rights of the owner in the site or soil over which the street exists. It does not own the soil but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. The Municipal Committee cannot use a public street otherwise than as a public street and it has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for private purposes. AIR (Vol 10) 1923 Lah 272 : 73 Ind Cas 292 : 5 L L J 26.

—S. 47.

——Ss. 47, 48 — Accused held came within mischief covered by S. 48 —S. 47, held afforded no defence.

The accused was a member of the Municipal Committee and was also a partner in a purtnership business concerned with making bricks. He was also employed as a clerk at a monthly wage in the firm. The partnership firm sold bricks to the Municipal Committee. The bill for these bricks was sent out by the accused and was addressed to the President, Municipal Committee, and was actually signed by the accused, not as a clerk but as a contractor. The money was paid to the accused and a receipt was issued to the Secretary, Municipal Committee by the accused :

Held, that the accused voluntarily rendered himself interested in the contracts for the sale of bricks between the partnership firm and the Municipality and hence, came within the mischief covered by S. 48, Punjab Municipal Act and must be deemed to be guilty of an offence under S. 168, Penal Code. Section 47 of the Municipal Act afforded no defence to the accused. AIR (Vol 31) 1944 Lah 12 : 45 P L R 443 : 45 Cr L J 267 : 210 Ind Cas 396 (DB).

——S. 47—Suit by Municipality.

Contract with Municipality not reduced to writing:

Held, that a suit by Municipality to recover money was maintainable when defendant enjoyed benefit under contract even though it was not in accordance with the imperative provisions of S. 47. (1936) 38 P L R 41 (DB).

——S. 47 — Factum of transfer admitted by Committee—Absence of writing—Effect.

Where the factum of the transfers has been admitted by the Committee, the conditions subject to which the transfers were made must also be held to have been admitted. The provisions of S. 47 cannot be availed of to repudiate the conditions subject to which the sales were made, on the ground of omission of formal writing. AIR (Vol 22) 1935 Lah 632 : 37 P L R 289 : 162 Ind Cas 59 (DB).

——S. 47—Applicability.

The conditions laid down in S. 83 do not result in the avoidance of those laid down in S. 47. Section 83 presumes the existence of a lease which is a contract, and before such lease or contract can be binding, it must be drawn up in the manner given in S. 47. AIR (Vol 22) 1935 Pesh 124 : 157 Ind Cas 879 (DB).

——S. 47—Failure to observe formalities—Effect.

Where a Corporation or Committee makes a contract, the formalities for which are prescribed by statute, and when there is a failure to observe those formalities, the contract is invalid and cannot form the subject of an action, even though there is executed consideration. AIR (Vol 22) 1935 Pesh 124 : 157 Ind Cas 879 (DB).

——S. 47 — Lease by Municipality — Absence of formal document in writing —Liability of defendant —Measure of compensation.

Where a suit by a Municipality for rent on the basis of a lease of property belonging to the Municipality was met by the plea that the lease had not been reduced to writing as required by S. 47 :

Held, that although the contract as such could not be enforced, the plaintiff was, under S. 70, Contract Act, entitled to claim compensation for loss caused to it by occupation of the land by the defendant for the period in question.

Held, further that having regard to the fact that the defendant continued in possession for the entire period in question and that there was no evidence on the record that there was a fall in the market rate, during the period, the proper measure of compensation was the amount for which the defendant had taken the property on lease subject to a deduction regarding the diminution in the rental value of those portions of the property brought about by the action of the plaintiff himself. AIR (Vol 20) 1933 Lah 15 : 13 Lah 561 : 33 P L R 1051 : 140 Ind Cas 621 (DB).

—— S. 47—A contract not being under seal, held was not binding on the Municipal Committee under S. 47, Punjab Municipal Act. AIR (Vol 20) 1933 Lah 14 : 145 Ind Cas 687 (DB).

——S. 47 — Lease of right to use ground for sale of cattle—Necessity of Commissioner's sanction —Contract not complying with formalities — Executed consideration, effect of—Decree on quantum meruit.

Where a corporation or committee makes a contract, formalities for which are prescribed by statute, and there is a failure to observe those formalities, then the contract is invalid and cannot form the subject of an action, even though there is executed consideration.

Where a contract is invalid so far as one party is concerned, by reason of statutory provisions, it cannot bind the other party also.

There is, however, no reason why a decree should not be passed on quantum meruit in such a case against a party who has enjoyed any benefit under the contract. AIR (Vol 20) 1933 Pesh 16: 141 Ind Cas 23.

——S. 47—Contract with Municipality for supply of goods — Non-compliance with formalities — Suit against Municipality for price — Part performance —Right to interest.

Where a person has supplied goods to Municipality under a contract with the Municipality for the supply of such goods, he is entitled to sue the Municipality for the price of the goods supplied even though the agreement with the Municipality does not comply with the formalities prescribed by S. 47 and is, consequently, not enforceable as such against the Municipality.

Interest however, can be allowed under the Interest Act or if the Act has no application, as part of the compensation claimed under S. 70, Contract Act. AIR (Vol 18) 1931 Lah 457 : 32 P L R 546 : 134 Ind Cas 1028 (DB).

——S. 47—Contract by Secretary.

Contract with a Municipal Committee is not binding on the Committee unless signed by the President or the Vice-President and one more member or members to whom the functions had been delegated as required by S. 47 of the Punjab Municipal Act. AIR (Vol 6) 1919 Lah 222 : 39 P R 1919 : 80 P L R 1919 : 51 Ind Cas 391 (DB).

—S. 49

——S. 49—Sanction to build given by Municipality to person — Municipality subsequently superseded and sanction suspended—Notice by person to Secretary of State through Deputy Commissioner described as under S. 80. Civil P. C. and S. 49, Punjab Municipal Act — Deputy Commissioner also Administrator of Municipality :

Held, that the notice was valid and proper. AIR (Vol 27) 1940 Lah 451 : 42 P L R 550 : 192 Ind Cas 729.

——S. 49—Notice, when may not be given.

Where a Municipal Committee has served notice on a person to remove structures on the ground that the land belonged to the Committee and that person brings a suit for a declaration that site in dispute was owned and possessed by him without giving notice to the Committee, the suit is not barred by S. 49. AIR (Vol 26) 1939 Lah 254 : 41 P L R 771.

——S. 49—Mere non-payment, suit—Notice, if necessary.

A mere non-payment is not an illegal omission. Consequently, S. 49, Municipal Act does not apply to a suit for recovery of amount alleged to be due for work done, on contract for the Municipal Committee and not paid for. In such a case, notice under S. 49 is not necessary and the plaintiff is not entitled to a deduction of one month as period of notice. AIR (Vol 24) 1937 Lah 102 : 38 P L R 970 : 164 Ind Cas 1083 (DB).

——S. 49— Suit against Municipality under S. 54, Specific Relief Act (I of 1877), restraining it from building drain on plaintiff's alleged plot—Temporary injunction granted — Injunction cancelled due to approach of rainy season and consequent hardship to public — Plaintiff amending plaint and asking for mandatory injunction —Notice to Municipality under S. 49, is not required. A I R (Vol 23) 1936 Lah 1008 : 38 P L R 1069 : 164 Ind Cas 425.

——S. 49 — Where a khal situated on the plaintiff's site was illegally demolished by the defendant Municipality and the plaintiff sued for a mandatory injunction against the Municipality to re-build the khal at their own expense and for a perpetual injunction to restrain the defendant from building a drain on the site in question as it belonged to the plaintiff:

Held, that the suit was maintainable so far as the relief for declaration and perpetual injunction was concerned though the relief for mandatory injunction was barred under S. 49, Punjab Municipal Act and S. 54, Specific Relief Act. AIR (Vol 18) 1931 Lah 124: 31 P L R 991 : 131 Ind Cas 348.

——Ss. 49, 50—Civil suit—When lies.

A person aggrieved by any resolution or order passed by the Municipal Committee is entitled to claim redress in the Civil Court if he can satisfy it that the act of Committee is arbitrary, oppressive or ultra vires. AIR (Vol 16) 1929 Lah 774 : 115 Ind Cas 755.

—S. 56

——S. 56 — Wells — User for 30 years — Well, if public.

In India ordinarily the owners of wells do not prohibit public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells; therefore, the mere fact that the public was allowed to take water from a well and it continued to take water for nearly 30 years, cannot necessarily lead to the conclusion that the well was dedicated to the public. AIR (Vol 11) 1924 Lah 511 : 75 Ind Cas 896 (DB).

——S. 56—Well dedicated to the public—Right of — Municipality to close the well.

When the Amritsar Municipal Committee passed a resolution to close a well which was sunk as a charitable act by a private person and was by him dedicated to the public and which lay in a recess at the end of a cul de sac lane,

Held, the recess together with the well must be regarded as a public place and as such vests in the Municipality under Section 56 (1) (b), Municipal Act, and the Municipality may deal with it as it pleases, provided that no private rights are invaded. AIR (Vol 9) 1922 Lah 167 : 4 Lah L J 62 : 67 Ind Cas 899.

——S. 56 (1) (f) — Land vesting in Municipality — Locus standi to institute suit against trespasser when dispute exists between Government and Municipality.

Where, in a suit for possession of certain land against a trespasser, it appeared that the plaintiff Municipality was in possession up to some time before suit and the land has vested in them under S. 56 (1) (f), the Municipality has a locus standi to institute the suit, although there is a dispute about it between the Government and the Municipality. AIR (Vol 24) 1937 Lah 492 : 173 Ind Cas 971 (DB).

——S. 56 (g)—A road, the sub-soil of which is owned by the Government cannot vest in the Municipal Committee under S. 56 (g). AIR (Vol 29) 1942 Pesh 1 . 197 Ind Cas 856.

——S. 56 (g) — Powers of Municipality.

There is no provision in the Act other than in Ss. 56 (g), 18 and 169 (g), giving the Committee other powers of disposal in respect of public streets or allowing it to contract with respect to its rights in public streets. AIR (Vol 23) 1936 Lah 296 : 163 Ind Cas 372 (DB).

—S. 58

——S. 58 — (Amended by 2 of 1923 etc.)— S. 58 — Adverse possession.

The Municipal Committee is not precluded from acquiring title by adverse possession under the Act. AIR (Vol 10) 1923 Lah 534 : 77 Ind Cas 509.

—S. 61.

——S. 61—Where the octroi is leviable by the Municipality on all goods imported within the Municipal area, the transmission of parcels from a factory situated outside the Municipal limits for the despatch to various destinations, amounts to "importation" and hence an octroi duty is leviable. A I R (Vol 29) 1942 Lah 11 : 44 P L R 463 : 199 Ind Cas 130.

——S. 61 — It is the tax that was actually being levied that is saved under S. 61 and not a tax that could be levied under the old Municipal Act. A I R (Vol 28) 1941 Lah 40: 42 P L R 780: 193 Ind Cas 72.

——Ss. 61, 62 (12)—Tax on salt.

The combined effect of Ss. 100, 140, sub-s. (1) and the Federal Legislative List Item No. 47 is that salt is a matter which is within the jurisdiction of the Federal Legislature alone and cannot, therefore, by virtue of sub-s. (1) of S. 100, be dealt with in any manner by a Provincial Legislature. Consequently, a Municipal Committee cannot legally impose a tax on salt. AIR (Vol 28) 1941 Lah 40 : 42 P L R 780 : 193 Ind Cas 72.

——S. 61 — Illegal imposition of tax by Municipality under S. 61 (1) (c) — Perpetual injunction can be granted as there is no equally efficacious relief under Punjab Municipal Act. A I R (Vol 27) 1940 Lah 377: 42 P L R 573 : I L R (1940) Lah 707 : 191 Ind Cas 65 (F B).

——S. 61 (1) (c)—Hirer of motor lorries is not owner.

The mere fact that a lorry displays the board of a certain company does not necessarily lead to an inference that the company is the owner thereof. The ordinary meaning of the word "owner" is "one who owns or holds something as his own; a proprietor; one who has the rightful claim or title to a thing" and nearly the same meaning attaches to this term in law A hirer cannot be called an owner. AIR (Vol 27) 1940 Lah 377 : 42 P L R 573 : I L R (1940) Lah 707 : 191 Ind Cas 65 (FB).

——S. 61—Scope—Powers of Local Government.

The powers conferred by S. 242 are limited to the imposition of taxes described in S. 61 (b). A I R (Vol 11) 1924 Lah 361 : 75 Ind Cas 908 : 4 Lah 442 (F B).

——S. 61—Offerings to Guru by disciples—Liability to assessment.

The income derived by a spiritual leader from offerings made by his disciples is income derived from a profession or at least a calling within the meaning of S. 61 (b). A I R (Vol 10) 1923 Lah 127 : 68 Ind Cas 996 (D B).

——S. 61 (1) — Person not owner but hirer of motor lorries — Imposing of tax upon such person under S. 61 (1) (c) is ultra vires. A I R (Vol 27) 1940 Lah 377 : 42 P L R 573 : I L R (1940) Lah 707 : 191 Ind Cas 65 (FB).

——S. 61 (2)—Municipality imposing octroi duty on salt.

The imposition of an octroi duty on salt by the administration of Lahore under S. 61 (2) by which the Municipal administration is empowered with the previous sanction of the Provincial Government to impose any tax which a Provincial Legislature has power to impose in the Province under the Government of India Act. 1935, is invalid. A I R (Vol 29) 1942 F C 14 : 23 P L T 304: 8 B R 586: 1942 O W N 297 : 44 P L R 284 : (1942) 2 M L J 1 : 1942 M W N 393 : I L R (1942) Kar (F C) 34 Sup : 46 C W N F C 69 : 55 L W 765 : 1942 A W R 7 : 76 C L J 286 : 1942 F C R 31: ILR (1944) Lah 373: 199 Ind Cas 331.

—S. 62.

——S. 62—Notification not necessary—If conclusive of imposition of tax.

A notification which is not necessary under the Act, shall not be conclusive evidence that the tax was imposed in accordance with the provisions of the Act. AIR (Vol 14) 1927 Lah 140 : 100 Ind Cas 426 : 9 L L J 22 : 28 P L R 57.

——S. 62 (7)—Notification imposing tax—Date from which it is to come into force not specified—Imposition of tax, if legal.

Where the notification by the Local Government regarding the imposition of a tax does not specify any date and even if it were held that by implication it specifies a date, the date specified is a date less than three months from the date of the notification, the tax cannot be said to be imposed in accordance with the provisions of the Punjab Municipal Act. A I R (Vol 22) 1935 Lah 980 : 160 Ind Cas 524.

——S. 62 (12), if precludes enquiry into question whether tax is legal or otherwise.

All that sub-s. (12) of S. 62 lays down is that a notification of the imposition of a tax under the Municipal Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act and does not preclude an enquiry into the question whether the tax is legal or otherwise. A I R (Vol 28) 1941 Lah 40 : 42 P L R 780 : 193 Ind Cas 72.

—S. 70.

— S 70 — Scope — Contract of exemption is ultra vires and not binding on Municipality.

The question of exemption from taxation has always been regarded as a very special right only to be considered as granted by express words in the statute and only to be considered as exercised where and when express words in the statute gave the right to exempt from taxing. Section 70 is the only section which confers any right on the Municipality to exempt from taxation under certain conditions and where these conditions do not exist, the action of the Municipal Committee, if it did not fall within the terms of S. 70 is ultra vires and, therefore, cannot constitute a valid contract nor can bind the Municipality. A I R (Vol 23) 1936 Lah 972 : I L R (1937) Lah 567 : 39 P L R 976 : 168 Ind Cas 82 (DB).

—S. 78.

——Ss. 78, 82—Octroi limits.

Railway premises are subject to octroi laws only when they are situated within municipal limits. (1940) 42 P L R 483.

——S. 78—Intention of defrauding.

Where the accused is not shown to have planned or committed any fraud, he cannot be convicted under S. 78. (1940) 42 P L R 444.

——S. 78——Cartman passing octroi-barrier without paying tax — Accused subsequently helping cartman in resisting demand—Assault—Acquittal—Conviction under S. 78 :

Held, that the assault was clearly a transaction entirely separate from the offence alleged to have been committed by the cartman when he crossed the octroi barrier without complying with the demand of the octroi official to have his load examined for paying terminal tax. The offence having become a fait accompli, the alleged assault by the accused on the octroi peon could not relate back to that offence and hence their conviction under S. 78 of the Municipal Act was illegal (1937) 172 Ind Cas 846 : 39 P L R 636 : 39 Cr L J 199.

——S 78—Complaint under S. 78 against four persons — One of them acquitted — Others sentenced to pay fine of Rs. 10 each—Appeal :

Held, that the appeal was not tenable, S. 413, Criminal P. C. being a bar to it. (1937) 172 Ind Cas 846 : 39 P L R 636 : 39 Cr L J 199.

——S. 78—Smuggling—'Fraudulent intention" necessity of.

To constitute an offence under S. 78, the accused must have intended to defraud the Committee. The section is not applicable where there is a mere refusal to pay tax on the ground that it is not due. A I R (Vol 18) 1931 Lah 752 : 32 P L R 688 : 32 Cr L J 1081 : 133 Ind Cas 866.

—S. 81.

——S. 81—Applicability — "Arrears of tax claimable by a committee under this Act" — Meaning—Tax levied but wrongly refunded under misrepresentation—Recoverability by procedure under S. 81.

Section 81 of the Punjab Municipal Act does not cover the case of tax legally levied but wrongly refunded owing to misrepresentation. That is not an arrear of tax claimable by a committee under the Act and hence cannot be recovered by recourse to summary proceedings under S. 81. The claim is really one for recovery of the amount paid under a mistake to a person who was not entitled to it, and the amount therefore cannot be said to be under the Act. (1947) 229 Ind Cas 549 : 48 Cr L J 452 (Lah) (DB).

——S. 81 — Nature of proceedings — Order without jurisdiction — Revision — Powers of High Court — Cr. P. Code, S. 439.

There is no justification for the view that proceedings under S. 81 of the Punjab Municipal Act are ministerial and not judicial proceedings liable to control. The penal provisions of S. 81 should be set in motion strictly in accordance with and within the scope of the section and not at the mere will and pleasure of the Magistrate. The High Court is competent to revise an order under S. 81 in the exercise of its powers under S. 439, Cr. P. Code, when such order is made in a case to which S. 81 has no application and to set aside the same in revision. (1947) 229 Ind Cas 549 : 48 Cr L J 452 (Lah) (DB).

——S. 81—Scope of inquiry under—Duty of Magistrate—Availability of remedy—Conditions.

The specific mode of collection laid down under S. 81 of the Punjab Municipalities Act must be rigidly confined to the nature and description of the tax, etc., authorised by that statute. Other dues cannot be recovered under this procedure. In proceedings under the section the Magistrate has, therefore, imposed upon him a clear duty to find out whether the money claimed is or is not claimable under the Act; and where it is not claimable the Magistrate is bound to refuse to lend his assistance under S. 81. In order that the Magistrate can act under the section two conditions have to be satisfied: (1) there should be arrears of tax, water rate, rent, fee or any other money; (2) that the tax, water rate, rent, etc., should be claimable by a Municipal Committee under that Act. (1947) 229 Ind Cas 549 : 48 Cr L J 452 (Lah) (DB).

——S. 81 — Application to Magistrate under S. 81— Application transferred to Tahsildar — Tahsildar, whether can decide objection that amount is not recoverable under Act.

A Magistrate dealing with an application under S. 81 has himself power to decide whether the amount claimed is, in fact, an amount claimable under the Act, on objection being raised before him. There is no need for a reference to the High Court. If a transfer order under S. 81 is intended to be an order transferring the application under S. 81 to the Tahsildar for disposal as a Magistrate, then it can be left to the Tahsildar to decide the objection in that capacity. If it is an order of transfer, however, the District Magistrate should dispose of the objection himself. It is advisable that the form of such orders should make the intention clear. A I R (Vol 29) 1942 Lah 72 : 44 P L R 4 : 43 Cr L J 542 : 199 Ind Cas 254 (DB).

——S. 81 (As amended in 1933) — Rent not recoverable under Act cannot be recovered by procedure prescribed by S. 81. A I R (Vol 26) 1939 Pesh 40 : 40 Cr L J 851 (1) : 184 Ind Cas 16.

——S. 81 — Proprietors of flour-mill sending bags of flour through terminal post with their servant — Servant paying less terminal tax by misrepresenting weight — Bags weighed at Railway Station — Fraud discovered — Servant prosecuted and imprisoned— Municipal Committee claiming deficiency from proprietor and on refusal, applying under S. 81 for recovery of money by attachment and sale — Magistrate issuing warrant :

Held, that the claim was intra vires and Magistrate's function was ministerial only. A I R (Vol 25) 1938 Lah 627 : I L R (1938) Lah 251 : 39 Cr L J 872: 40 P L R 1025 : 177 Ind Cas 413.

——S. 81 — (As amended by Act III of 1933)—Scope —Only sum claimable under Act can be recovered.

The operation of S. 81 is controlled by the words "claimable by a committee under this Act." It is not any sum that can be described as rent or fee which can be recovered under the summary provisions of the section but only a sum that is claimable by the committee under the express provisions of the Act. The mere use of the word 'rent' applied to a sum recoverable by the committee will not, of necessity, make that sum recoverable as rent claimable by the committee under the Act. A I R (Vol 25) 1938 Lah 29 : 39 Cr L J 286 : 173 Ind Cas 211 (DB).

——S. 81 — Lease of platform by auction — Plaintiff highest bidder — Three months' rent in advance and execution of rent-deed within 48 hours — Failure to execute deed entitling Committee to forfeit deposit— Plaintiff paying deposit but refusing to execute rent-deed on ground of misdescription of property—Committee returning deposit — Subsequent attachment under S. 81 for recovery of deposit.

Held, that it was not a suit for the recovery of rent because no relationship of landlord and tenant was created between the Municipal Committee and the appellant in the absence of execution of a lease within 48 hours. The Committee was not even entitled to recover for use and occupation because the plaintiff had not taken actual possession of the two platforms. The only remedy of the Municipal Committee was to confiscate the deposit but the Municipal Committee, by its resolution, voluntarily returned that amount. There was no law under which the amount voluntarily paid or returned to another person could be recovered either by suit or by other coercive method. The action taken by the Committee, therefore, under S. 81, Punjab Municipal Act, to recover the sum of Rs. 25-8-0 by attachment of the property was illegal and the plaintiff was entitled to an injunction.

Held, further that the plaintiff suffered no special damages by the illegal attachment and decree for damages for the illegal attachment of his property could not be granted A I R (Vol 24) 1937 Lah 771 : 40 P L R 93 : 175 Ind Cas 664.

——Ss. 81, 170—S. 81, if can be invoked if S. 170 is inapplicable——Application under S. 170 — Written permission of Committee, if essential—Mere payment of rent—Significance of.

Written permission by the Municipal Committee is essential for an application under S. 170, and where S. 170 is not applicable, the Committee cannot invoke the penal provision of S. 81. Consequently, where there has been payment of rent to the Committee without any written permission by the Committee, S 81 cannot be invoked. Payment of rent shows only the relationship of landlord and tenant and any dispute regarding arrears of rent must be determined by Civil Court. A I R (Vol 21) 1934 Lah 699 : 36 P L R 298: 15 L 834 : 152 Ind Cas 919 (DB).

——S. 81 — Municipal Committee granting permission to construct certain projections unconditionally —Committee claiming teh zamini for occupation— Teh zamini, if a tax or fee — Recovery by summary process—Legality.

A Municipal Committee applied to a Magistrate to recover some amount alleged to be due from the petitioner on account of occupation by him of land belonging to the Municipal Committee which formed part of a public street and also on account of some permanent projection made by the petitioner on a Municipal drain. The petitioner's father built some shops with the permission of the Municipal Committee and with like permission, he constructed some projections over the Municipal drain which were supported by posts erected on the road beyond the drain. At the time when the permission was granted by the Municipal Committee no condition as to payment of rent was imposed, but subsequently, the Municipal Committee decided to levy from the petitioner what they called teh zamini :

Held, that the amount was neither a tax nor a fee which the Municipal Committee was authorised to levy under any provision of the Municipal Act; that after having granted permission, the Municipal Committee was not entitled to turn round and say that it would levy fees or taxes for the occupation of the land which originally took place with its unconditional permission and that the amount claimed by the Committee could not be recovered by the summary process provided by S. 81. A I R (Vol 21) 1934 Lah 84 : 14 L 664 : 34 P L R 944 : 35 Cr L J 439 : 147 Ind Cas 604.

——Ss. 81, 121—License fees — License not granted —Recovery of fees, legality of—Proper remedy.

License fees under S. 121 are only payable when licenses are granted. In cases where no license has ever been granted nor have they been applied for, the attempt to levy those fees by the distress and sale of the movable property of the people carrying on the various trades under S. 81 would be illegal, the proper remedy apparently being provided in sub-s. (5) of S. 121. A I R (Vol 20) 1933 Lah 814 : 34 Cr L J 867 : 144 Ind Cas 830.

——Ss. 81, 170—Claim for rent by Municipal Committee.

Section 81 cannot be applied to a case where money is claimed by a Municipality by way of rent and not as money claimable under the Act. A I R (Vol 20) 1933 Lah 394 : 34 P L R 429 : 34 Cr L J 369 (1) : 142 Ind Cas 516.

——Ss. 81, 170 — Fee: for temporary occupation of street—Recovery of fee through Magistrate — Legality of.

Where a Municipal Committee granted permission for the temporary occupation of a portion of a street for a temporary erection thereon subject to a certain sum of money being paid annually to the Municipality and subject also to the condition that the permission could be withdrawn at any time :

Held, that the sum was a fee claimable under the provisions of S. 170, and could be realised, if in arrears, through a Magistrate under S. 81 of the Act. A I R (Vol 18) 1931 Lah 753 : 32 P L R 707 : 32 Cr L J 1041 (1) : 133 Ind Cas 550.

——S. 81—Chabutras constructed by Municipality— Claim for rent : Procedure—Suit questioning procedure under S. 81 — Onus of proof — Jurisdiction of Civil Court.

Where a Municipal Committee sought to recover the amounts payable by the occupants of certain chabutras constructed by the Committee and it appeared that the case was really one of ordinary relationship of landlord and tenant between the parties :

Held, that the money claimed could not be recovered under S. 81 and that the proper course was for the Committee to institute suits in the Civil Court.

A Civil Court is entitled to adjudicate upon the question of the ultra vires or intra vires of an action of a Municipal Committee and can give proper relief to the aggrieved party.

Where a suit is filed questioning the procedure adopted by the Municipal Committee in recovering certain amounts due by way of rent by recourse to the procedure prescribed by S. 81 of the Act, it is for the Municipal Committee to show that the amount for which they applied to the Magistrate is money legally recoverable under the Act. A I R (Vol 18) 1931 Lah 315 : 32 P L R 172 : 133 Ind Cas 278.

——S. 81—Money due on contract.

Section 81 cannot be invoked for the purpose of realising money due to a Municipal Corporation on a contract. 32 Cr L J 693 : (1931) 131 Ind Cas 337.

——S. 81 — Amount due by farmer — Procedure for recovery—Applicability of S. 81.

It is open to a Municipal Committee to farm out the collection of any octroi, toll or terminal tax for a period not exceeding one year. However the amount due by the farmer is not amount due under the Act. It is an amount due under a simple lease or contract and only recoverable by law suit and not by the procedure laid down in S. 81. AIR (Vol 14) 1927 Lah 161 : 28 Cr L J 230 : 99 Ind Cas 1030.

——S. 81 — Revision.

An order made by a Magistrate under S. 81 in a case to which that section has no application can be set aside in revision by High Court. A I R (Vol 14) 1927 Lah 161 : 28 Cr L J 230 : 99 Ind Cas 1030.

——S. 81— Money due under lease — Procedure for recovery—Applicability of S. 81.

Money due to the Committee under a lease or a contract cannot be recovered by proceeding under S. 81. Such money should be realized by action in Civil Courts. AIR (Vol 13) 1926 Lah 518: 7 Lah 568: 27 Cr L J 912 : 27 P L R 840 : 96 Ind Cas 224.

—S. 82.

——S. 82—Scope of.

Section 82 does not take away the remedies which are available to the Municipal Committee for the collection of arrears of a tax. It merely provides an additional remedy in the case of octroi and terminal tax. The words "arrears of any tax" must be given their ordinary meaning and if octroi or terminal tax has not been paid when it is due, the recovery of such a tax is the recovery of arrears of any tax. As the tax is payable for the export of goods, the exporter must be held to be liable for such a tax. A I R (Vol 26) 1939 Lah 163 : 41 P L R 675.

——Ss. 82 and 242—Profession tax — Jurisdiction of Civil Court to determine legality of tax.

The power conferred by a Special Act on a local authority to impose a particular tax for a particular purpose in a special manner does not oust the jurisdiction of the civil Courts to give relief against an illegality committed by that body under cover of statutory powers. A civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and ultra vires and to give relief if a tax has been levied from a person who is not liable to pay the same. A I R (Vol 6) 1919 Lah 68 : 74 P L R 1918 : 74 P W R 1918 : 44 Ind Cas 910.

—S. 83.

——Ss. 83, 47 — Conditions laid down in S. 83 — Whether result in avoidance of those laid down in S. 47.

The conditions laid down in S. 83 do not result in the avoidance of those laid down in S. 47. Section 83 presumes the existence of a lease which is a contract, and before such lease or contract can be binding, it must be drawn up in the manner given in S. 47. AIR (Vol 22) 1935 Pesh 124 : 157 Ind Cas 879 (DB).

——S. 83—A lease by a Municipal Committee of the right to collect dues from owners of cattle who use a particular ground for selling cattle during a fair held on that ground is not a lease of a right to collect any octroi or toll within the meaning of S. 83 but the lease of a right to use the ground. AIR (Vol 20) 1933 Pesh 16 : 141 Ind Cas 23.

—Ss. 84 and 86.

——Ss. 84 and 86 — Plaintiff escaping levy of octroi for some years — Later, executive officer of committee agreeing to accept plaintiffs' goods in transit through Municipal limits on payment of annas 2 per trip — Subsequently, committee demanding full octroi duty.

The plaintiff had escaped the levy of octroi by devious methods for some years and later, as a result of a dispute with the committee, came to terms with the executive officer of the committee or some other subordinate, who without apparent authority agreed to accept the goods of the plaintiff in transit through the Municipal limits for despatch from the local post office, on payment of annas two only per trip (irrespective of the number of the parcels despatched.) It was, therefore, contended that the committee was acting ultra vires in subsequently demanding full octroi duty and was estopped from doing so :

Held, that even if the agreement with the executive officer of the municipality had any sanction, it was merely a provisional arrangement to enable the committee to recover some money pending the decision of the Local Government to whom the dispute was referred and as it was the result of an order from the Local Government that octroi duty was leviable in the ordinary way that the committee proceeded to make a demand on the plaintiff, there was nothing illegal, arbitrary or ultra vires in the action of the committee and in such circumstances, no question of estoppel arose against the committee. A I R (Vol 29) 1942 Lah 11 : 44 P L R 463 : 199 Ind Cas 130.

——Ss. 84 and 86—Suit for injunction.

Person not owner but hirer of motor lorries — Imposing of tax upon such person under S. 61 (1) (c) of the Act is ultra vires — Suit by such person for perpetual injunction restraining Municipality from recovery of such tax can be entertained by Civil Court. A I R (Vol 27) 1940 Lah 377 : 42 P L R 573 : I L R (1940) Lah 707 : 191 Ind Cas 65 (FB).

[AIR (Vol 22) 1935 Lah 970: 16 Lah 529: 159 Ind Cas 1059, Overruled.]

——Ss. 84 and 86—Jurisdiction of Civil Court.

Where a tax is alleged to be imposed and assessment made ultra vires the Act, Civil Court has jurisdiction to try the dispute regarding such tax and assessment. A I R (Vol 23) 1936 Lah 972 : 39 P L R 976 : I L R (1937) Lah 567 : 168 Ind Cas 82 (DB).

——Ss. 84 ond 86—Suit for injunction.

Section 84 does not include a suit for a permanent injunction against a Municipal Committee on the ground that a tax has not been lawfully imposed. AIR (Vol 22) 1935 Lah 980 : 160 Ind Cas 524.

——Ss. 84 and 86 — Question turning purely on terms of contract — Question of validity and effect.

Where the decision of the question turns merely on the terms of a contract between the parties, the question of the validity and effect of this contract is obviously a matter for the decision of the Civil Courts and not of the executive authorities referred to in Ss. 84, 86. A I R (Vol 22) 1935 Lah 632 : 37 P L R 289 : 162 Ind Cas 59 (DB).

——Ss. 84 and 86 — Assessment by Municipality — Detention of article— Remedy — Suit by assessee, if maintainable.

The plaintiff firm imported two cases of spangles weighing 3½ maunds into a Municipality. The Terminal Tax authorities demanded terminal tax at the rate of Rs. 10, per maund, that is Rs. 35, and detained one case of spangles by consent. The plaintiff firm sued for a declaration that the spangles were chargeable with terminal tax at 8 annas a maund only and they also asked for damages for wrongful detention of the one case :

Held, that an appeal against the assessment lay to the Commissioner under S. 84, Punjab Municipal Act but that a suit was barred under S. 86 :

Held, also that the spangles in question were assessable according to Art. 75 of the Terminal Tax Schedule. AIR (Vol 21) 1934 Lah 200: 35 P L R 165: 15 Lah 663 : 149 Ind Cas 775.

——Ss. 84 and 86— Applicability—Illegal levy of tax —Jurisdiction of civil Court.

The procedure prescribed by Ss. 84 and 86 relates only to appeals against the assessment or levy of a

tax under the law and do not provide a remedy which might be done in violation of that law. The special Act does not oust the jurisdiction of the civil Court to relieve one subject of the Crown against an illegality imposed upon him by any other subject. A civil Court can try a suit to recover tax illegally levied by a Municipality though the plaintiff did not first take action under S. 84 of the Municipal Act. AIR (Vol 11) 1924 Lah 619 : 75 Ind Cas 737.

—S. 93.

——S. 93—Fire brigade, if agent of Municipal Committee.

The fire brigade maintained by the Peshawar Municipal Committee is not the agent of the Peshawar Municipal Committee. The fire brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Peshawar Municipal Committee pays for it does not make it liable for its acts or omissions. A I R (Vol 28) 1941 Pesh 20 : 193 Ind Cas 593.

—S. 96.

——S. 96—Liability for damages — Breaking of subterranean Municipal pipes—Escape of water causing damage to houses—Liability of Municipality.

Under the provisions of the Municipal Act, Ss. 96, 97 and 99, the subterranean system of connexion pipes and ferrules attached and fixed to the Municipal main, whether used for the benefit of the public generally or connected with private houses, so far as these latter are actually on the municipal lands and streets, is under the control, supervision and management of the Municipality and it is its duty to see that it is properly maintained and kept in working order. If owing to breaking of such pipes and ferrules, water escapes and the subterranean soil is thereby flooded with the result that the houses in the vicinity are damaged, and if the municipality fails to take steps in proper time to stop the leakage of water it is liable for the damage. A I R (Vol 16) 1929 Lah 730 : 121 Ind Cas 500 (DB).

—S. 97.

——S. 97—Agreement to use water in family only—Person found allowing use to sub-tenants—Municipality, if entitled to charge the water rate per family.

Municipality supplied water connection to the plaintiff on specific agreement that the plaintiff would not allow others except his family members to draw water. Subsequently, it was discovered by the Committee that not only was the family of the plaintiffs living in the house but there were sub-tenants. The Committee pleaded that as there were three different tenants, they were entitled to charge water rate separately for each family :

Held, that prima facie, the clause in the plaintiff's application whereby he agreed not to allow others to use water governed the matter and he was bound by the terms of the contract which was in no way contrary to the terms of the statute and the Municipality was, therefore, entitled to charge water rate per family :

Held, further, that under S. 97 (1), the Municipality could limit the supply of water by limiting its use to one family in one house. A I R (Vol 24) 1937 Lah 662 : 39 P L R 206 : 172 Ind Cas 7.

—S. 102.

——S. 102—Alterations in system—Powers of Municipality.

In carrying out a system of water-supply, extensions, additions and alterations can be done to meet new exigencies, and the argument that once a scheme of water-supply has been determined on by a committee it may carry out that scheme but it can never afterwards do anything in the way of extensions, cannot command acceptance. AIR (Vol 17) 1930 Lah 526 : 31 P L R 196 : 12 L L J 41 : 122 Ind Cas 495.

—S. 114.

——S. 114 — Option of demolishing or repairing building rests with owner — It must be given in notice under S. 114.

It is incumbent upon the Municipal Committee to give in the notice under S. 114, option to the owner of the building of either demolishing the building or causing it to be repaired. The option of demolition or repairs rests with the owner of the building and not with the Municipality. A I R (Vol 27) 1940 Pesh 16 : 41 Cri L J 549 : 188 Ind Cas 119.

——Ss. 114 and 121 — Notice to demolish must be specific.

A notice under S. 114 of the Municipal Act (Punjab) must specify the portion of the building which is dangerous and the repairs required to be made. A I R (Vol 3) 1916 Lah 400 : 9 P R 1916 Cr: 11 P W R 1916 Cr : 17 Cri L J 105 : 32 Ind Cas 841.

—S. 121.

——Ss. 121, 188 — S. 121, whether per se contemplates bye-law — Municipality, whether under obligation to frame bye-laws under S. 121—Failure to frame bye-laws, if debars Municipality from imposing penalty provided by S. 121 (5).

Section 121 does not per se contemplate any bye-laws. It is a self-contained section workable so far as the grant or withholding of a license is concerned without bye-laws. The Municipal Committee are not under statutory obligation to frame bye-laws under S. 121. They have a discretion in the matter. Hence, in the absence of requisition by the Local Government under S. 188 to frame bye-laws under S. 121, the failure of the Municipality to frame bye-laws under that section cannot debar the Municipality from imposing the penalty provided for by S. 121 (5). A I R (Vol 28) 1941 Lah 305 : 43 P L R 341 : 42 Cri L J 825 : 196 Ind Cas 225.

——S. 121—Applicability.

In cases where no license has ever been granted nor has it been applied for, the attempt to levy licence fees by the distress and sale of movables of the people carrying on various trades under S. 81 would be illegal; the proper remedy apparently being provided in S. 121 (5). A I R (Vol 20) 1933 Lah 814 : 34 Cri L J 867 : 144 Ind Cas 830.

——S. 121—Order—If Courts can interfere.

A civil Court has no jurisdiction to interfere with an order under S. 121 of the Act, unless the action of the Municipal Committee is wanton, or without jurisdiction or is tainted by mala fides. A I R (Vol 6) 1919 Lah 313: 135 P W R 1918: 6 P R 1919: 11 P L R 1919 : 46 Ind Cas 571.

——S. 121—Offensive business—Decision of Municipal Committee – Civil Court.

The question whether a certain business is offensive within S. 121 of the Act is to be decided by the Municipal Committee and unless the Committee's action is wanton, unreasonable or tainted with mala fides, the civil Courts have no power to interfere with its decision. A I R (Vol 6) 1919 Lah 119 : 34 P W R 1919 : 49 Ind Cas 881.

——S. 121 (5) — License to run engine granted on conditions — Failure to comply with conditions — Breach of license—Offence.

Where license was given to run an engine between 8 p. m. and 6 a. m. on condition that licensee should instal a silencer and on the Health Officer reporting that engine was producing offensive and unwholesome noise, the President filed a complaint against the licensee :

Held, that the permission was strictly limited and that the failure to comply with those conditions was in itself a breach of the license and the special autho-

rization given thereunder and the licensee was liable to prosecution. A I R (Vol 23) 1936 Lah 1011 : 38 Cri L J 128 166 Ind Cas 80 (1).

——S. 121 (5)—Obiter.—The Municipal Committee are legally entitled to attach a condition to the license given to a dealer in firewood restricting the amount that he can deposit. A I R (Vol 22) 1935 Lah 676: 36 Cri L J 1478: 37 P L R 783: 158 Ind Cas 944.

—S. 126.

——S. 126 — Interference by Court — When justifiable.

The committee is the primary body to determine when its power is to be exercised and the Court will not interfere unless it has used its power in a wanton manner or in bad faith. A I R (Vol 17) 1930 Lah 477.

—S. 131.

——S. 131—Demolition in good faith—Municipality demolishing reservoir in good faith—Remedy.

Where in a suit for injunction to restrain the Municipality from preventing plaintiff from rebulding his reservoir which had been demolished by the Municipality and for damages, it was found that the Municipality had acted in good faith but its only mistake was that it demolished the reservoir instead of filling it up :

Held, that the plaintiff is not entitled to the injunction, but is entitled to damages. 8 L L J 162 : 27 P L R 869 : 94 Ind Cas 192.

—S. 132.

——S. 132 — Injunction against Municipality, if can be granted.

The Municipal Committee are not entitled under any law to keep open as a channel or as a pit passing through another person's land something which is not used by way of drainage or sewerage. These are the only relevant purposes which are mentioned in S. 132, and in the absence of these, a person whose property is damaged by accumulation of water, is entitled to an injunction against the Municipal Committee ordering them to close the opening passing under his house.

In a suit for perpetual injunction against the Municipality in the absence of any proof as to when, if ever, any license or grant was made by the plaintiff, it is sufficient to assume that the Municipality acted without protest on the part of the plaintiff under the provisions of S. 132. A I R (Vol 20) 1933 Lah 1003 : 147 Ind Cas 801.

——S. 132—Alterations in system—Powers of Municipality.

In carrying out a system of water-supply, extensions, additions and alterations can be done to meet new exigencies, and the argument that once a scheme of water supply has been determined on by a committee it may carry out that scheme but it can never afterwards do anything in the way of extensions, cannot command acceptance. AIR (Vol 17) 1930 Lah 526 : 31 P L R 196 : 12 L L J 41 : 122 Ind Cas 495.

——S. 132—Notice—When necessary.

The first part of S. 132 goes as far as "intended for a road or street." There is a pause there, and the section goes on to say that a notice must be given to the owner or occupier if the committee intends to traverse "any land or building." Clearly, then, there is a distinction between road and street on the one hand, and land or building on the other. That even if a committee is going to lay a pipe under or across a public street, it must give notice to the owners or occupiers of adjacent buildings is a proposition that could readily be made a reductio ad absurdum. A I R (Vol 17) 1930 Lah 526 : 31 P L R 196 : 12 L L J 41 : 122 Ind Cas 495.

—S. 152.

——S. 152 (1), (2) (as amended by Act III of 1933)—Necessity of new notice — Punjab General Clauses Act (1 of 1898), S. 6.

In view of the provisions of S. 2 of the Act and S. 6 of the Punjab General Clauses Act 1 of 1898, the public notice declaring certain areas as prohibited for prostitution issued in 1929, that is, before the amendment of the Punjab Municipal Act by the Punjab Municipal Act III of 1933 can be held to be in force even after the amendment and it is not necessary for the Municipality to issue a fresh public notice under the amended cl. (1) of S. 152. (1935) 158 Ind Cas 527: 36 Cr L J 1396 (Lah).

——S. 152—Public prostitute—Meaning.

Neither the term "prostitute" nor "public prostitute" has been defined in the Act. Though it may be said of such a woman that she is a prostitute in the popular sense of the expression, the term "public prostitute" cannot be applied to her. Before a "prostitute" can be described as a "public prostitute" it must be shown that she is available at any time to the public at large. AIR (Vol 17) 1930 Lah 824 : 123 Ind Cas 536: 31 P L R 547 (DB).

——S. 152 — Interference by Civil Court — Municipality declaring certain women prostitutes and prohibiting their residence — Suit for injunction against Municipality—Maintainability.

The Municipal Committee of Delhi, purporting to act under S. 152, Punjab Municipal Act, issued notices to certain women prohibiting their residence in certain localities on the ground that they were public prostitutes. The women instituted suits against the Committee for an injunction asserting that they were not public prostitutes.

Held, that the Civil Courts had jurisdiction to try the suits as it was asserted by the plaintiffs that the action of the Committee was ultra vires. The Committee was not the sole judge of whether a person was or was not a prostitute and its conclusion could be challenged in a Civil Court. A I R (Vol 17) 1930 Lah 824: 123 Ind Cas 536: 31 P L R 547 (DB).

——S. 152—Service of notice—Personal service.

The notice required by S. 152 (c) prohibiting the residence of the prostitute in a certain quarter ought to be served upon her personally. Where therefore the Municipal Committee promulgated a general notice, it is ineffective to bind a particular person and in such cases regular trial is preferable to summary trial. AIR (Vol 17) 1930 Lah 62 : 116 Ind Cas 191: 30 Cr L J 574: 1930 Cr C 30: 12 A I Cr R 440: 31 P L R 332: 11 Lah 235.

——S 152 — Municipality declaring certain women prostitutes and prohibiting their residence — Suit for injunction against Municipality—Maintainability.

The Civil Courts have jurisdiction to decide in a suit by alleged public prostitutes against Municipal Committee for their having issued notice under S. 152 of the Municipal Act, the question whether or not the plaintiffs were public prostitutes and, on a finding of this issue in their favour, to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality.

It is only when the Municipal Committee acts bona fide, reasonably and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the Civil Courts; and that if its requisitions go beyond the powers conferred upon it then the Civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised, but they are competent to restrain such bodies if they act ultra vires, and where the Municipal Committee issued a notice under S. 152 of the Municipal Act against persons who are proved not to be public prostitutes, the Committee acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was ultra vires and hence

Civil Courts would interfere. AIR (Vol 14) 1927 Lah 358: 100 Ind Cas 1010.

——S. 152—Meaning.

A woman who is a prostitute by profession and whose trade is to let out her body on hire to all or visitors of a specified class, is a public prostitute, but where she is the employee of one man or has been living with different lovers at different occasions but with one man at a time she is not a public prostitute. AIR (Vol 13) 1926 Lah 461: 93 Ind Cas 827.

——S. 152—Notice when valid.

It is essential that the person to whom a notice under S. 150 is given should be carrying on her profession of a public prostitute at the time of the issue of the notice. A I R (Vol 13) 1926 Lah 461 : 93 Ind Cas 827.

——S. 152—Action of Municipality ultra vires.

It is a well-recognized rule of the law that when it is alleged that action of the Municipal Committee is ultra vires or is not covered by the authority of the Act, the Civil Courts have power to interfere. It is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Municipal Act that the jurisdiction of the Civil Courts is ousted. Their discretion as to the mode of action is not subject to a scrutiny by the Civil Courts but their power to take that action is always open to examination by such Courts. A I R (Vol 13) 1926 Lah 461: 93 Ind Cas 827.

——S. 152—Brothel, what is.

In order to constitute a brothel the place must be resorted to by persons of both sexes for the purpose of prostitution, who are strangers to the occupancy.

The brother of the accused and the brother's wife were living in the accused's house. The brother's wife was practising prostitution in the house. Held, that the house did not constitute a brothel within the section and that the accused was not a brothel keeper. A I R (Vol 12) 1925 Lah 146 : 81 Ind Cas 122 : 25 Cr L J 634.

——S. 152 — Delegation of powers — No sanction—Validity.

According to S. 33 of the Act the Committee cannot delegate its powers under S. 152 of the Municipal Act. Over and above this the Second class Committee cannot delegate any of its powers to the President without the previous sanction of the Commissioner, and similarly the 1st class Committee without the sanction of the Local Government Where no such sanction is ever obtained for delegating such powers to the President a notice issued by the latter cannot be held as legal. A I R (Vol 11) 1924 Lah 80: 74 Ind Cas 433: 4 Lah 120: 5 L L J 522: 24 Cr L J 769.

——Ss. 152 and 153—Brothel — Residence of prostitute—Notice—Summary trial—Criminal P. C. S. 260.

Unless the owner or tenant of the house summoned by the Magistrate fails to comply within five days with the Magistrate's order to discontinue the use of the house as a brothel, no offence is committed by him. Where no offence is committed by the owner of a brothel at the time when the complaint is made to the Magistrate, the Magistrate had no jurisdiction to hold a summary trial under S. 260, Criminal P. C.

The house of a public prostitute, does not become a brothel within S. 153 of the Act merely because the owner plies the trade of a prostitute therein. A I R (Vol 5) 1918 Lah 249 (2) : 55 P L R 1918 : 12 P W R (Cr) 1918: 19 Cr L J 449: 45 Ind Cas 113.

—S. 153.

——S. 153 — Non-compliance with notice issued by Committee, if an offence.

The failure to comply with a notice issued by the Committee does not constitute an offence under S. 153. It is only the failure to comply with Magistrate's order which is punishable under that section.

It is doubtful whether the owner of a house, who is doing his best to get rid of a disorderly tenant, can properly be fined under S. 153. A I R (Vol 21) 1934 Lah 619 : 37 P L R 61 : 36 Cr L J 219 (1) : 152 Ind Cas 1036 (1).

——S. 153 — Brothel — Hotel used as brothel—Procedure.

An order passed under S. 153, Punjab Municipal Act, on an owner of a hotel which was being used as brothel to vacate the premises is bad; the proper order in such a case is to ask the owner to discontinue the using of the hotel as a brothel. AIR (Vol 15) 1928 Lah 278 : 107 Ind Cas 391 : 9 Lah 394: 29 Cr L J 250: 9 A I Cr R 501.

——S. 153 — House used as brothel — Magistrate — Powers of.

Under S. 153, a Magistrate passed an order to the effect that if the accused did not vacate the house by a certain date mentioned therein she would be fined Rs. 20, held, that the order of the Magistrate was bad as it contravened the provisions or S. 153, but revision was refused as there was no injustice. A I R (Vol 3) 1916 Lah 220: 10 P W R 1916, Cr: 17 Cr L J 46: 32 Ind Cas 334.

—S. 155.

——S. 155 - Long use—Validity of pleas.

The section contemplates only recent and temporary breach of the rules and the person prosecuted thereunder can successfully plead that he had been using the premises for the purpose objected to for a long period. A I R (Vol 11) 1924 Lah 670: 77 Ind Cas 495: 25 Cr L J 415.

—S. 169.

— S. 169 —Sanction for building schemes.

Clause (e) of S. 169 cannot be construed in a sense precisely the opposite of S. 192, which requires that the committee should obtain sanction for building schemes. A I R (Vol 31) 1944 Lah 15: 45 P L R 449 : 211 Ind Cas 117 (DB).

——S. 169 —Municipal Committee leasing out site in front of plaintiff's building — Plaintiff suing for permanent injunction restraining Committee from leasing out site on ground that it formed part of public highway Evidence showing that Committee has provided sufficiently wide road for public contiguous to plaintiff's building:

Held, that plaintiff was not entitled to injunction sought for. AIR (Vol 26) 1939 Lah 44: 41 P L R 234.

——S. 169 - Scope—Powers of Committee.

Section 169 even if properly applied, would not authorize what would otherwise be an unlawful infringement of the plaintiff's right of access to his property. In putting the section into operation, the Committee must exercise its powers without injuring adjacent owners. Before laying out and making a public street, the Committee must acquire the necessary land or possess it already; they are not given power to make a new street through the land of a private owner without his consent. AIR (Vol 24) 1937 Lah 94: 171 Ind Cas 509.

——S. 169 - Powers of Committee.

There is no provision in the Act other than in Ss. 169 (g), 18 and 56 (g) giving the Committee other powers of disposal in respect of public streets or allowing it to contract with respect to its rights in public streets. A I R (Vol 23) 1936 Lah 296 : 163 Ind Cas 372 (DB).

——S. 169 —Owner of house abutting on highway — Importance of frontage — Comforts of occupants diminished—Right of action—Special damages.

For the owners of houses abutting on a public highway, the question of frontage means great deal, and if anything is done by those in whom the highway vested which interferes with the rights of the owners with regard to the highway and which tends to

diminish the comforts of the occupants of the houses, the owners will undoubtedly have an actionable claim against them. In such cases, it is not necessary to prove that any special injury has taken place before a person wronged by the Committee can take action against it. The principle of English Law which requires proof of special damage in such cases is not applicable to India. A I R (Vol 22) 1935 Lah 196: 16 Lah 517 : 37 P L R 753 : 152 Ind Cas 850 (DB).

——S. 169—Power of obstruction.

The mere vesting of the public highways in the Municipal Committee does not confer any such powers on it so as to permit the Committee to treat it as personal property. Under S. 169, the Committee may close any street temporarily for any public purpose or may close any public street permanently, but in the latter contingency, it shall have to provide the public with another road. The power of obstruction is not implied in the power of closure for such limited purposes as are contemplated by S. 169. AIR (Vol 22) 1935 Lah 196: 16 Lah 517 : 37 P L R 753 : 152 Ind Cas 850 (DB).

——S 169 — Right to close a street — Municipal Committee.

A Municipal Committee can permanently close a street for a particular class of traffic, though it causes some hardship to individuals. AIR (Vol 6) 1919 Lah 81 (1) : 50 Ind Cas 215.

——S. 169 (g) — Question whether land is no longer required for public street is one of fact to be decided by Civil Court and not one of discretion of Municipal Committee. A I R (Vol 29) 1942 Lah 28 : 43 P L R 667 : ILR (1943) Lah 70 : 198 Ind Cas 273 (DB).

——S. 169 (g), proviso — Disposal of part of public street proposed by Municipality — Damage likely to be caused — Burden to prove that part proposed to be disposed of is no longer required as public street.

The Municipal Committee cannot act arbitrarily and prejudice the rights of the public in disposing of a part of the public street on the mere pretext, without any substance behind it, that, it is no longer wanted as a public street. Where, by doing so, they will cause damage to the vested interests of members of the public, the burden lies heavily upon the Municipality to prove that in fact the portion of land they propose to dispose of is no longer required as a public street. AIR (Vol 26) 1939 Lah 199 : 41 P L R 548 : 187 Ind Cas 686.

——S. 169 (g) — Right to lease out land used for public street.

A Municipal Committee is authorised under S. 169 (g), to lease out any land used by the Committee for a public street and no longer required therefor. (1935) 37 P L R 160 : 157 Ind Cas 966 (DB).

—— S. 169 (g) (as amended in 1933)—Power to lease portion of public street given to Municipality subsequent to institution of suit — Lease on the date of institution of suit—Such lease obstructing view from plaintiff's shop—Nuisance.

The Municipal Committee was empowered, after the institution of a suit, by amendment in the Municipal Act to lease portions of a public street. The Committee had leased a portion of public street in front of plaintiff's shop. The plaintiff sued for injunction contending that as the Municipal Committee had no such power on date of institution of suit, it could not do so :

Held, that since the injunction is to operate in the future and in view of the powers of the Municipal Committee as they stood after amendment, injunction could not be granted.

Held, also that the fact that the view from their shops had been obstructed did not constitute any nuisance which could be made the basis for claiming relief. A I R (Vol 21) 1934 Lah 986 : 153 Ind Cas 777 (1).

—S. 170

——S. 170—Written permission.

Written permission by the Municipal Committee is essential for an application under S. 170 and where S. 170 is not applicable, the Committee cannot invoke the penal provision of S. 81. AIR (Vol 21) 1934 Lah 699 : 36 P L R 298 : 15 Lah 884 : 152 Ind Cas 919 (DB).

——S. 170—Rent—Mode of recovery.

Money claimed by the Municipal Committee by way of rent and not as money claimable under the Act cannot be recovered by the process prescribed under S. 81. AIR (Vol 20) 1933 Lah 394 : 34 Cr L J 369 (1) : 34 P L R 429 : 142 Ind Cas 516.

——S. 170—Fee for temporary occupation of street.

Where a Municipal Committee granted permission for the temporary occupation of a portion of a street for a temporary erection thereon subject to a certain sum of money being paid annually to Municipality and subject also to the condition that the permission could be withdrawn at any time :

Held, that the sum was a fee claimable under S. 170. AIR (Vol 18) 1931 Lah 753 : 32 P L R 707 : 32 Cr L J 1041 : 133 Ind Cas 550.

——S. 170—Applicability—Condition for.

In order that S. 170 may apply the Municipal Committee must prove the following matters.

(1) that a permission in writing was granted: (2) that it was for the temporary occupation of any street or land vested in it; and (3) that the purpose for which it was granted was one of the three specified purposes mentioned in the section, that is to say, deposit of any building materials, making of any temporary excavation or making an erection thereon, that is to say, the erection by the person to whom the permission is granted. Where there was no permission in writing by the Municipal Committee and the permission was merely for the occupation of a structure constructed by the Committee and the purpose was to give more business area to the occupants of certain shops :

Held, that S. 170 did not apply. AIR (Vol 18) 1931 Lah 315 : 32 P L R 172 : 133 Ind Cas 278.

——S. 170 — Applicability—Permanent structure in house.

Section 170 does not apply to a permanent structure like a verandah which a person builds in his house and does not therefore justify the committee in granting permission to make it conditional on payment of rent and imposition of other limitations. AIR (Vol 17) 1930 Lah 246 : 31 P L R 228 : 123 Ind Cas 84 (DB).

——S. 170—Structure over street.

Section 170 does not apply to a structure overhanging street. AIR (Vol 16) 1929 Lah 701.

—S. 171

——S. 171 — Absence of notice under S. 171 (4)—Effect of—Power of Executive Officer to issue notice under S. 171 (4).

Under S. 171, sub-cl. (4), a resolution by the committee or a decision by the Administrator after its supersession is a condition precedent without which it is impossible to acquire any man's private property for a public purpose and when that condition has not been complied with, the private property cannot be regarded to have vested in the Municipal Committee or the Administrator for the purposes of a public street. The Executive Officer cannot issue any notice under S. 171 (4), unless the Committee or, after its supersession, the Administrator had resolved or decided the portion in dispute to be a public street. The Executive Officer can only communicate the decision of the Municipality or the Administrator on

behalf of the Municipality or the Administrator, but can pass no orders for that purpose under the Act on his own initiative. When no notice has been issued under S. 171 (4), after the Administrator had decided to declare the land in dispute to be a part of the public street, the disputed land cannot be deemed to be part of the public street. AIR (Vol 31) 1944 Lah 56 : 45 P L R 405 : 211 Ind Cas 510.

——S. 171—Absence of resolution or notice—Effect.

When no resolution was passed or decision made by the Municipal Committee or the Administrator under S. 171 (4) and no notice was issued under their orders under S. 171 (4) and the notice under S. 171 (4) was issued by the Executive Officer on his own initiative S. 37 cannot apply. AIR (Vol 31) 1944 Lah 56 : 45 P L R 405 : 211 Ind Cas 510.

—S. 172

1. **Applicability and scope.**
2. **Permission in writing by the committee.**
3. **Overhanging structures.**
4. **Erects or re-erects.**
5. **Imposition of conditions.**
6. **Demolition.**
7. **Notice.**
8. **Removal without compensation.**
9. **Conviction.**
10. **Private property.**

1. Applicability and scope.

——Ss. 172, 232 — Scope — Section only allows suspension of execution of resolution.

A person applied for permission to build a platform and the application was sanctioned by resolution of the Committee. Permission was given and he constructed a platform. Subsequently, the Deputy Commissioner, acting under S. 232, suspended the resolution granting sanction and more than two years after sanction had been given, the Committee served the person with a notice under S. 172 to demolish the platform :

Held, that the suspension of the resolution by the Deputy Commissioner under S. 232 could not affect the validity of the sanction granted and acted on. All that S. 232 allows is the suspension of the execution of a resolution or the prohibition of the doing of an act which is about to be done or is being done in pursance of the sanction granted by the Committee. But the Deputy Commissioner did not suspend the execution of the resolution nor prohibit the building of the platform.

Held, also that the circumstances were not such as to allow the committee to proceed summarily under S. 172 and that the notice under S. 172 was invalid. AIR (Vol 23) 1936 Lah 689 : 38 P L R 897 : 165 Ind Cas 856.

——S. 172 — Statutory right to remove encroachments erected without permission — Limitation — Acquisition of prescriptive rights, if avail against such right.

The Municipal Committee does not lose its statutory right of removing encroachments from the site of the streets through the acquisition of prescriptive right to resists a suit of the class mentioned under Art. 146A, Limitation Act. Section 172 gives a statutory right to Municipal Committee in the Punjab to remove any encroachment erected without permission, and there is no limitation in point of time, except that compensation must be paid if the structure is more than three years old. The exercise of a Committee's right under this section is not the same as the institution of a suit for possession and the operation of Art. 146A is limited to suits. A I R (Vol 23) 1936 Lah 182 : 38 P L R 744 : 159 Ind Cas 639.

——S. 172 (1)—Conviction under S. 219—Legality.

Where the complaint was for an offence under S. 172 (1) of the Municipal Act it is not open to a Magistrate to convict the accused under S. 219 of that Act. AIR (Vol 18) 1931 Lah 98 : 31 P L R 967.

——S. 172—Scope.

Section 172 only applies to cases where an encroachment has recently been made by a person on a public street, etc., without the written permission of the Municipal Committee. Where it is found that no encroachment was made recently the notice under S. 172 is illegal and the question of the ownership of the land on which the said encroachment is alleged to have been made is immaterial. AIR (Vol 18) 1931 Lah 79 : 31 P L R 951.

——S. 172—Scope—Newly built structures.

Section 172 must be restricted to newly built structures and has no applicability to cases in which an old projection has been demolished, and substituted by new one. AIR (Vol 14) 1927 Lah 276 : 28 P L R 205 : 101 Ind Cas 747.

——Ss. 172, 175, 195 and 219 — Encroachments — Action of Municipal Committee—Modes of.

Section 195 of the Punjab Municipal Act is inapplicable unless the Committee had delivered the notice to accused to remove certain chappers, etc., within reasonable time. S. 172 is inapplicable to structures or encroachments built from 8 to 15 years prior to the date of the notice. The section applicable to encroachments or structures which are not recent or were made with permission is S. 175 (1) under which the Committee must award reasonable compensation. AIR (Vol 1) 1914 Lah 554 : 16 Cr L J 350 : 2 P R Cr 1915 : 18 P L R 1916 : 28 Ind Cas 734.

2. Permission in writing by the Committee.

——S. 172 — Sanction once given, if can be revoked on ground of mistake

Section 172 authorises the Committee to prosecute an offender or demolish a structure only when it is erected without its permission in writing. Where, however, a person applies for permission to construct an overhanging balcony and constructs it in anticipation of sanction and the Committee grants permission inflicting a penalty and the penalty is paid, S. 172 does not apply even if the sanction be in contravention of the bye-laws of the Committee.

There is no provision in the Act enabling the Committee to revoke a sanction once given. A sanction to build given by a Committee cannot be revoked on the ground that there had been a mistake. AIR (Vol 21) 1934 Lah 1021 : 36 P L R 124 : 155 Ind Cas 491.

——S. 172 - Seal of Municipal Committee—Value of.

Application to build two tharras abutting on the public street and overhanging a municipal drain — Resolution as follows : "Sanctioned as recommended by the Building Sub-Committee — The necessary agreement deed be obtained before issuing the permit." No permit issued but a copy of the plan which they had filed in the said office returned—This plan bore the seal of the Municipal Committee with the words "manzur shud" meaning "granted." There was also a reference in their map to the resolution :

Held, that the plan containing the words quoted above accompanied with the seal of the Municipal Committee must be considered as permission in writing.

No particular form is prescribed in which the permission is granted under S. 172 (1).

The seal of the Municipal Committee, when affixed, is equivalent to signature of the Secretary or some other competent Municipal Officer. AIR (Vol 21) 1934 Lah 1011 : 36 P L R 277 : 155 Ind Cas 893.

3. Overhanging structures.

——S. 172—Door leaves if "immovable overhanging structure."

The words "immovable overhanging structure", in S. 172 are not meant to cover door leaves. They are

meant to cover any structure like that of a balcony rather than that of door leaves.

The door leaves are immovable property within the definition of the General Clauses Act. They may not have been embedded or attached to the earth themselves but they are fastend to a gate which is attached to the earth. The fixing of door leaves in a street, therefore, constitutes immovable encroachment within S. 172. AIR (Vol 31) 1944 Lah 13 : 45 P L R 371 : ILR (1944) Lah 416 : 210 Ind Cas 539 (DB).

——S. 172—Structure projecting over street — Committee's power to withhold permission.

It is clear from S. 172 that a person is not entitled to build a balcony without the permission of the committee. The Committee has full power to withhold permission for the building of a structure that will project over a street and a civil Court has no jurisdiction to interfere in such a matter. AIR (Vol 9) 1922 Lah 41 : 68 Ind Cas 675.

4. Erects or re-erects

——S. 172 — Where the previous owner of the building had no intention to re-fix the doors at the time when they were removed by him, the putting up of the doors, whether they were the same doors or fixed in the same place or not, by the subsequent owner would amount to erection and not merely re-erection within the meaning of S. 172. AIR (Vol 31) 1944 Lah 13 : 45 P L R 371 : ILR (1944) Lah 416: 210 Ind Cas 539 (DB).

5. Imposition of conditions

——S. 172 (1)—Imposition of conditions, legality of.

In granting sanction under S. 172 (1), the Municipal Committee cannot impose any condition on the grantee nor can a sanction once granted be revoked. AIR (Vol 21) 1934 Lah 1011 : 36 P L R 277 : 155 Ind Cas 893.

——S. 172—Sanction for construction of building on condition of payment of rent — Suit for recovery of rent.

The applicant was given sanction by a Municipality for the construction of a building which encroached upon a street on condition of his agreeing to pay a certain rent to the Municipality. He erected the building after agreeing to pay the rent fixed. In a suit by the Municipality for rent, it was contended that the condition as to payment of rent was ultra vires :

Held, that the agreement as to payment of rent was not in any way illegal but was enforceable by the Municipality. AIR (Vol 18) 1931 Lah 634 : 32 P L R 607 : 132 Ind Cas 696.

——S. 172 – Public street — Encroachment – Conditional sanction by Municipal Committee, when permissible.

Where a Municipal Committee has not framed any bye-laws regulating their power to impose conditions as to payment of rent, etc., on sanctioning an encroachment under S. 172, it is not open to the Committee to grant permission to make an immovable encroachment on a public street subject to the condition of payment of ground rent. 32 P L R 211 : (1931) 133 Ind Cas 124.

——S. 172 – Restrictions on permission — Absence of bye-law—Effect.

The committee has no power to put restriction upon the permission granted by it. It has power to refuse permission but if it once grants the same, it cannot put any restrictions or limitations upon it. Where, therefore, the committee grants permission to build a verandah in front of a person's house imposing conditions as regards payment of rent and removal of structure in future in case the committee so required, such conditions are ultra vires in the absence of a bye-law framed under S. 188 conferring those powers on the committee. AIR (Vol 17) 1930 Lah 246 : 31 P L R 228 : 123 Ind Cas 84 (DB).

——S. 172—Absence of bye-law—Effect.

Section 172 does not intend to give the Municipal Committee anything more than absolute power of refusal or grant of an application made under the section. It cannot therefore grant such permission subject to any conditions such as payment of rent by the applicant. Imposition of a condition of payment of rent is therefore ultra vires under S. 172. AIR (Vol 16) 1929 Lah 701.

6. 'Demolition'

——S. 172—Plaintiff allowed by Committee to retain projections — Deputy Commissioner advising Committee to order demolition—Committee having projections demolished:

Held, order to demolish was not proper. A I R (Vol 24) 1937 Lah 84 : 171 Ind Cas 616.

7. "Notice".

——S. 172—Where the notice given by the Municipal Committee under S. 172 is in part within the powers conferred on the Municipality and in part beyond its powers, it must be treated as bad in its entirety. AIR (Vol 20) 1933 Lah 935:34 P L R 636:146 Ind Cas 241.

——S. 172—Encroachment not recent—Notice under S. 172, legality of.

Section 172 only applies to cases where an encroachment has recently been made by a person on a public street, etc., without the written permission of the Municipal Committee. Where it is found that no encroachment was made recently, a notice under S. 172 is illegal and the question of the ownership of the land on which the said encroachment is alleged to have been made becomes immaterial. AIR (Vol 18) 1931 Lah 79 ; 31 P L R 951 : 131 Ind Cas 221.

——S. 172 — Absence of encroachment—Validity o notice.

Under S. 172 a written permission of the committee is necessary to enable a person to build or erect any immovable encroachment upon the ground level of any street. But where the site on which the portion objected to by the Committee is constructed is not proved to be a street, a notice under S. 172 for demolition of the portion is invalid, and suit for injunction against the committee is competent. A I R (Vol 17) 1930 Lah 598.

——S. 172—Notice to alter thara—Validity.

Notice served upon a person on behalf of the Municipal Committee to alter an encroachment (thara) on the drain, within a week, so as to bring it in conformity with the sanction failing which he would be dealt with according to law is a notice under S. 172. AIR (Vol 16) 1929 Lah 566 : 116 Ind Cas 908 (DB).

——S. 172 — Old encroachment — Right of Municipality to issue notice.

The Municipal Committee is not competent to issue a notice under S. 172 in respect of the encroachments which were made about twenty years ago. (1926) 97 Ind Cas 288 : 27 P L R 410.

——S. 172—Notice by Municipal Committee requiring demolition of bridge constructed with permission —Injunction.

The Municipality gave permission to plaintiff to build a bridge across a drain in front of his house on condition that he would, at the end of ten years either apply for fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed, the plaintiff not having applied for fresh permission (Punjab Pre-emption Act, S. 3) the Municipality issued a notice under S. 172 calling upon the plaintiff to demolish his bridge or obtain fresh permission to maintain it. Held, that the notice issued by the Municipality was ultra vires and as the Municipality was exceeding its statutory powers, it could be restrained by an injunction. AIR (Vol 6) 1919 Lah 380 : 51 Ind Cas 831 (DB).

8. Removal without compensation.

——S. 172—Remedy of aggrieved party for unlawful removal.

The remedy of an aggrieved party for the unlawful removal of a projection by a local authority is a suit for compensation and not a suit for injunction. This rule applies to a case where the Municipal Committee has not made any tender of compensation before removal of the structure. AIR (Vol 23) 1936 Lah 182 : 38 P L R 744 : 159 Ind Cas 639.

9. Conviction.

——Ss. 172, 219—Encroachment—Notice to remove —Non-compliance—Prosecution—Imposition of daily fine—Legality.

Where for non-compliance with a notice to remove an encroachment, a person was prosecuted under S. 219 and he was sentenced to pay a fine of Rs. 10, and in the event of continuance of the bench, he was filed to pay eight annas per day till the thara was removed :

Held, that the order imposing a fine after the date of the conviction was bad and that the proper course was to institute further prosecution and to allow the accused an opportunity of defending himself before the further fine was imposed but that the words "continuing breach" in S. 219, empower the Magistrate to impose a daily fine from the date mentioned in the notice for the removal of the thara to the date of the compliance or to the date of conviction whichever may first occur. AIR (Vol 21) 1934 Lah 447 : 35 P L R 355 : 36 Cr L J 298 : 153 Ind Cas 198 (2).

10. Private property.

——S. 172 — Building on site declared private by Civil Court—Legality of prosecution.

Where the applicant has obtained a decree in his favour declaring that the site was his private property but the Municipal authorities prosecuted him for building on that property.

Held, the prosecution was wrong. A I R (Vol 12) 1925 Lah 238 : 84 Ind Cas 718 : 6 L L J 525 : 26 Cr L J 366 : 26 P L R 47.

—S. 173.

——S. 173 — The Municipal Committee has no right to interfere with the enjoyment of the right of way by the public on a public street by letting out a portion of it to a particular individual for a private purpose. A I R (Vol 21) 1934 Lah 900 : 155 Ind Cas 951.

——S. 173 — Structure made with permission of Municipality years ago—Continuance after expiry of period without payment—Offence.

Section 173 applies only to encroachment which have recently been made and it is the act of building erecting the encroachment which has been made punishable and the section does not apply to encroachments or erections which have existed for some years. Where a moveable encroachment or projection was made some years ago and with the permission of the Municipal Committee on payment of right no offence is committed if the structure is continued after the period fixed without payment of rent. In such a case, the relation between the parties is that of landlord and tenant or licensor or licensee and hence the aggrieved party should seek the remedy in the Civil Court. A I R (Vol 21) 1934 Lah 733 : 36 Cr L J 710 : 35 P L R 601 : 155 Ind Cas 384.

——S. 173—Superstructure on Takhtposh—Right of Municipality to summary removal.

Where a takhtposh is placed on the drain in front of a person's shop, the superstructure on the takhtposh is a movable encroachment over the drain and is, therefore, an encroachment which the Municipal Committee is entitled under S. 173 (2) to have summarily removed. A I R (Vol 13) 1926 Lah 327 : 93 Ind Cas 627.

——S. 173 — Deposit of goods in street—Site let out to third person.

If the Municipality has leased out the right to stock goods on a specified portion of a street to one person, it cannot prosecute another person under S. 173 for depositing goods thereon without the permission of the lessee. AIR (Vol 6) 1919 Lah 110 : 22 P R Cr 1919 : 20 Cr L J 516 : 51 Ind Cas 676.

—S. 175.

——S. 175—Powers of Committee.

Lease of public street by Municipality — Lessee allowed to build chabutra thereon :

Held, that the site under the chabutra ceases to be a portion of the public street and the Municipal Committee has no power to issue notice under S. 175 for demolishing the chabutra. A I R (Vol 27) 1940 Lah 261 : 42 P L R 690 : 190 Ind Cas 531.

——S. 175—Operation of.

Section 175 comes into play only if the property vests in the Municipal Committee. (1940) 42 P L R 202.

——S. 175 — Tender of compensation — Absence of tender—Validity of notice.

The committee must make a tender of reasonable compensation to the person to whom the notice under S. 175 to demolish his building on the ground of encroachment is given before he can be called upon to demolish the structure. It is immaterial whether the question is raised in criminal or civil suit. AIR (Vol 16) 1929 Lah 763 : 121 Ind Cas 424.

——S. 175 — Interference by Civil Court — When justifiable.

Where the action of the Committee is shown to be intra vires and it is in no way dishonest or malicious, the question of whether it was necessary in the public interest to take action to remove the structures does not arise in Civil Court. AIR (Vol 11) 1924 Lah 699 : 79 Ind Cas 8 (DB).

——S. 175—Absence of tender—Validity of notice.

The language of S. 175 indicates that the requisition open to the Municipality is subject to the payment of compensation, i.e., the tender of compensation must accompany the notice. AIR (Vol 11) 1924 Lah 89 : 73 Ind Cas 813 : 4 Lah 158 : 24 Cr L J 701.

——S. 175 — Suit to challenge action of Municipal Committee—Civil Court—Jurisdiction.

The Municipal Committee first sanctioned the erection by plaintiff of a verandah on a chabutra in front of his house and afterwards required him to pull it down. The site of chabutra belonged to Municipality. The plaintiff then sued for an injunction against the Committee.

Held, that persons dissatisfied with the action of a Committee cannot appeal, to a civil Court, which can interfere only when the Act is in excess of the powers of the Committee and cannot decide whether the Act is reasonable or not.

Held, also that as the site under the chabutra was not the property of the plaintiff and was, therefore, part of the Municipal property the verandah built on it was overhanging the street and the Committee could rightly require it to be demolished on payment of reasonable compensation under S. 175. AIR (Vol 3) 1916 Lah 14 : 104 P R 1916 : 81 P L R 1917 : 36 Ind Cas 599 (DB).

—S. 188.

—S. 188 — Punjab Government notification 573G. 40/8380 of 23rd February 1940 issued under S. 188 —Effect of.

The only effect of the Notification 573 G. 40/8380 dated 23rd February 1940, issued by the Punjab Government under S 188 is that it extends the operation of the bye-laws made by the Municipality of

Hoshiarpur under the Hackney Carriage Act to their roads and not that the roads have become a part and parcel of the Municipality. The result is that the owners and drivers of tongas plying within ten miles of the municipal limits of the Hoshiarpur Municipality are liable to be taxed by both the Municipality and the District Board. AIR (Vol 31) 1944 Lah 69 : 46 P L R 84 : 211 Ind Cas 634.

——S. 188—Powers of Committee.

In absence of requisition by the Local Government under S. 188 to frame bye-laws under S. 121, the failure of the Municipality to frame bye-laws cannot debar it from imposing penalty provided by S. 121 (5). AIR (Vol 28) 1941 Lah 305 : 43 P L R 341 : 42 Cr L J 825 : 196 Ind Cas 225.

——S. 188 — Levy of octroi on animal brought into town for slaughter authorized—Octroi on animals already slaughtered — Whether can be levied — Refund.

Section 188 (g) is purely permissive. It does not presume that octroi on animals can only be levied on entry into the Municipality. If the Committee is entitled to charge octroi on animals brought into the town for slaughter but not on animals already in the town either born there or not brought there for slaughter, it can realise octroi on animals already slaughtered at the shops of licensed butchers, where there is no Municipal slaughter house.

There is no warrant for the proposition that it would not be in accordance with law for the Committee to grant a refund on any article except that exported. A I R (Vol 24) 1937 Lah 310 : 174 Ind Cas 54.

——S. 188 — Permission under S. 172—Restrictions on permission—Absence of bye-law—Effect.

The committee has no power to put restriction upon the permission granted by it. It has power to refuse permission but if it once grants the same it cannot put any restrictions or limitations upon it. Where therefore the committee grants permission to build a verandah in front of a person's house imposing conditions as regards payment of rent and removal of structure in future in case the committee so required, such conditions are ultra vires in the absence of a bye-law framed under S. 188 conferring those powers on the committee. AIR (Vol 17) 1930 Lah 246 : 123 Ind Cas 84 : 31 P L R 228 : 11 Lah 276 (DB).

——S. 188—Occupier—Meaning.

The definition of an "occupier" given in the bye-laws made by the Delhi Municipality under S. 188 (b) is inconsistent with the definition of the same term given in the Act itself and is therefore ultra vires. AIR (Vol 8) 1921 Lah 134 : 64 Ind Cas 129 : 2 Lah 239 : 102 P L R 1921 : 22 Cr L J 737.

——Ss. 188 (2), 121, 219 — Bye-law (4) under S. 188 (q)—Persons committing breach — Ss. 121 and 219, applicability.

As bye-law (4) framed under S. 188 (q) prohibiting the keeping of sulphur matches for purposes of trade in excess of 40 doz. boxes, provides no penalty for its breach, a person committing breach of the bye law cannot be convicted and fined; Ss. 121 and 219 do not apply to such a case. AIR (Vol 22) 1935 Lah 943.

——S. 188 (g) — Power of Committee to exclude areas from octroi limits.

The fixing of Municipal limits is entirely a matter of discretion with the Municipal Committee. The Committee is competent to exclude a certain area from octroi limits in view of the consideration in the shape of high prices that it has realised for the sites of the shops. AIR (Vol 22) 1935 Lah 632 : 37 P L R 289 : 162 Ind Cas 159 (DB).

——S. 188 (p)—Bye-laws not framed under S. 188 (p) —Committee, if can construct tonga stand—Action, ultra vires — Jurisdiction of Civil Court to grant relief to aggrieved party.

The Committee cannot act without framing the necessary bye-laws in those matters in which a bye-law is necessary under the Act. If any power is vested in the Committee for which a bye-law is necessary, it is precluded from exercising that power in the absence of a bye-law. In the matter of the construction of a tonga stand, therefore, the Committee cannot take any step without making bye-laws under S. 188, cl. (p) and when no such bye-laws have been framed, the act of the Committee is clearly ultra vires. In these circumstances, a suit against the Municipal Committee is quite competent. In cases where the Municipality acts ultra vires the Civil Court has power to interlere and grant proper relief to the aggrieved party. AIR (Vol 22) 1935 Lah 196 : 16 Lah 517 : 37 P L R 753 : 153 Ind Cas 850 (DB).

—S. 189.

——S. 189—Sanction given in contravention of bye-laws—Effect.

A local body has no power to grant sanction for a building in contravention of its own bye-laws. But where a Municipality has granted the sanction and accepted the required penalty from the applicant, it is estopped from withdrawing it and requiring the applicant to demolish the structure. A I R (Vol 21) 1934 Lah 1021 : 36 P L R 124 : 155 Ind Cas 491.

——S. 189 — Conditions under bye-law 26 — New building abutting street or lane.

The condition provided in bye-law 26 can only be imposed in relation to the new building which it is proposed to erect and does not empower the committee to direct the demolition of any existing building. So also a condition precedent to the application of the bye-law is that the new building should abut on a street or lane. AIR (Vol 17) 1930 Lah 488 (DB).

——S. 189—Condition regulating line of frontage — Enforceability.

The committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street. Section 193 empowers the committee to refuse sanction to build or grant sanction either absolutely or subject to such modification as it may deem fit in respect of all or any of the matters specified in sub-section (3) of Section 189. That is to say, the committee may refuse permission to build at all, but if permission is granted it can only impose such conditions as are provided for in the sub-section. AIR (Vol 10) 1923 Lah 417 : 73 Ind Cas 725 (DB).

—— Ss. 189 and 193—Removal of Thara — Compensation.

A Municipal Committee is competent to remove a Thara old or new, but in the former case it is necessary to give compensation. 52 P W R 1913 : 122 P L R 1913 : 19 Ind Cas 781.

——S. 189 (3) (i) and (iii) — Conditional sanction — Condition, if fair, should be complied with.

In granting sanction under S. 193, the Municipal Committee ordered that the plaintiff should not build his wall within 2 feet of a certain open space which was originally about 5 feet and 4 inches wide. In spite of this order, the plaintiff built his house and thereupon the Committee served a notice on him under S. 194 requiring him to demolish the upper story. The plaintiff sued for an injunction.

Held, that the condition was not illegal, wanton, capricious or oppressive, but was eminently reasonable and conducive to sanitation, free circulation of air and ventilation within S. 189 (3) (i) and (iii). AIR (Vol 3) 1916 Lah 232 : 75 P R 1916 : 140 P L R 1916: 154 P W R 1916 : 35 Ind Cas 377 (DB).

—S. 190.

——S. 190—Absence of bye-law — Powers of Committee.

The Municipal Committee can impose conditions in order to regulate line of frontage only by framing a bye law under S. 190. Apart from any such bye-law the Committee has no power to prohibit construction of building within four feet of the centre of a passage which is not a street. A I R (Vol 17) 1930 Lah 547 : 122 Ind Cas 564 : 31 P L R 193 (DB).

——S. 190—"Building"—Meaning—Applicability of bye-law.

The term "building" as used in Ss. 189, 190 and 193 means that part of the house in respect of which an application is made to the Committee and it does not mean the whole of the house, a portion whereof is proposed to be erected or re-erected and, therefore, the conditions imposed by the Committee under S. 193 must be confined to that part of the house in respect of which an application to erect or re-erect is made to it. It also follows that the Committee is not entitled to invoke the aid of a bye law which prohibits erection of any portion of any building abutting on a street or lane within four feet of the centre of such street or land, for putting back an old outer wall of the applicant's house which abutted a street, if the building proposed to be erected does not abut a street. AIR (Vol 15) 1928 Lah 393 : 110 Ind Cas 285.

—S. 192.

——Ss. 192, 193 — Scheme under S. 192 under contemplation and expected to be put into force fairly soon — Administrator's refusal to sanction building plan in contemplation of scheme justified—Plaintiff, held not entitled to injunction.

On 6th October 1936, the Administrator of Lahore rejected a building plan submitted by the plaintiff on the ground that the Commissioner had given orders for a scheme to be prepared under S. 192. This scheme was finally sanctioned by Government in October 1937. The building plan submitted by the plaintiff was not in accordance with this scheme with regard to the minimum area and frontage. After waiting to see the results of some litigation, the plaintiff finally brought the present suit in 1941 for a perpetual injunction directing the Administrator not to interfere with the construction of the house as shown in the building plan on the ground that the reason given for refusing to sanction the plan was arbitrary, capricious and ultra vires :

Held, that as building scheme was already in contemplation and was expected to be and was, in fact, put into force fairly soon, the refusal of the Administrator to sanction the building plan was justified. The minimum area requirements were imposed for the purpose of preventing overcrowding and it was in the public interest that immediate steps should be taken to stop this. The Court would not, by granting the injunction prayed for, direct something to be done contrary to public interest. Nor was individual hardship a sufficient reason for acting contrary to public interest. A I R (Vol 31) 1944 Lah 19 : 45 P L R 373 : 211 Ind Cas 612 (DB).

——Ss. 192 and 193 — Sanctioned building scheme — Applicability of, to land purchased before scheme.

It is incorrect to say that the requirements of a sanctioned building scheme cannot be made to apply to any land which has been purchased before the scheme comes into force as this would mean that no building scheme could ever be enforced at all. A I R (Vol 31) 1944 Lah 19 : 45 P L R 373 : 211 Ind Cas 612 (DB).

——S. 192 — Scheme already sanctioned by Committee not approved — Scheme by Commissioner—Validity of.

Section 192 provides that the Commissioner may enforce a scheme of his own if a scheme sanctioned by the Committee is not finally approved. The scheme so sanctioned by the Commissioner cannot be held to be invalid merely because there was a scheme already sanctioned by the Committee but not finally approved. The mere existence of buildings constructed in accordance with a scheme which has not been found to be suitable cannot be regarded as a reason for holding a scheme sanctioned by the Commissioner to be invalid. A building scheme sanctioned under sub-s. (4) of S. 192 cannot be held to be ultra vires merely because it, in some way, modifies or affects existing interests, since that is precisely what a building scheme is usually intended to do. If a person stands by and does not object at the proper time, he cannot be allowed to come forward and object on the ground of personal hardship to himself in a Civil Court. A I R (Vol 31) 1944 Lah 15 : 45 P L R 449 : 211 Ind Cas 117 (DB).

——Ss. 192 and 169 — Sanction for lay out plan for streets, whether precludes sanction of building scheme.

The mere fact that a municipality has at some time or other sanctioned the laying-out of streets can hardly be taken as making it impossible for any building scheme to be subsequently sanctioned under S. 192 for this would make S. 192 completely meaningless. Clause (e) of S. 169 cannot be construed in a sense precisely the opposite of S. 192 which requires that the committee should obtain sanction for building schemes. A I R (Vol 31) 1944 Lah 15 : 45 P L R 449: 211 Ind Cas 117 (DB).

——S. 192 — Scheme under S. 192 (4) — Municipal Committee, if must invite objections.

It is not necessary that the Municipal Committee should invite objections on a scheme sanctioned under sub-s. (4) of S. 192. In the absence of evidence to show that the Commissioner had not invited objections, it must be presumed that all the formalities were duly carried out. A I R (Vol 31) 1944 Lah 15 : 45 P L R 449 : 211 Ind Cas 117 (DB).

—S. 193.

——S. 193—Suit against municipal body — Government should be made party.

Obiter.—In a case where a municipal body is concerned, the Government should be made a party to the suit for there may be cases in which the Municipal Committee is deliberately seeking to defy the orders of the Commissioner, although it is the intention of the Act that they should carry them out and it would not be suitable that the validity of the order should be questioned in a suit between a private person and the Municipal Committee alone. A I R (Vol 31) 1944 Lah 15 : 45 P L R 449 : 211 Ind Cas 117 (DB).

——Ss. 193, 193-A (as amended by Act III of 1933) —Sanction to build under S. 193 granted before amendment of Act — Sanction, if can be modified after amendment under S. 193-A.

Section 193-A empowers the Municipal Committee to modify the plans which had been sanctioned under S. 193 before 17th July 1933 the date on which the Amending Act (Act III of 1933) came into force. It can modify it any time before the completion of the building.

Every owner of land has the right to erect buildings thereon. The Act merely restricts the undoubted right of the owner of erecting a building on his own land by providing that the owner of the land can erect buildings only with the sanction of the Committee and subject to the conditions laid down in the resolution conveying the sanction. Section 193 of the Act, by granting sanction to the owner of the land to erect buildings thereon does not create any vested

rights. A I R (Vol 23) 1936 Lah 983 : I L R (1937) Lah 42 : 38 P L R 878 : 163 Ind Cas 958 (DB).

——S. 193 — Sanction, when necessary — Effect of sanction.

The sanction of the committee under S. 193 is only necessary on sanitary and general public grounds and a sanction so given does not prevent the Committee from taking any steps which it thinks fit, in order to assert its rights to its own private property.

Appellant applied to the Committee for sanction to open a number of doors in the wall bounding his property. The Municipal Committee omitted to pass any orders with the result that after the lapse of two months, sanction was deemed to have been given under S. 193. Accordingly, after two months, appellant opened certain doors. The Committee then issued notice to him under S. 195 to demolish them but he appealed to Deputy Commissioner who accepted his appeal on the ground that under S. 193, the committee was deemed to have sanctioned the doors.

A short time afterwards the committee erected a wall close to and in front of the doors which effectually masked them :

Held, that as the wall in which the doors were built and the land on which the doors were opened were both the property of the committee, the committee was not prevented from so doing by the implied sanction. A I R (Vol 22) 1935 Lah 131 (DB).

——S. 193—Refusal of sanction to build — Power of Court to enquire into reasons — Arbitrary refusal—Power to give relief—Meaning of 'absolutely'.

The civil Court is not ordinarily entitled to decide the question of sufficiency or otherwise of the reasons given by a Municipal Committee, for refusing sanction to build, but it is entitled to see whether the reasons for which sanction has been refused are not ultra vires or are not arbitrary or capricious; and if a Committee acts ultra vires or arbitrarily or capriciously in refusing sanction, the Court is competent to give relief to the person aggrieved against the action of the Committee.

The word 'absolutely' in S. 193, is used as alternative to "subject to such modification" It does not imply that the Municipal Committee has unrestricted power to refuse to sanction a building, or that it is not bound to disclose its reasons for such refusal. The word does not qualify 'refuse to sanction' but governs the power of the Committee to sanction the building. A I R (Vol 19) 1932 Lah 59 : 133 Ind Cas 549.

——S. 193—Question of title—Suit for injunction to restrain Committee from preventing building — Power of Court to decide question of title.

A person intended to erect a chabutra in front of his house and gave notice of the intention to the Committee under the provisions of S. 189 (2). The Committee refused permission to build on the ground that the title of the land on which it was proposed to build vested in the Committee. He brought a suit for "an injunction against the Committee restraining it from preventing him from building a platform on the land owned and possessed by him" :

Held, that the relief claimed implied a prayer for the declaration of the person's title and the Court should adjudicate on the question of title in the land and if it was found to vest in the person he was entitled to the injunction prayed for. A I R (Vol 16) 1929 Lah 774 : 115 Ind Cas 755.

——S. 193—Revocation of sanction—Validity.

Where once the Municipal Committee has given sanction to roof a drain, it cannot revoke it. A I R (Vol 14) 1927 Lah 891 : 100 Ind Cas 813.

——S. 193—Tacit sanction—Applicability to projection over street.

A tacit sanction provided for by S. 193 covers erection or re-erection of buildings entirely within the bounds of a person's own land, but does not cover a projection or structure over-hanging or encroaching upon any street or road. (1926) 92 Ind Cas 765 (Lah).

—— S. 193 – Restrictions on sanction—Validity.

Where sanction was granted subject to the condition that a particular wall in the plan of the proposed new building should be put back a certain distance.

Held, the Committee was not acting beyond its powers in imposing the condition in question. A I R (Vol 11) 1924 Lah 393 : 71 Ind Cas 775.

——S. 193—Scope.

S. 193 refers only to buildings to be erected on private property. A I R (Vol 9) 1922 Lah 41 : 68 Ind Cas 675.

——Ss. 193 and 195—Injunction, suit for, against the Municipal Committee—Question of good faith or mala fide.

In granting sanction under S. 193, the Municipal Committee ordered that the plaintiff should not build his wall within two feet of a certain open space which was originally about five feet and 4 inches wide. In spite of this order, the plaintiff built his house and thereupon the Committee served a notice on him under S. 194 requiring him to demolish the upper storey. The plaintiff sued for an injunction.

Held, that the question of good faith or mala fide of the Municipal Committee in imposing the condition was one of fact, and could not be considered in second appeal. A I R (Vol 3) 1916 Lah 232 : 75 P R 1916 : 140 P L R 1916 : 154 P W R 1916 : 35 Ind Cas 377 (DB).

——S. 193—Alteration.

The mere substitution of new bricks for old ones in a platform on the ground does not constitute anything more than repairs to such platform. 52 P W R 1913 : 122 P L R 1913 : 19 Ind Cas 781.

——S. 193 (1)—Mere proposed scheme which has not yet been sanctioned does not entitle committee to refuse sanction under sub-s. (1).

Sub-section (1) of S. 193, makes it imperative for the Municipal Committee or the Executive Officer to refuse to sanction the erection or re-erection of a proposed building only where it is calculated to contravene any scheme that has actually been sanctioned under sub-s. (3) or (4) of S. 192. A mere proposed scheme which has not yet been sanctioned does not entitle the Municipal Committee or the Executive Officer to refuse sanction under this sub-section. So far as this sub-section is concerned, it is wholly immaterial whether the Municipal Committee is merely contemplating to draw a scheme or has actually drawn it up and submitted it to the Provincial Government for sanction. A I R (Vol 33) 1946 Lah 216 : 48 Pun L R 8 : 225 Ind Cas 369 (DB).

—S. 193

——S. 193 (1) and (2)—Scheme not sanctioned — Committee refusing sanction under S. 193 (2) — Action of committee, held to be collateral and in excess of its powers.

A submitted a building plan to the committee for sanction on the plot of land that he had purchased. On 31st October 1935, the committee accorded its sanction. A constructed a boundary wall on this plot and also filled the foundations and constructed the building up to the plinth but failed to complete the building within the time allowed by law, and the result was that sanction lapsed. On 15th May 1940, A resubmitted the same plan for renewal of the sanction. The Committee refused its sanction under S. 193 (2) to the proposed building on the ground that area was low lying and could not be properly drained off. By the time sanction was refused, about two hundred houses had been built in the same low-lying area. A

did not seek the remedy under S. 225 but instituted a suit for an injunction restraining the committee from interfering with the construction of his proposed building on the plot :

Held, that (1) the reason for refusal was outside the purview of S. 193 (2) as the reason affected the whole of the area in which the site of the proposed building was situate and such an objection could not be said to affect the building itself ;

(2) ground for refusing sanction taken by the committee could only be taken under the provisions of S. 193 (1), only if a scheme had been sanctioned for the low-lying area but as the scheme was not sanctioned, the committee could not refuse the building plan of A under provisions of S. 193 (2) which covered only those cases which were outside the provisions of S. 193 (1). The committee acted collaterally by giving reason for refusal to sanction the proposed building under S. 193 (2), which could only fall under S. 193 (1) ;

(3) the committee, instead of acting under S. 131 for making low-lying area habitable and to make arrangements for draining it off resorted to the provisions of S. 193 (2), for the same purpose and acted collaterally and in excess of the powers conferred by that section ;

(4) the committee by assigning the reason for refusal of sanction under S. 193 (2), declared that nobody could build on the whole of that low-lying area. In other words, it deprived the owners of their proprietary rights in that lands as they could not make any effective use of that and therefore, the owners were certainly entitled to claim redress against such an infringement of their rights by having recourse to a Civil Court ;

(5) as A had raised up to the strict level the site of the house on which he proposed to build, the objection regarding the rest of the low-lying area could not be made applicable particularly when the committee had in the meanwhile sanction at least two hundred houses to be built on that low-lying area. The action of the committee in these circumstances could only be described as abuse of its power. The committee as a statutory body should not have acted discriminately as it acted in case of A. The exercise of its power was wanton, arbitrary and oppressive and was subject to control of Civil Court ;

(6) the Court could issue an injunction. AIR (Vol 32) 1945 Lah 81 : 47 P L R 178 : I L R (1945) Lah 382 (FB).

——Ss. 193 (1) and 192 — Plan not in accordance with scheme sanctioned under S. 192—Rejection of, by Administrator—Validity.

As S. 193 (1) requires the Administrator to reject a plan which is not in accordance with the scheme sanctioned under S. 192, compliance with the requirements of S. 193 (1) cannot be said to be ultra vires unless it can be clearly shown that there was some such serious irregularity of procedure as would make it possible to say that there never was any sanctioned scheme at all within the meaning of S. 193. In that case the Administrator might have power to sanction a plan which was not in accordance with the scheme and his order could be attacked ; but when the question is really one of holding that the scheme, although regularly sanctioned, should not be enforced because it is oppressive, then it would be impossible to hold that the Administrator had power to do anything except to reject such a plan. The Court may have power to hold the scheme invalid on the grounds of its being oppressive, but until it has been so held, the Administrator is bound to act in accordance with it and reject a plan which is not in accordance with the scheme sanctioned under S. 192. The Commissioner's order sanctioning the scheme must be directly attacked and not indirectly through the orders of the Administrator rejecting the plan. A I R (Vol 31) 1944 Lah 15 : 45 P L R 449 : 211 Ind Cas 117 (DB).

——S. 193 (1) — Convenience in cleaning drain — Right of Municipality.

The right to supervise the drain and to have a right of way to the drain is accessory to the right to the drain and the Committee are, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain. A I R (Vol 14) 1927 Lah 891 : 100 Ind Cas 813.

—— S. 193 (2)—Sub-s. (2) does not give power to refuse sanction merely because erection of building, if permitted, will result in inconvenience to other persons.

The language of sub-s. (2) of S. 193 is perfectly clear. It enables the Municipal Committee or the Executive Officer only to refuse sanction for a reason which is just and sufficient as affecting the proposed building itself. It is not possible to read into it a provision giving the Municipal Committee or the Executive Officer power to refuse sanction because there is reason to believe that the erection, if permitted, will result in difficulties or inconveniences to other persons. AIR (Vol 33) 1946 Lah 216 : 48 Pun L R 8 : 225 Ind Cas 369 (DB).

——S. 193 (2) — Sub-s. (2) does not apply merely because proposed building is likely to interfere with proposed town planning scheme.

In order to attract the application of sub-s. (2) of S. 193 the sanction must be refused for any reason which the Executive Officer or the Municipal Committee deems to be just and sufficient as affecting the proposed building and such reason has to be communicated in writing to the applicant. Where the order of the Executive Officer simply says that the sanction is refused because the proposed building will interfere with the proposed town planning scheme and no reason affecting the building itself is given in the said order, sub-s. (2) does not apply. AIR (Vol 33) 1946 Lah 216 : 48 Pun L R 8 : 225 Ind Cas 369 (DB).

——Ss. 193 (2), 225—In spite of S. 225, Punjab Municipal Act, the Civil Courts can interfere even with the discretionary orders of the Municipal Committee under S. 193 (2) of the Municipal Act if those orders are an abuse of the power vested in it or are in any way unreasonable, capricious, arbitrary or partial. A I R (Vol 28) 1941 Lah 200 : 43 P L R 18 : I L R (1941) Lah 278 : 196 Ind Cas 70 (DB).

——S. 193 (4)—Where the trust neither refuses nor grants permission within a reasonable time to a resident in Delhi who applies for permission to erect or re-erect, the provisions of S. 193 (4), Punjab Municipal Act apply to the case by virtue of S. 49, U. P. Town Improvements Act there being nothing in S. 193 (4), Punjab Municipal Act inconsistent with the tenor of the U. P. Act VIII of 1919. AIR (Vol 28) 1941 Lah 431 : 43 Cr L J 108 : 197 Ind Cas 67.

——S. 193 (4)—Applicability and scope.

Section 193 (4) refers to a town planning scheme sanctioned only under S. 192 and does not apply to a scheme sanctioned by the trust under U. P. Town Improvements Act, as applied to Delhi. AIR (Vol 28) 1941 Lah 431 : 43 Cr L J 108 : 197 Ind Cas 67.

—S. 194.

——S. 194—(As amended by Act III of 1933)—If retrospective.

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. Hence, S. 194 as amended in 1933 is not retrospective. AIR (Vol 26) 1939 Lah 546 : 41 P L R 472.

—S. 195.

——S. 195—Notice to demolish re-erected portion of wall — Measurements of such portion not given—Notice, if vague.

A notice under S. 195 of the Municipal Act calling upon the plaintiff to demolish the portion of a wall re-erected by him as having been re-erected without sanction without specifying the length and breadth of the re-erection is not vague or indefinite, as the plaintiff must be deemed to have known what portion was re-erected. AIR (Vol 34) 1947 Lah 256 : 231 Ind Cas 20 : 49 P L R 32.

——Ss. 195 and 195-A — Construction of building started without permission'— Construction stopped in pursuance of notice under S. 195-A — Application to continue construction—No order passed within 60 days—Subsequent completion of building—Sanction must be deemed to have been given — Subsequent notice under S. 195 for demolition of building is invalid.

Where an application for sanction to continue the construction of a building, which was stopped in pursuance of a notice under S. 195A is made to a Municipal Committee but no order is passed thereon within the period of 60 days laid down by S. 193 (4), and the applicant completes the building after the statutory period, the sanction to build must be deemed to have been granted by the Municipal Committee. Any subsequent notice under S. 195 for demolishing the building is invalid as the notice under S. 195 can be issued only where no sanction has been given or is deemed to have been given at the time of the issue of notice. It cannot, in such a case, be contended that the notice was valid with respect to that portion of the building which had been erected without sanction before the date of application for sanction. The reason is that the portion of the building erected by the applicant before the date of application must also be deemed to have been sanctioned. Even if it be taken that the notice was valid in respect of the portion erected before the application, the notice would be invalid, being also in respect of the portion which must be deemed to have been sanctioned. Since it must be held to have been partially invalid, it must be held to have been invalid as a whole. AIR (Vol 33) 1946 Lah 413 : 48 P L R 102 : 223 Ind Cas 152.

——S. 195 — Erection of building without proper sanction — Discretion of the municipality to take compensation or to order demolish—Court no substitute for municipality.

In a case where it is proved that a building has been erected without proper sanction, the discretion is that of the municipality as to whether to order the demolition or to take compensation. The Court cannot substitute itself for the committee and decide whether or not a demolition order should be made or whether compensation should be demanded. There is nothing in the section to show that a Court can compel the municipality to accept compensation. The Legislature has given choice to the municipality to take one course or the other and the quantum of compensation is also within the sole discretion of the committee. AIR (Vol 32) 1945 Lah 151 : 47 P L R 36 (DB).

[A I R (Vol 27) 1940 Lah 185 : 189 Ind Cas 151 Overruled.]

——Ss. 195 and 220—Elapsing of considerable time between service of notice under S. 195, and service of notice under S. 220—Inferences.

In a case where there is proper material before the Court and municipality allows considerable time to elapse between service of notice under S. 195, and service of notice under S. 220, the Court may infer from the delay that municipality has abandoned its right to act under the notice given under S. 195, or it may be deemed to have withdrawn or cancelled the notice. The municipality cannot be deemed to have withdrawn, cancelled or abandoned its notice merely from the fact that it did not act for a time or period. There might be a very good reason for the delay and mere delay by itself cannot constitute sufficient material from which a Court can infer abandonment. AIR (Vol 32) 1945 Lah 151 : 47 P L R 36 (DB).

——Ss. 195, 225 — Notice not falling under S. 195 and ultra vires—Civil Court's jurisdiction, if ousted.

If the notice falls within the purview of S. 195, then the civil Courts have no jurisdiction and the only remedy of the aggrieved party is to take action under S. 225. If, however, the notice does not fall within the purview of S. 195 and is wholly ultra uires, then the jurisdiction of the civil Court is not ousted. The Committee may have jurisdiction to pass a resolution, but as soon as they issue a notice which affects the rights of the third parties, it is for the civil Court to determine whether the action of the Committee is wholly ultra vires or whether it is intra vires. A I R (Vol 26) 1939 Lah 38 : 40 P L R 980 : 179 Ind Cas 699.

——S. 195 — Necessity of definite finding as to the date on which unauthorised structure was completed.

Action under S. 195 can be taken only if notice is delivered within six months of the date of completion of the unauthorized structure. A mere finding that the structure was "constructed" in certain year is vague and indefinite. There must be a clear finding as to the date on which it was "completed." A I R (Vol 25) 1938 Lah 613 : 40 P L R 278 : 177 Ind Cas 763.

——S. 195—Sanction of Municipality—Good portion of building built—Sanction not cancelled by Deputy Commissioner —Demolition.

Section 195 does not empower the Committee to require the demolition or alteration of a building which it has expressly sanctioned and even in respect of a building which has been deemed to have been sanctioned by it. The powers of the Committee are limited as indicated in the section. Where, therefore, a person, in pursuance of the sanction of the Committee, builds a good portion of the building, the Committee cannot order its demolition under S. 195, before such sanction is cancelled by the Deputy Commissioner. A I R (Vol 24) 1937 Lah 201 : 39 P L R 411 : 172 Ind Cas 698.

——S. 195—Section 195 lays down penalties "should a building be begun, erected or re-erected without sanction." Repairing the walls of a shed and putting thereon an iron corrugated roof prima facie does not come within the words "begun, erected or re-erected." A I R (Vol 23) 1936 Lah 702 : 37 Cr L J 935 (2) : 38 P L R 886 : 164 Ind Cas 368.

——Ss. 195, 81 — Notification extending Ss. 195 and 81 to Notified Area of Karnal— Duty of Courts to take judicial notice — Recovery of money under S. 81 by Magistrate — Magistrate, if has powers to determine if proper notice was given or not.

Sections 81 and 195 were extended to the Notified Area of Karnal by Notification No. 11832, dated 29th May 1918, (p. 164 of Part 1-A of the Punjab Gazette). The Courts must take judicial notice of this Notification.

A Notified Area Committee to which Ss. 81 and 195 had been extended, served a notice on the petitioner under S. 195 requiring certain shops within the notified area to be demolished. Later on, he was given notice that compensation would be accepted. But after the amount was fixed, the petitioner appealed to the Commissioner, the ground urged being that the order to pay compensation was not justified because the Committee had no power to levy house tax on the property concerned. The appeal was rejected and the Committee resolved to take action under S. 81. Application was made to the Local Magistrate accordingly

and the Magistrate passed an order for recovery under that section :

Held, that the Magistrate had no authority to determine whether the notice was or was not actually given within six months of the demolition of the buildings and so to re-open a matter which was determined by the Commissioner's order. A I R (Vol 23) 1936 Lah 144 : 38 P L R 4 : 37 Cr L J 556 : 162 Ind Cas 201.

——Ss. 195, 220, 225 (1) (b) – Re-erection of building without sanction—Power to demolish—Jurisdiction of Civil Court to question validity of notice

Section 225 (1) (b), does not bar the jurisdiction of the civil Courts to question the validity of a notice issued by a Committee under S 195.

Where there is no erection of a new building but only re-erection of a wall on the foundations of a pre-existing kacha wall, the Municipal Committee is not entitled to issue a notice under S. 195.

In the case of a restrictive statute, Courts are bound to place a strict interpretation on it so as not to bring a case within its provisions which does not come within the phraseology employed by the Legislature. AIR (Vol 19) 1932 Lah 597 : 33 P L R 782 : 138 Ind Cas 743.

—— S. 195—Time of notice—Notice within 6 months of knowledge of erection—Validity.

H applied in December 1924 for sanction to erect a building. As the Committee did not pass any order within prescribed time, the building was automatically sanctioned. In September 1925 the Committee noticed that the building was being built higher than the height given in the plan. Accordingly it issued notice under S. 195 on 12th March 1926 to the effect that the portion of the building higher than had been applied for should be demolished. Notice was served on H on 17th March 1926. H and his brother brought a suit for injunction restraining the Committee from demolishing any portion of the building.

Held, that the notice was in no respect vague. H was the person who had applied for sanction and notice to him was sufficient. The Committee came to know on 30th September 1925 that H was constructing the building higher than was allowed, and the notice being delivered within six months of the date, requirements of S. 195 had been complied with. The notice was issued in time and the Committee was not in any way dilatory so as to prejudice H. A I R (Vol 17) 1930 Lah 478.

——S. 195—Notice requiring demolition — Remedy of party — Power of Magistrate to prohibit demolition.

The Municipal Committee has power under S. 195 to require a building to be demolished, and a Magistrate cannot interfere with the exercise of the power and is not competent to prohibit the demolition of the building, the remedy of the accused, if he is aggrieved by the notice, being to appeal to the Commissioner under S. 225. 99 Ind Cas 80 : 8 L L J 562 : 27 P L R 734 : 7 A I Cr R 204 : 28 Cr L J 48 : A I R (Vol 14) 1927 Lah 69 (DB).

——S. 195—Remedy of party — Power of Magistrate to prohibit demolition.

The Municipal Committee has power under S. 195 to issue a notice requiring the building to be demolished and the Magistrate is not competent to direct that the building should stand, the remedy of the persons aggrieved by the notice being to appeal to the Commissioner under S 225. 99 Ind Cas 944 : 8 Lah 103 : 28 Cr L J 208 : 28 P L R 494 : 8 L L J 564 : 27 P L R 786 : AIR (Vol 14) 1927 Lah 58 (DB).

——Ss. 195 and 225—Municipal Committee—Appeal to Commissioner against order of Committee.

The omission to appeal to the Commissioner under S. 225 of the Act against the order of a Municipal Committee does not deprive a party of the right to sue for an injunction restraining the Committee from taking steps to remove a structure 62 P R 1919 : 51 Ind Cas 708 : A I R (Vol 6) 1919 Lah 111.

——S. 195, Proviso (1) — Compensation under — Whether can be recovered under S. 81.

The Municipal Committee is not entitled to recover the amount of compensation mentioned in proviso (1) to S. 195 of the Punjab Municipal Act by the coercive provisions of S. 81 of that Act. The amount of compensation offered by a person and received by the Committee cannot be described as a sum "claimable by a committee under this Act" within the meaning of S. 81. The proviso to S. 195 does not authorise the committee as of right to claim any sum by way of compensation from a person who has contravened the provisions of S. 195 of the Act. The only powers given to the committee is to accept a certain sum of money if it is satisfied that it is sufficient by way of compensation, but if no such sum is received by the committee, the proviso to S. 195 does not come into play and the notice issued for demolition or alteration of the building is not exhausted. A I R (Vol 35) 1948 Lah 194.

—S. 195-A.

——S. 195-A—Validity of notice.

Where notice under S. 195 A has not been signed by the executive officer but by another person who has been specially authorised by the executive officer to sign such notices, the notice is valid.

The legal maxim omnia praesumuntur rite esse acta has been embodied in an illustration to S. 114, Evidence Act, and if a person receives a notice purporting to be signed by somebody on behalf of the executive officer, the presumption is that it is signed by a person who has been authorized to sign it, and if the person receiving that notice presumes otherwise and disobeys the notice, he is taking a risk. The burden lies on him to rebut the presumption of regularity. A I R (Vol 28) 1941 Lah 90 : 42 P L R 402 : ILR (1940) Lah 237: 42 Cr L J 389 : 193 Ind Cas 317.

——S. 195 A—Notice, if should specify in detail how sanctioned plans had been contravened.

There is nothing in the language of S. 195A of the Act as it now stands which requires the notice to state any more than that the sanction has been contravened. The notice is not invalid if it does not specify in detail how the sanctioned plans had been contravened. AIR (Vol 28) 1941 Lah 90 : 42 Cr L J 389 : 193 Ind Cas 317 : 42 P L R 402: ILR (1940) Lah 237.

——S. 195-A — Expression "delivered to", if means "served upon."

The words "service" or "served" are technical terms implying a definite process of the law and where those terms are used, that process has to be carried out. The words "delivered to" do not appear to me to mean or to be intended to mean the same as "served upon." They are words of much wider meaning. AIR (Vol 28) 1941 Lah 90 : 42 P L R 402 : I L R (1940) Lah 237 : 42 Cr L J 389 : 193 Ind Cas 317.

—S. 197.

——S. 197 — Scope of power — Bye-law under old Cl. (d) prohibiting persons from selling vegetables except at particular places — Applicability under the new section.

Clause (a) of S. 197 does not authorise Municipal Committee to frame any bye-law prohibiting the sale of fresh fruits and vegetables. The bye-law, therefore, framed under the old section before the amendment in 1923 prohibiting a person selling whole-sale or by auction any fruit or vegetables except at vegetable markets cannot be considered to remain in force and goes beyond the scope of Cl. (a) of S. 197. 120 Ind Cas 188 : 11 Lah 24 : 31 Cr L J 49 : 1929 Cr C 164 : AIR (Vol 16) 1929 Lah 607 (DB).

——S. 197 — Old bye-law prohibiting persons from selling vegetables except at particular place — Prosecution for infringement under amended section — Legality.

Clause (a) of S. 197, as amended by the Municipal Act of 1923, does not authorize a Municipal Committee to frame a bye-law prohibiting the sale by auction of fresh fruits and vegetables at any place other than a particular place. Therefore where a Municipality had framed a bye-law that the sale should take place at a particular place under S. 197 (d) of the Act, which authorized the framing of such a bye-law but which sub-section had since been repealed by Act of 1923.

Held, that no person could be prosecuted for the breach of the bye-law under old S. 197 (d) when the alleged offence was committed after passing of the Municipal Act of 1923. 112 Ind Cas 360 : 29 Cr L J 1032 : 11 A I Cr R 310 : AIR (Vol 15) 1928 Lah 540.

—S. 198.

——S. 198—Excavations—Object of S. 198—Excavation on private estate — Liability.

The object of S. 198 is to empower the Committee to forbid excavations in order to preserve the soil or to prevent landslips, and it is not intended that a person should be prohibited from making an excavation or a hole or a cavity in his own estate for domestic purposes which cannot cause any landslip or danger to the public.

Where, therefore, an alleged excavation is made on a private estate for making charcoal and the complainant does not produce any evidence to prove the nature or the dimensions of the excavation, nor is there any warrant for the assumption that the prevention of the excavation is necessary for any of the purposes mentioned in the section the accused cannot be said to have done an act contrary to the provisions of law 117 Ind Cas 801 : 1929 Cr C 573 : 30 Cr L J 836 : AIR (Vol 16) 1929 Lah 845.

—S. 214.

——S. 214—Notice not specifying time—Legality of proceedings.

Where a Municipal Committee passed a resolution ordering a notice to issue prohibiting a particular area to be used for prostitution without fixing any time within which the order was to be carried out.

Held, that as no time was fixed under S. 152 of the Municipal Act as to when the persons affected have to comply with the notice, by virtue of Section 214 of the Act, it was the duty of the Committee to fix a reasonable time within which the persons affected should carry out the resolution. Hence there was a defect in the resolution which invalidated all the proceedings taken on its basis. Section 37 of the Municipal Act could not cure this defect. A I R (Vol 12) 1925 Lah 146 : 25 Cr L J 634 : 81 Ind Cas 122.

—S. 219.

——S. 219—Scope.

Encroachment—Notice to remove—Non-compliance —Prosecution — Fine of Rs. 10 and in the event of continuance of the breach, further fine of annas eight per day till the thara was removed :

Held, that the order was bad; the words "continuing breach" in S. 219 empower the Magistrate to impose a daily fine from the date mentioned in the notice for the removal of encroachment to the date of the compliance or of conviction whichever may first occur. A I R (Vol 21) 1934 Lah 447 : 35 P L R 355 : 36 Cr L J 298 : 153 Ind Cas 198 (2).

——S. 219—Repairs—Offence.

Effecting crude repairs to existing walls does not constitute 'erection' or 're-erection' of a building under the Punjab Municipal Act and is no offence under S. 219. A I R (Vol 20) 1933 Lah 85 : 33 P L R 1041 : 34 Cr L J 452 : 142 Ind Cas 869.

——S. 219—A Magistrate cannot convict an accused for an offence under S. 219 unless there is a complaint from the Municipal Committee. If he does so, the conviction is illegal and without jurisdiction. A I R (Vol 18) 1931 Lah 98 : 31 P L R 967.

——S. 219—Composition Order permitting projection on payment of penalty—Legality.

The accused erected certain projections overhanging a public street without the permission of the Municipal Committee. The Committee issued a notice under sections 172 and 195 for their removal. The accused removed all the projections with the exception of one which was about 9 inches in width. The Committee thereupon prosecuted the accused under sections 172 and 219. The trial Magistrate ordered that the accused should pay a penalty of Rs. 5 and that the projection should be allowed to remain intact.

Held, that the order was without jurisdiction and that it could not be sustained as no composition being provided by the Act for a case under S. 172. A I R (Vol 10) 1923 Lah 686 : 25 Cr L J 373 : 77 Ind Cas 421.

——S. 219—Building without sanction—If continuing offence.

A person who has been tried once for building a house without sanction of the Municipality and acquitted cannot be tried again for the same offence on the ground that the house continues to stand and thus constitutes a continuous offence. AIR (Vol 4) 1917 Lah 143: 14 P W R 1917 Cr : 18 Cr L J 324 : 38 Ind Cas 436.

——S 219—Encroachment—Acquittal — Subsequent conviction for disobedience—Autre fois acquit.

A person was convicted for constructing an overhanging balcony without permission of the Municipality and sentenced to fine of Rs. 50 and to pay Re. 1 per day for the time the balcony remains undemolished. In revision it was held that the order for demolition and the fine for prospective disobedience were bad. The accused still persisted in disobeying the Municipality's notice to remove the offending balcony. Then the Municipality prosecuted him and had him fined Rs. 50 for disobedience and Rs. 2 for every day of his disobedience till judgment.

Held, that the subsequent prosecution was not bad on any principle of Autre Fois Acquit. A I R (Vol 2) 1915 Lah 147 : 119 P L R 1915 : 36 P W R Cr 1915 : 16 Cr L J 605 : 30 Ind Cas 157.

—S. 220.

——S. 220—Erection of building without proper sanction — Suit for injunction restraining municipality from demolishing it — Plea of delay Plea should be taken in plaint and an issue should be framed.

In a suit for a perpetual injunction restraining the municipality from demolishing a construction erected without proper sanction on the plea that notice under S. 220 is belated, it is for the plaintiff to establish that there is an abandonment, withdrawal or cancellation of the earlier notice. Such a plea should be taken in plaint and an issue on the matter should be framed. Where a proper issue is framed, evidence can be called to explain the delay if there is any explanation. In the absence of an issue giving rise to this question, the Court cannot hold that the municipality may be deemed to have abandoned or withdrawn its notice merely because it did not act promptly. A I R (Vol 32) 1945 Lah 151 : 47 P L R 36 (DB).

——S. 220 — Alteration and demolition — Proper order.

All that the Municipal Committee could do on the failure of the party to comply with the notice under

S. 220 is to have the necessary alterations made through its own agency. The right to alter does not necessarily carry with it the right to demolish. If the immovable encroachment can be altered without demolition so as to conform with the sanction there is no jurisdiction for wholesale demolition. A I R (Vol 16) 1929 Lah 566 : 116 Ind Cas 908 (DB).

—S. 221.

——S. 221—Bona fide dispute of ownership — Obstruction offered to contractor.

Where there exists a bona fide dispute regarding the ownership of a plot of land between the Municipal Committee and the accused and it is doubtful whether the Committee could direct its contractor to pave the disputed land and thus constitute him a person legally authorised under S. 221, the accused will not be guilty of offence under S. 221, if he, on the contractor proceeding to pave the site, tells the contractor that the property belonged to him and should not be paved. A I R (Vol 22) 1935 Pesh 16 : 36 Cr L J 806 : 155 Ind Cas 548.

——Ss. 221, 228 — Authority to Sanitary Inspector, requirements of.

In the case of a Sanitary Inspector, the authority to bring a suit on behalf of the Municipal Committee must be in writing and by name and not by office. A conviction following upon a complaint instituted by a Sanitary Inspector on whom such authority has not been conferred must be set aside. A I R (Vol 20) 1933 Lah 597 : 34 Cr L J 1128 (1) : 145 Ind Cas 741.

——S. 221—Disobedience of order proved by Municipality—Order not precise.

A conviction under S. 221 for disobedience of an order passed by the Municipality is bad when the order is vague and indefinite. A I R (Vol 1) 1914 Lah 129 : 5 P L R 1914 : 2 P W R 1914 Cr : 15 Cr L J 191 : 22 Ind Cas 767.

—S. 225.

——S. 225 does not provide the remedy when committee acted in excess of its powers.

Section 225 of the Act provides a subject only in cases were the committee has acted within the four corners of the Act and has not acted in excess of the provisions of the Act or in contravention of those provisions. When a jurisdiction is vested in a committee and it either irregularly exercises that jurisdiction or errs in the exercise of the jurisdiction in those cases, the remedy of the subject against the order of the committee is by preferring an appeal to the Commissioner under the provisions of S. 225, and the order of the appellate authority would conclude the matter. Such a decision cannot be collaterally attached in a Civil Court. When however, the committee acts in excess of the powers, then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess and for usurpation of power, the remedy provided by the Act cannot be held to be exclusive. The remedies given to the subject by a statute are for relief against exercise of power conferred by a statute but those remedies are not contemplated for usurpation of power under the cover of the provisions of the statute. The Civil Courts are the proper tribunals in these kinds of cases and their jurisdiction cannot be held barred by reason of statutory remedies provided for grievances arising in exercise of statutory powers. To cases of this kind the rule that where a statute creates a right and provides at the same time a remedy and no other is available has no application. Again the rule has no application to a case where the right was not created by a statute but existed independently of it. AIR (Vol 32) 1945 Lah 81: 47 P L R 178: I L R (1945) Lah 382 (FB).

——Ss. 225, 193—Orders of Committee—Jurisdiction of Civil Courts.

In spite of S. 225 or the Act, the Civil Courts can interfere even with the discretionary orders of the Municipal Committee under S. 193 (2) of the Act if those orders are an abuse of the power vested in it or are, in any way unreasonable, capricious, oppressive or partial. Section 225 does not bar the jurisdiction of the Civil Courts to entertain a suit for perpetual injunction directing the Committee not to object to the construction of a house in accordance with the plan submitted to it on the allegation that the Committee's order rejecting the plan is ultra vires. A I R (Vol 28) 1941 Lah 200 : 43 P L R 18 : I L R (1941) Lah 278 : 196 Ind Cas 70 (DB).

——S. 225—Jurisdiction of Civil Court.

Section 225 (c) (b) does not bar the jurisdiction of the Civil Courts to question the validity of a notice issued by a Committee under S. 195. A I R (Vol 19) 1932 Lah 597 : 33 P L R 782 : 138 Ind Cas 743.

—S. 228.

——Ss. 228, 172—Municipal Committee giving sanction in general terms for prosecution of petitioner for offence set out in sanction—Offence not mentioned by section but by facts constituting offence under S. 172—Held, S. 228 was sufficiently complied with. A I R (Vol 28) 1941 Pesh 9 : 42 Cr L J 420 : 193 Ind Cas 365.

——S. 228—Applicability.

If the notice falls within the purview of S. 195, then the Civil Courts have no jurisdiction and the only remedy of the aggrieved party is to take action under S. 225. A I R (Vol 26) 1939 Lah 38 : 40 P L R 980 : 179 Ind Cas 699.

——S. 228—Municipal Committee ordering shops to be demolished—Suit for permanent injunction directing Committee to refrain from carrying out the order can be entertained by the Civil Court. AIR (Vol 23) 1936 Lah 572 : 38 P L R 83 : 160 Ind Cas 942.

——S. 228—Provisions are mandatory.

The provisions of S. 228 are mandatory. A conviction is not maintainable on the complaint of an unauthorised person. A I R (Vol 21) 1934 Lah 972 : 36 P L R 180 : 150 Ind Cas 693.

——S. 228—Delegation of power to decide whether suit should be brought or not—Subsequent ratification.

There is nothing in the Act which empowers a Municipal Committee to delegate the right to decide whether a suit shall or shall not be brought to a particular person. Suits brought by the Secretary of the Notified Area Committee without reference to the corporation are hence bad.

The fact that the action of the Secretary had been ratified by resolutions of the Committee is of no avail, inasmuch as a suit must be decided to be good or bad on the day when it is instituted and it cannot be ratified subsequently. AIR (Vol 19) 1932 Lah 388 : 33 P L R 956 : 137 Ind Cas 253.

——S. 228—General authority—Authority.

A general authority can be given without naming each accused. AIR 1924 Lah 80, Overruled. A I R (Vol 15) 1928 Lah 27 : 8 Lah 613 : 28 P L R 637 : 28 Cr L J 1002 : 9 A I Cr R 178 : 106 Ind Cas 826.

——S. 228—Authority in writing.

The authority to prosecute a person under Municipal Act must be in writing and full particulars of the person to be prosecuted should be given with the authority so given to the prosecutor. A I R (Vol 11) 1924 Lah 80 : 4 Lah 120 : 5 L L J 522 : 24 Cr L J 769 : 74 Ind Cas 433.

[Overruled in AIR (Vol 15) 1928 Lah 27.]

——S. 228—Unauthorised complaint—Conviction.

Under this Act complaints must be by authorised persons. A complaint by an unauthorised person is no complaint and conviction in such a case is bad. A I R (Vol 4) 1917 Lah 233 : 4 P R 1917 Cr : 18 Cr L J 511: 39 Ind Cas 479.

——S. 228—Authority to prosecute must be personal.

Except in cases specified in explanation to S. 228 the authority to prosecute must be personal and therefore a conviction based on the complaint of a person authorised not by a name but by designation is illegal.

Where the "Daroga Sajai" was to institute a complaint under S. 219 of the Act, the complaint is not made by a 'duly authorised' person in accordance with S. 228 of the same Act, and is therefore illegal. AIR (Vol 3) 1916 Lah 358 : 8 P R 1916 Cr : 13 PWR 1916 Cr : 17 Cr L J 199 : 34 Ind Cas 311.

—S. 229.

——S. 229—Sub-Committee compounding case of encroachment on payment of penalty — Committee accepting payment—Committee, if bound by resolution of Sub-Committee.

It is within the powers of a Sub-Committee in a Municipality to compound under S. 229, an offence with respect to an encroachment when authorized to do so by the Municipal Committee. Where, by a resolution, a Sub-Committee compounds a case of encroachment on payment of a penalty and the order is not repudiated by the Municipal Committee, but on the other hand, the payment of the penalty is accepted by its officer, the Committee as a whole or the Administrator standing in its shoes, is bound by the resolution of the Sub-Committee. AIR (Vol 26) 1939 Lah 581 : 186 Ind Cas 314.

—S. 232.

——S. 232—Scope.

Subsequent to the granting of the permission by a Municipality to a person for building certain building, the Municipality was superseded and the sanction was suspended. The person served a notice on the Secretary of State for India in Council through the Deputy Commissioner which was described as a notice under S. 80, Civil P. C., and S. 49, Punjab Municipal Act. The Deputy Commissioner occupied a dual capacity, one as the Collector of the District and the other as the Administrator of the Municipality :

Held, that under S. 232, the Commissioner or the Deputy Commissioner is authorised to suspend the execution of any resolution or the order of a committee and not the resolution or the order itself. If once a resolution or order of a committee has been acted upon, it cannot be suspended. In other words, the order of suspension should be made before the resolution or order is executed and not after. AIR (Vol 27) 1940 Lah 451 : 42 P L R 550 : 192 Ind Cas 729.

——S. 232—Powers of Deputy Commissioner.

Section 232 clearly says that the power of the Deputy Commissioner is confined to suspending of the execution of a resolution of the Municipal Committee and he cannot suspend the resolution itself. (1940) 42 P L R 202.

——S. 232— A Committee acting under the orders of the Deputy Commissioner or Commissioner cannot go behind a sanction once given or composition once accepted for encroachments. AIR (Vol 26) 1939 Lah 581 : 186 Ind Cas 314.

——S. 232—Deputy Commissioner or Commissioner, power of to suspend execution of order of Committee after it has been carried out.

There is no distinction between suspending execution of any resolution or order of a Committee and prohibiting the doing of an act. The Deputy Commissioner or the Commissioner can prohibit the doing of an act if it has not already been done and can also suspend the execution of a resolution or order if that order has not already been carried out. It is within the competence of the Deputy Commissioner or the Commissioner to suspend execution of the resolution passed by the Committee before it is carried out but not afterwards, and their orders passed after the execution are ultra vires. A I R (Vol 26) 1939 Lah 581 : 186 Ind Cas 314.

——S. 232—Validity of sanction.

Application for permission to build a platform — Permission given after resolution — Resolution acted upon —Subsequently, Deputy Commissioner suspending execution of resolution — Notice issued by Committee two years after the sanction :

Held, that the suspension by the Deputy Commissioner could not affect the validity of the sanction already granted. AIR (Vol 23) 1936 Lah 689 : 38 P L R 897 : 165 Ind Cas 856.

—S. 238.

——S. 238 — "All powers" in S. 238 mean all powers without distinction or restriction. AIR (Vol 26) 1939 Lah 369 : 41 P L R 504 : ILR (1940) Lah 14 : 184 Ind Cas 237 (FB).

——S. 238 —Supersession of committee — Period of supersession—Appointment of administrator—Tenure of office.

Section 238 itself puts no limit on the period of supersession and the use of the words "at any time" in sub-s. (3) of S. 238 indicates that no limit was intended to be put on the period. Whether the Committee is, by the act of supersession, annihilated or remains dormant during the period of supersession, there is no warrant for applying as a limit for the period of supersession, the limit fixed by the Act for the term of office of the members of the Committee; the period of supersession continues until the Local Government takes the appropriate steps to terminate it by constituting another Committee. Therefore, the person appointed by the Local Government to exercise and perform the powers and duties of a Municipal Committee in pursuance of S. 238, does not become functus officio on the date on which the members of the Committee would have ceased to hold office, if the Committee had not been superseded but is entitled to exercise and perform those powers and duties both before and after such date. A I R (Vol 26) 1939 Lah 369 : 41 P L R 504 : ILR (1940) Lah 14 : 184 Ind Cas 237 (FB).

——S. 238—Suit against Municipality —Supersession —Administrator not impleaded—Effect.

Suit against Municipality—Municipality superseded and Administrator appointed before decree in suit —Administrator not brought on record— Decree cannot be executed against property in his hands. A I R (Vol 25) 1938 Lah 83 : 177 Ind Cas 389.

—S. 240.

——S. 240 — Category of goods for purposes of terminal tax—Competency of civil Court to go into.

The civil Court is not debarred from deciding whether goods imported fall within one or the other category of the Terminal tax schedule. A I R (Vol 36) 1949 E P 18 : 50 P L R 102.

——S. 240, Rules under, notified by Government of Delhi, Part VIII, R. 3 and Part XIII — Returning Officer rejecting nomination paper — Election petition lies to special tribunal under Part XIII—Special tribunal erroneously refusing to entertain petition — Suit challenging rejection of nomination paper lies in civil Court—Civil P. C., S. 9.

Erroneous rejection of a nomination paper by the Returning Officer is a material irregularity in the course of an election and, therefore, an election peti-

tion lies to the special tribunal (Deputy Commissioner) under Part XIII against the rejection of the nomination paper.

If the special tribunal refuses to entertain and decide on the merits the election petition against the rejection of the nomination paper on the erroneous ground that the applicant had no locus standi to present it and the tribunal was not competent to hear it as no election petition lay, the action of the tribunal amounts to a refusal to exercise jurisdiction and not merely an error in the exercise of that jurisdiction and the civil Court would be competent to entertain a suit challenging the rejection of the nomination paper. A I R (Vol 33) 1946 Lah 85 : 47 P L R 94 : 224 Ind Cas 324 (DB).

——Ss. 240, 12 and 24—Election rules under — Part XIII – Election petition, what is.

The term 'election' embraces the whole procedure whereby an elected member is returned whether or not it be found necessary to take a poll. A rejection of a nomination paper is a matter in the course of an election and can furnish a ground for election petition. AIR (Vol 33) 1946 Lah 85 : 47 P L R 94 : 224 Ind Cas 322 (DB).

——S. 240—Proceedings without sanction — Rule 26 (ii)—Legality.

Rule 26 (ii) of the rules made by the Local Government under Section 240 of the Punjab Municipal Act lays down that no Court shall take cognizance under these rules except upon complaint made with the sanction in writing of the Deputy Commissioner. A prosecution without such sanction is not cognizable by any Court. AIR (Vol 9) 1922 Lah 183 : 37 P L R 1922.

——S. 240—Court — False statement before Deputy Commissioner – Sanction for prosecution.

A Deputy Commissioner acting under R. 5 (ii) or 5 (iii) is Court and his sanction is necessary under S 195, Cr. P. Code, before a Court can take cognizance of a complaint in respect of a false statement made on oath before him. (1921) 62 Ind Cas 413 : 22 Cr L J 525 (Lah).

—S. 242.

——S. 242—Scope of powers—Levy of tax.

The powers conferred on the Local Government by S. 242 with regard to Notified Areas are limited to the imposition of taxes described in S. 61-B and the sanction of the Governor-General in Council is an indispensable preliminary condition for their imposition. A I R (Vol 14) 1927 Lah 140 : 9 L L J 22 : 28 P L R 57 : 100 Ind Cas 426.

——S. 242—Levy of tax.

The powers conferred by S. 242 are limited to the imposition of taxes described in S. 61 (b) A I R (Vol 11) 1924 Lah 361 : 4 Lah 442 : 75 Ind Cas 908, (F B).

——S. 242—Interpretation – "Profession."

The expressions "persons exercising any profession" "or carrying on any trade" do not cover or include a Naib Tahsildar. A I R (Vol 11) 1924 Lah 147 : 4 Lah 256 : 5 L L J 509 : 73 Ind Cas 785(DB).

——Ss. 242 (1), 61 (1), (6) — Teachers in school under District Board — Small Town Committee, if justified in imposing "house tax" on them.

A teacher in a school under the District Board holds an office under a "local authority." This being so, the Small Town Committee is justified in imposing the "house-tax" upon him. The case comes under sub-cl. (1), S. 61, and the taxes imposed under this sub-section require only the sanction of the Local Government. Sub-section (3), S. 61 which refers to the Governor General in Council refers to a tax which is not covered by sub-s. (1) or sub-s. (2). The demand made by the Small Town Committee from such teachers is justified under the provisions of S. 242 (1) read with S. 61 (1) (b) with the "explanation" and the Government Notification No. 397, dated 27th June 1916. A I R (Vol 21) 1934 Lah 980 : 153 Ind Cas 750.

PUNJAB MUNICIPAL (EXECUTIVE OFFICER) ACT (2 of 1931).

—S. 4.

——Ss. 4 (a), 11 — Suit against Municipality restraining Municipal Committee from obstructing plaintiff from building on his land — Appeal by Municipal Committee.

The words "for the purpose of carrying on the administration of the municipality" in S. 4 (a) do not confer any power to file an appeal The act of filing an appeal in a suit against the Municipality for injunction restraining the Municipal Committee from obstructing plaintiff from building on his land cannot be regarded as an act for carrying on the administration of the Municipalility. The administration of the Municipality of affairs which it is, by statute, entitled or liable to perform is one thing and the carrying on of its own administration which the words "administration of Municipality" seem to suggest, another. That act of filing an appeal still requires a special resolution of the Committee and the authority of the decision in. A I R (Vol 22) 1935 Lah 345 : 158 Ind Cas 348, cannot be said to have been shaken by what is contained in S. 4. Punjab Municipal (Executive Officer) Act, or in the rules framed by the Local Government under S. 11 of that Act. The fact that the plaintiff filed the suit against the Municipality through its executive officer is besides the point. A I R (Vol 30) 1943 Lah 318 : 45 P L R 365 : 211 Ind Cas 353 (DB).

—S. 6.

——Ss 6 (2), (4), 173 (1) (a) — Contract for use of wall for affixing posters thereto — Such contract entered into by Executive Officer.

A poster affixed to a wall cannot be regarded as a movable encroachment. A contract for the use of a wall for the purpose of affixing posters thereto is one which affects immovable property and it must be sanctioned by the Committee, drawn up in writing, and sealed with the common seal of the Committee. In the absence of sanction, the contract will not be binding upon the Committee. A I R (Vol 23) 1936 Lah 177 : 38 P L R 741 : 159 Ind Cas 775.

PUNJAB MUNICIPAL WORKS RULES (1925).

—R. 11.

——R 11—"Professional standing" is possible prior to obtaining degree from university — Executive Officer or President, if can remove Municipal employee.

The words 'professional standing' in R. 11 are too vague to be properly defined and the mere fact that a person obtains his degree from a university in a certain year does not necessarily exclude the possibility of his having a professional standing prior to that period.

Neither the Executive Officer nor the President of the Municipal Committee constitutes the committee nor can they exercise the powers which the committee alone can do. There is no provision of the Municipal Act or the Executive Officer Act on the point nor in any rule or by-law made under those enactments which can authorize the Executive Officer or the President of the Municipal Committee to arrogate the powers to themselves. A I R (Vol 25) 1938 Lah 282 : 178 Ind Cas 153 (DB).

PUNJAB OPIUM SMOKING ACT (6 of 1923)

—S. 5.

——S. 5 — Different tenants occupying different

storeys of building—Chandu found in one storey :

Held, that presumption under S. 5 does not apply to tenants occupying other storeys. A I R (Vol 23) 1936 Lah 913 : 39 P L R 58 : 38 Cr L J 389 : 167 Ind Cas 443.

PUNJAB ORDINANCE (1 of 1944) AND PUNJAB ACT (7 of 1944)

——Whether ultra vires—If validate orders and acts therein referred to.

Per Full Bench:—The Punjab Ordinance No. I of 1944 and the Punjab Act VII of 1944 are both intra vires the Governor of the Punjab and the Provincial Legislature respectively, except to the extent that where, if at all, the exclusive sphere of the Federal Legislature is encroached upon, the legislation is void to the extent of the encroachment.

Per Full Bench (Abdul Rashid, A. C. J., contra) :—The Ordinance and the Act as worked do not validate the orders, proceedings and Acts therein referred to.

Per Abdul Rashid, A. C. J. :—The Ordinance and the Act validate all orders made, proceedings taken and acts done up to the 22nd December, 1944. They do not validate any orders made, proceedings taken and acts done after the 22nd December, 1944. A I R (Vol 35) 1948 Lah 33 : I L R (1947) Lah 274 : 48 Cri L J 984 (FB).

PUNJAB PANCHAYAT ACT (2 of 1939)

—S. 39.

——Ss. 39 and 73—Order of Panchayat under Ch. IV—Revision

When the Panchayat which has the alternative of proceeding against a person either on the executive side or on the judicial side decides to proceed against him on the executive side and passes an order under Chap. IV of the Panchayat Act, the only authority which is competent to revise that order is the Deputy Commissioner. The District Magistrate has no such power. A I R (Vol 34) 1947 Lah 298.

—S. 55.

——S. 55 — Scope and effect of — Occurrence witnessed by members of Panchayat — Trial of case by Panchayat—Conviction—Legality.

Section 55 of the Punjab Panchayat Act, like S. 556, Criminal P. C., accords statutory recognition to the principle that a person cannot be Judge of his own cause. The trial and conviction by a Magistrate of an accused in a case where the Magistrate is himself a witness is illegal. Although the Panchayat Act has constituted a separate tribunal for certain kinds of offences, that tribunal cannot appropriate to itself the role of an adjudicator and a witness. The Panchayat being a Court when acting in exercise of judicial powers conferred upon it by the Act, it cannot try a case which arises in respect of an occurrence which the members of the Panchayat have witnessed. If the Panchayat tries such a case, both the trial and the order of conviction are manifestly illegal and must be set aside. AIR (Vol 34) 1947 Lah 238 : 47 Cri L J 1017 : 227 Ind Cas 185.

PUNJAB POLICE RULES

—Chap. 16

——Table of punishments.

It is not fatigue duty which is penal but only extra fatigue duty. 15 P W R 1911 Cr : 184 P L R 1911 : 12 Cri L J 143 : 9 Ind Cas 831.

PUNJAB PRE-EMPTION ACT (2 of 1905)

——Right to arrears of rent—If agricultural land.

The right to realise arrears of rent of agricultural land is not agricultural land and need not be included in a pre-emption suit in respect of the land with which the said right is sold. A I R (Vol 1) 1914 Lah 56 : 182 P W R 1914 : 230 P L R 1914 : 13 P R 1915: 25 Ind Cas 68 (DB).

——Effect of non-payment of pre-emptive price with the time fixed.

The failure to pay the pre-emptive price within the time fixed by the Court results in the dismissal of a suit for pre emption. Subsequent compromise between the parties does not save the decree from becoming null and void. 26 P R 1909 : 35 P W R 1909: 48 P L R 1909 : 1 Ind Cas 877 (DB).

——S. 2 (2) — Punjab Tenancy Act (XVI of 1887), Ss. 5, 6, 53, 56 and 60.

Where one of two joint occupancy tenants sells his rights to the landlord, the other tenant is entitled to pre-empt and the landlord is estopped by reason of being a party to the sales from suing to avoid the sale under S. 60 of the Tenancy Act. There is nothing in Tenancy Act or in the Pre-emption Act giving a landlord a right of pre-emption or a right to defeat a claim to pre-empt in the case of a sale of an occupancy right under any section other than S. 5. 15 P W R 1912 : 18 P L R 1912 : 36 P R 1912 : 13 Ind Cas 28.

——Ss. 2 (3), 28 and 29 — Right to sue for pre-emption accruing before and after commencement of the Punjab Pre-emption Act, II of 1905.

If the right to sue for pre-emption has accrued before the coming into force of the Punjab Pre-emption Act (II of 1905) and limitation has begun to run against the claimant but had expired upon the commencement of the Act. Section 28 of the Act, applies and the claimants suit within one year from the date of commencement, e. g., a suit instituted on the 8th February 1907, for pre-emption of land sold on 2nd September 1904, is time-barred. Now if the right to sue accrues after the Act has come into force (11th May 1905) and the period of limitation has not begun to run before its commencement, the pre-emptor will have the period of one year, as laid down in S. 29, from the date on which limitation begins to run 74 P R 1909: 85 P L R 1909: 47 P W R 1909 : 3 Ind Cas 636 (DB).

——Ss. 2 (3) (a), 28 and 29—Enquiry Scope of.

In a suit for pre-emption by plaintiffs who claimed a preferential right by reason of their relationship to the vendor :

Held, the right of the plaintiffs to inherit the property within the meaning of S. 12 (a) of the Act must be enquired into, that as the plaintiffs had a right to sue before the commencement of the Punjab Pre-emption Act, 1905, their right could not be held time barred under S. 29. 98 P L R 1909 : 91 P W R 1909 : 4 Ind Cas 935 (DB).

—S. 3.

——Ss. 3 (1) and (2) and 4 — Tea factory — Agricultural land—Notification of Government negotiating pre-emption within specified area — Not retrospective.

A tea factory outside the village site and a tea garden not within the village site or abadi though within the village boundary are not liable to pre-emption under S. 4 of the Act.

Neither the site of such building nor a stretch of natural forest is "agricultural land" under the Act. But the fields in which the tea is grown come within that definition.

Plaintiff must sue to pre-empt 'the machinery as well as the site. A notification by the Government declaring that the right of pre-emption shall not exist in the area concerned could not affect the plaintiff's statutory rights of pre-emption in respect of a sale which took place before the notification. A I R (Vol 6) 1919 Lah 222 : 91 P R 1919 : 52 Ind Cas 563 (DB).

——Ss. 3 (1) and 5—Agricultural land—Test.

The test to find out whether a certain land is for pre-emption purposes agricultural or urban depends

upon its character at the time of the sale and not before or after so that the fact that it was revenue free or abutting a road in a town extension scheme connecting the town with a Railway Station will not make it urban if it is proved that it was used for agricultural purposes. 21 P W R 1912: 23 P L R 1912: 26 P R 1912 : 13 Ind Cas 167.

—— S. 3 (2)—Village immoveable property—"Village site," meaning of — Parao Lala Musa, not a town — Extensions to inhabited portion of village — New buildings on unoccupied land.

The houses standing on the parao constitute village immoveable property.

Extensions made to the existing Abadi of a village, or hitherto unoccupied site within the boundaries of a village built over and settled on, become "village immoveable property" and as such come within the operation of sub-section (2), S. 3. "Village site" does not mean only the original Abadi Deh, but includes new buildings or Bazars, which spring up on the village lands though separate from the original Abadi Deh.

Per Ryves J.—The word "village" does not mean a collection of houses but the whole estate or Mauza, and includes everything within the boundaries of the village area.

Per Scott-Smith J.—The expression "village site" is not synonymous with "village" or "estate". It means the inhabited part of the village or "Abadi Deh". Sub-section (2) of S. 3 does not apply to all immoveable property within the limits of a village. 89 P R 1910: 176 P L R 1910: 119 P W R 1910: 8 Ind Cas 312 (DB).

——S. 3 (3)—Town or village.

A place which is not described in the last Gazetteer as a town is a village though it contains above fifty pucca houses and about 10 income-tax payers and the population is about 3,300 and number of houses 600 and the area about 11,500 acres. 26 P R 1910 : 32 P W R 1910 : 152 P L R 1910 : 5 Ind Cas 909.

——Ss. 3 (3) (a) and 7 (1) — House property in Cantonment—Notification—Effect of.

Notification No. 677 of 10-11-1908 of the Punjab Government under S. 3 (3) (a) declaring the Rawalpindi City and Cantonment to be a town cannot confer a right of pre-emption in respect of house property situated in the Cantonment of Rawalpindi for house property in a Cantonment is by S. 7 (1) made not subject to pre-emption. 3 P L R 1911 : 9 P R 1911 : 30 P W R 1911 : 9 Ind Cas 388.

——S. 3 (5) — Execution of decree, possession given to decree-holder.

A transaction whereby possession of land is given to the decree-holder in execution of a compromise decree does not give rise to a right of pre-emption. 150 P W R 1913 : 296 P L R 1913 : 20 Ind Cas 556.

——S. 3 (5)—Sale.

The guardian of a minor when selling the minor's share along with his own land held by him and the minor jointly, agreed that if the minor should object, he would transfer to the vendee his other land equal to the share of the minor. The vendee afterwards obtained a decree to enforce the condition and obtained possession of the land belonging to the guardian in execution. The sons of the guardian claimed the land by right of pre-emption.

Held, that the claim was not valid for there was no sale withih the Pre-emption Act and even if it was it being a sale completed by the execution of a decree, no pre-emption would be claimed. 40 P R 1911 : 203 P L R 1910 : 105 P W R 1911 : 8 Ind Cas 777 (DB).

——S. 3 (5)—Sale of immovable property not subject to pre-emption.

A sale of immoveable property by a Receiver under the direction of the Court is a sale in execution of an order of a civil Court within S. 3 (5) of the Act and consequently not subject to pre-emption. 41 P W R 1909 : 46 P R 1909: 72 P L R 1909: 1 Ind Cas 474 (DB).

—S. 4.

——S. 4—Transfer by pre-emptor pending appeal by vendee—Effect under decree.

Where a pre-emptor obtained a decree and during the pendency of an appeal from that decree preferred by the vendee, he parted with his property, held, that the transfer does not disentitle him to his rights and the vendee cannot ask the appellate Court to take away from the pre-emptor, the benefit of the decree. 126 P L R 1912 : 67 P R 1912 : 255 P W R 1912 : 13 Ind Cas 667 (DB).

——Ss. 4 and 5 — Scope of enquiry under—Right of pre-emption.

No right of pre-emption can be set up in cases of a grant of occupancy rights even to a stranger. The initial question to be determined in cases of pre-emption is whether or not the transaction is a sale, S. 5 precludes inquiry into custom in cases of agricultural land while S. 4 limits pre-emption to sales. 121 P L R 1911 : 37 P R 1911 : 104 P W R 1911 : 10 Ind Cas 4 (DB).

——S. 4—Right to acquire—Meaning.

The section deals with secondary right of pre-emption accruing after the actual sale.

The words "right to acquire" do not necessarily mean "acquire by substitution" but may also mean "right to acquire in preference" to the "vendee."

The words "sale" in S. 4 means an actual as well as a contemplated sale. 147 P L R 1909 : 90 P R 1909 : 159 P W R 1909 : 4 Ind Cas 179 (FB).

——S. 4—Agricultural land—Decree between mortgagee and mortgagor passed after operation of Land Alienation Act creating conditional sale — Position of mortgagee - Punjab Alienation of Land Act (XIII of 1900, Local), S. 10.

A right of pre-emption cannot be claimed in respect of a mortgage of agricultural land or a foreclosure of a right to redeem a mortgage of such land. A decree passed after the Punjab Land Alienation Act came into force provided that mortgagee should retain the land in suit and that if the mortgagor failed to redeem the mortgage within two years, on payment of the mortgage debt and costs, the mortgagee should, be deemed to become the absolute owner of the land.

The mortgagor failed to redeem the mortgage within the said period of two years. Thereupon the mortgagor's brother sued for pre-emption.

Held, (1) that having regard to the provisions of the Act the mortgagee was merely a mortgagee of the land and the condition by way of conditional sale in his favour was null and void, (2) that even if the mortgagee became absolute owner he became such owner by reason of the foreclosure of the mortgagor's right to redeem and that there was no right of pre-emption. 82 P R 1909 : 130 P W R 1909 : 143 P L R 1909 : 3 Ind Cas 600 (DB).

—S. 6.

——S. 6—Custom—Banga Town, Jullundur District —Nawan Bazaar.

The custom of pre-emption exists in Banga, a town in the Jullundur District. The Nawan bazaar, in the town of Banga, is not a sub-division of that town. 71 P R 1912 : 200 P W R 1912 : 211 P L R 1912 : 16 Ind Cas 466.

——S. 6— Custom of pre-emption—Mohalla Acharijian, Gumti Bazaar, Lahore City.

The custom of pre-emption does not obtain in Mohalla Acharjan which is part of the recognized

sub-division of Bazaar Gumti in Lahore City. 91 P R 1911 : 127 P L R 1911 : 217 P W R 1911 : 10 Ind Cas 330.

——S. 6 — Custom of pre-emption of houses — Mohalla Mimaran or Mohalla Pansarian in Kaithal Sub-division.

The custom of pre-emption of houses exists in Mohalla Mimaran identical with Mohalla Pansarian a sub-division of Kaithal. 78 P R 1911 : 138 P L R 1911 : 241 P W R 1911 : 10 Ind Cas 240.

——S. 6—Custom of pre-emption—Kaunja.

The Custom of pre-emption prevails in Kaunja Gujrat Dist. : 17 P R 1895, Not approved.

Instances in which a custom of pre-emption is either admitted or assumed are not valueless precedents. 96 P R 1910 : 192 P L R 1910 : 8 Ind Cas 356 (DB).

—S. 7 (2).

——S. 7 (2)—Pre-emption — Notification of Government declaring pre-emption right not to exist — Retrospective.

A notification of the Punjab Government, dated 6-12-1910 under S. 7 (2) of the Act, declaring that the right of pre-emption does not exist in certain local areas has retrospective effect and affects a pre-emption suit pending on the date of the publication of the Notification. 10 P R 1913 : 264 P W R 1912 : 5 P L R 1912 : 16 Ind Cas 959 (DB).

—S. 10.

——Ss. 10 and 19 — Money deposited in Court by pre-emptor—Attachment—Liability for deficiency.

A pre-emptor deposited money under S. 19 of the Punjab Pre-emption Act, but during the pendency of the suit, a portion of the amount was withdrawn under an attachment at the instance of a person who had a decree against the pre-emptor plaintiff.

Held, that under S. 10 of the Act, the money deposited by the plaintiff could not be attached, but as he had presumably benefited by the payment to the attaching-creditor, he was in equity bound to make good the deficiency. AIR (Vol 1) 1914 Lah 505: 27 P R 1915 : 27 P L R 1916 : 29 Ind Cas 354 (DB).

—S. 11.

——S. 11— Proviso — Pre-emption suit — Plaintiffs proprietors at time of sale and date of suit.

The plaintiffs were proved to have been proprietors in the village at the time of the sale and the date of the suit.

Held, that they were entitled to pre-empt. A I R (Vol 3) 1916 Lah 257 : 35 P W R 1916 : 32 Ind Cas 605.

——S. 11[1]— Member of same tribe — Darzi Mir and Darzi Mughal of Rawalpindi District.

Where in deciding whether persons belong to the same tribe the real facts are impossible to ascertain, names used are the only data left, and they should be dealt with in a liberal spirit.

Held, also that in the absence of proof to the contrary Darzi Mir and Darsi Mughal are sub-divisions of a tribe of Darzis. A I R (Vol 3) 1916 Lah 231 : 37 P R 1916 : 101 P W R 1916 : 33 Ind Cas 967.

——S. 11—Proviso—Meaning of 'recorded'.

Entry in the register of mutation by a patwari as owner and his report to that effect is no sufficient entry in the Record of Rights. AIR (Vol 3) 1916 Lah 58 : 9 P R 1916 : 68 P L R 1917 : 205 P W R 1915 : 32 Ind Cas 528 (DB).

——S. 11, Proviso—Scope of.

The proviso to S. 11 of Act (II of 1905) only enables a person who is recorded as owner of agricultural land for 20 years previous to the date of sale, to claim the right of pre-emption; so that the land should have been registered either in the name of pre-emptor or an agnate of his for a continuous period of 20 years preceding the sale without even a short break of the ownership in the middle failing which he will lose his right of pre-emption. A I R (Vol 2) 1915 Lah 160: 75 P R 1915: 157 P W R 1915: 31 Ind Cas 202 (DB).

——S. 11—Member of an agricultural tribe— Notification by Government—Tenant holding at will.

The expression "member of an agricultural tribe" means, according to the Government notification on the subject, a person (1) belonging to any one of the tribes notified as agricultural tribes for the district in which he claims that status and (2) either holding land or residing in that district. It is very doubtful whether a person who occupies land as a tenant-at-will, can be said to hold land within that notification. AIR (Vol 2) 1915 Lah 83 : 47 P W R 1915 : 125 P L R 1915 : 43 P R 1915 : 27 Ind Cas 29 (DB).

——S. 11— Proviso — Sale to subsequent vendee— Limitation — Mutation — Register — Residence in same village whether necessary.

Limitation for a pre-emption suit against the subsequent vendee is 6 years from the date of sale in his favour.

Under the proviso to S. 11 of the Act, residence in the same village is not a sine Qua Non for success in a pre-emption suit. A mutation register is a record within S. 11, proviso and a presumption under S. 114, Evidence Act will be drawn that proper entries must have been made in the Jamabandi in pursuance of the register, when the Jamabandi has been destroyed. AIR (Vol 1) 1914 Lah 520 : 17 P R 1915 : 28 Ind Cas 695 : 186 P L R 1915 (DB).

——S. 11 — 'Agnate' — Meaning of — Joint sale by two vendors.

The word 'agnate' in the proviso to section is not limited to a deceased agnate to whom the vendee has succeeded by inheritance.

When a vendee buys from two vendors each owning a half, he should, when attacked by pre-emptor, be permitted to retain the half sold to him by one of the vendors if he can show that though plaintiffs' rights are superior as to the other half, his rights are equal to the plaintiffs in the former. AIR (Vol 1) 1914 Lah 494 : 190 P L R 1915 : 6 P R 1915 : 28 Ind Cas 213 (DB).

——S. 11—Proviso—"Tribe"—Lohars and Tarkhans —Village—Harnauli, District Mianwali.

The word 'Tribe' in S. 11 proviso of the Act should be construed broadly and each case should be decreed on its merits. The Lohars and Tarkhans of the village Harnauli, District Mianwalli form one tribe, within the meaning of S. 11, proviso of the Act. AIR (Vol 1) 1914 Lah 402 : 49 P R 1914 : 252 P L R 1914 : 160 P W R 1914 : 25 Ind Cas 443 (DB).

——S. 11—Proviso—Scope of — Pre-emptor entitled to pre-empt only a portion—If bound to claim pre-emption of whole.

S. 11 proviso of the Act does not require that the pre-emptor should own and be recorded as owning the same land for 20 years. It is sufficient if he owns and is recorded as owning any land in the village during that period. A pre-emptor need not claim the whole of the property sold if his rights of pre-emption extend only over a portion thereof. 156 P W R 1913 : 275 P L R 1913 : 20 Ind Cas 185 (DB).

——Ss. 11, 12 and 14 — Pre-emption — Rival Pre-emptors—Different tribes.

The mere fact that a pre-emptor is a member of an agricultural tribe gives him no preferential right of pre-emption as against a person who comes within the proviso to S. 11 of the Act. Shamilat land separately allotted on partition to a proprietor becomes part of his Khewat holding and can be taken into consideration for determining the rights of the rival

pre-emptors. 35 P W R 1913 : 77 P L R 1913 : 19 Ind Cas 84 (DB).

——Ss. 11 and 12—Pre-emption:— Waiver by father when binding on son.

A pre-emptor claiming under S. 11, proviso of the Act is bound by the waiver of his father, but it is not so in cases governed by S. 12 of the Act. 2 P W R 1913 : 143 P L R 1913 : 24 P R 1913: 18 Ind Cas 596.

——Ss. 11 and 12 — Pre-emption — Joint purchase if divisible — Vendee and stranger.

For a sale to be divisible, the mere specification in the sale-deed of the shares of each vendee in the property sold is not sufficient, and a vendee who claims the sale as divisible must show as a matter of fact, his purchase was in fact a distinct and separate purchase.

A vendee who joins a stranger with him in the sale cannot claim any status higher than that of his co-vendee. Where one of two rival pre-emptors is a member of an agricultural tribe, while the other is qualified under proviso to S. 11 of the Punjab Pre-emption Act, both are eligible to complete under S. 12 of that Act. 12 P L R 1912 Suppl : 276 P W R 1912 : 16 Ind Cas 979 (DB).

——Ss. 11, 12, 12 (a) and 12 (c)—Right of vendee to assist — Pre-emptor's right barred by S. 11 — Right of only some owners to sue under S. 12 (c).

In a suit for pre-emption the vendee must show that he has himself a right to purchase the property which is equal to, or superior than the right of the person who claims to pre-empt it. A person, who is entirely debarred from any right of pre-emption by S. 11 of the Act cannot claim that under S. 12 he has, as a defendant a right of pre-emption which enables him to defeat the right of a person to whom the Act gives the right of claiming pre-emption. A vendee who is debarred under S. 11 from claiming pre-emption as a plaintiff is not entitled to resist a suit for pre-emption as defendant on the ground that as the next heir of the vendor he has a superior right to that of plaintiff under S. 12 (a) of the Act. S. 12 (c) does not require that either of all the owners should sue jointly, or only one of them should sue in respect of his individual and several right. Under it, even some out of many owners, can sue while the rest elect to stand aside without taking any action in the matter. 2 PLR 1912 Suppl : 179 P W R 1912 : 15 Ind Cas 102 (DB).

——S. 11—Proviso—'Agnate'—Meaning of.

A Sapinda is not synonymous with agnate and so the widow of a male agnate is not an agnate within the meaning of S. 11 of the Act. 61 P W R 1912 : 108 P L R 1912 : 53 P R 1912 : 13 Ind Cas 665 (DB).

——S. 11—Aroras and Khatris — Burden of proof.

Aroras are not sub-divisions of Khatris within the meaning of S. 11 of the Act. The burden of proof that they are so, lies on the pre-emptor. 87 P R 1910: 173 P L R 1910 : 8 Ind Cas 311 (DB).

——Ss. 11 and 12—Pre-emption — Rights.

Under the Punjab Pre-emption Act unless a vendee satisfies the provisions of proviso to S. 11 he cannot defeat the claims of a pre-emptor belonging to an agricultural tribe. 80 P W R 1909 : 60 P L R 1909 : 4 Ind Cas 481 (DB).

——S. 11—"Tribe"—Meaning.

The word "tribe" in S. 11 covers the whole group of Aroras in the village, who satisfy the conditions laid down in that section. 62 P R 1909 : 83 P W R 1909 : 63 P L R 1909 : 2 Ind Cas 938 (DB).

——Ss. 11 and 12 (c)— Hanjra Jats form an agricultural tribe.

A male or female owner with limited right of ownership is nevertheless an owner within the meaning and for the purposes of Ss. 11 and 12 (c) of the Act.

Quaere— Whether the successful pre-emptor becomes an owner of the pre-empted property from the date of the original sale by the vendor. 26 P W R 1909 : 1 Ind Cas 460 (DB).

—S. 12.

——S. 12—Shamilat.

A plaintiff has no right of pre-emption under S. 12, if he claims by virtue of his Shamilat which is a mere appendage of the proprietary land, since that only gives a right of pre-emption. AIR (Vol 2) 1915 Lah 359 : 173 P L R 1915 : 114 P W R 1915 : 31 Ind Cas 272.

——Ss. 12 and 16—Pre-emption land under building —Improvements—Compensation for Costs.

A person owning a plot of land under building is not a land-owner within S. 12, the Punjab Pre-emption Act, even if it is assessed to land revenue. S. 16 of the Act is not exhaustive and does not exclude equities. A vendee can get the market value of the lands purchased, but he cannot get his costs of the pre-emption suit, except in exceptional circumstances. In a case of foreclosure of a mortgage, compound interest may be allowed to the mortgagee where a suit for a pre-emption of that property has been brought. It is the duty of the vendee or mortgagee to support his claim for improvements by production of account. AIR (Vol 2) 1915 Lah 346 : 13 P L R 1916 : 71 P R 1915 : 109 P W R 1915 : 30 Ind Cas 517 (DB).

——S. 12—Owner of the Estate —Mere house-holder in Abadi

A mere house-holder in the Abadi of a village is not an owner of the estate within S. 12 of the Act. There is a distinction between "Owner of the estate" and "Owner in the estate." 252 P L R 1913 : 167 P W R 1913 : 106 P R 1913 : 20 Ind Cas 2 (DB).

——S. 12—Sale by father—Son, a Minor — Acquiescence, if can be presumed — Right of son.

Under S. 12 of the Punjab Pre-emption Act, a son has got an independent right of pre-emption and so the fact of his being a minor under the guardianship of his father cannot give rise to a presumption of his father cannot give rise to a presumption of his acquiescence in a sale by the father. 54 P W R 1912 : 89 P L R 1912 : 14 Ind Cas 352 (DB).

——S. 12 — Right of each collateral is independent— Guardian waiving right to pre-empt — Ward not bound.

As by S. 12 each of several agnates has an independent right to claim pre-emption, the right of one agnate cannot be extinguished by waiver on the part of a nearer agnate. So also the guardian's acquiescence in a sale and the consequent giving up of minor's right to pre-empt will not in the absence of proof that he was acting on behalf of his ward bind the ward though the guardian were the father of the ward. 7 P R 1912 : 239 P L R 1911: 155 P W R 1911: 11 Ind Cas 708 (DB).

——S. 12 (a)—Sale by husband to wife — Succession under custom — Widow and reversioners — Precedence.

A widow takes by succession to her husband in precedence of her husband's reversioners under S. 12 (a) of the Act and in the case of a sale of land by a person to his wife, the reversioners have no right of pre-emption against the vendee. 84 P L R 1913 : 33 P W R 1913 : 70 P R 1913 : 18 Ind Cas 384 (DB).

——S. 12 (a) — Widow's right to pre-emptor as heir —Customary law.

Where a widow has a right to succeed collaterally, she has a right to pre-empt under S. 12 (a) of the Act. Under S. 12 (a), the right of pre-empt, is not confined to agnates alone. Obiter :—Under the custo-

mary law as under the Hindu Law, a widow is an heir of her husband. 205 P L R 1912 : 212 P W R 1912 : 15 Ind Cas 734.

——Ss. 12 (a), 14 (b)—Equal relations.

Where two persons are equally related to the vendor, the fact of sharing in the holding in which the land is situate give the superior right to either. 87 P R 1911 : 245 P W R 1911 : 13 Ind Cas 802.

——Ss. 12 (a) and (b) and 14 (a) and (b) — Rival pre-emptors — One of several heirs becoming co-sharer by pre-empting one sale — Preferential right of such heir against other co-heirs in regard to the second sale.

A vendor sold some land on 17-7-1907. He also sold some other land to another vendee, on 17-8-07, S one of the vendor's heirs, sued to pre-empt the first sale on 16-6-08 and obtained a consent decree on the 23rd idem. On 25th idem, S sued to pre-empt the second sale. The other heirs of the vendor stood on equal footing with S sued on 2-7-08 to pre-empt both sales as heirs of the vendor.

Held, that S. 12 (b) applied rather than S. 12 (a) and again cl. (a) rather than clause (b) of S. 14, and that S having got a decree on the first sale, had become a co-sharer and as such he took precedence over the other co-heirs.

Held, further, on the analogy of 91 P R 1909, that a pre-emptor, like a vendee, can improve his position by the date on which he sues for pre-emption. 201 P L R 1910 : 8 Ind Cas 486 (DB).

——Ss. 12 (b) and 14—Pre-emptor and vendee equally related — Former also co-sharer in holding, if can pre-empt.

Where the pre-emptor and the vendee are equally related to the vendor, but the former is also a co-sharer in the holding, the pre-emptor is entitled to a preferential right. 53 P L R 1913 : 72 P W R 1913 : 60 P R 1913 : 18 Ind Cas 86.

——S. 12 (b) (3) and (c), (2) and (4) — Mother or widow—Right to exercise pre-emption — Succession —Mother's right.

A mother or widow not being 'heirs' under customary law cannot exercise a right of pre emption under sub-cl. (3) but can do so as co-sharers under sub-cl. (4) of S. 12 (b) of the Act. Nor has the mother of an occupancy tenant any right to succeed on his death to occupancy rights held by him; her claim to pre-empt can only fall under cl. (c) (2). AIR (Vol 1) 1914 Lah 414 : 46 P R 1914 : 103 P W R 1914 : 55 P L R 1914 : 23 Ind Cas 532 (DB).

——S. 12 (c) and (d)—Scope—Recognition of further divisions of sub-divisions.

The intention of the Legislature in enacting clauses (c) and (d) of S. 12 was not only to recognise the primary sub-divisions of a village, but also any future divisions of such sub-divisions as may well be marked or authenticated by Settlement Record and history of the village. AIR (Vol 1) 1914 Lah 335 : 60 P R 1914 : 128 P L R 1914 : 83 P W R 1914 : 23 Ind Cas 151 (DB).

——S. 12 (c) — Pre-emption — Patti — Proprietor, rights of.

A 'Patti' created purely for fiscal purposes and in no way showing homogeneity of area or descent of the proprietors is not a "sub-division" within S. 12 (c) and, therefore, a proprietor in such Patti has no right of pre-emption. A pre-emptor is given a very special and peculiar right which overrides the ordinary rights of contract, and if he asks the Court to give effect to that right, he must be careful to see that he complies with his honest pleas, with the decree which follows. AIR (Vol 1) 1914 Lah 255 : 21 P R 1915 : 31 P L R 1916 : 26 Ind Cas 433 (DB).

——S. 12 (c)—'Occupancy tenant.'

Section 12 of the Pre-emption Act refers to occupancy tenures as contemplated by the Tenancy Act and not to tenants entitled to hold possession on certain special terms not mentioned in the Tenancy Act. 112 P L R 1911 : 285 P W R 1911 : 9 Ind Cas 833 (DB).

——S. 12 (c)—Owner of the estate — Meaning of— Punjab Land Revenue Act (XVII of 1887), S. 3 (1) and (2).

A person who only owns a share in a well within the boundary of an estate but pays no portion of the revenue, is not an owner of the estate within S. 12 (c), sub-cl. 1 (3). The term "Owner of the estate" is not equal to "land-owner"; it is equivalent to Khewaidar and the Legislature has used the term in this sense. (1910) 7 Ind Cas 213 (DB) (Lah).

—S. 13.

——Ss. 13 (1) and 14 (e) — Stair case—Meaning of— Step leading to Thara — Entrance from the street — Rival claimants—Option of vendor.

A step leading to the Thara cannot be called a stair-case within S. 13 (1) nor an entrance from the street within the fifth clause of the section. The sale having taken place while the old Act was in force and the suit having been instituted and the decree of the trial Court having been passed before the present Act came into force, the suit is governed by Act II of 1905 and the pre-emptors were entitled to the benefit of the election made by the vendors in their favour under S. 14 (e) of the Act. AIR (Vol 7) 1920 Lah 278: 2 Lah L J 630 : 56 Ind Cas 17 (DB).

——S. 13 (1) — 'Shop'—Meaning.

The question whether the disputed property is "Shop" and as such exempt from right of pre-emption under S. 13 of the Act is to be decided with reference to the primary purpose for which it has been used. If it is only residential and not a building or apartment primarily used for buying and selling goods it is not a "Shop" although there was in it an oven for cooking rotis and there were cash dealings with regard to rotis prepared. AIR (Vol 2) 1915 Lah 143 : 69 P R 1915 : 156 P W R 1915 : 31 Ind Cas 191 (DB).

——S. 13 (1), (Seventhly)—Mosque — Muttawalli if can claim pre-emption.

The Muttawalli of a mosque can claim pre-emption on behalf of and for the benefit of the mosque. (C. A. No. 1525 of 1882, Overruled.) A I R (Vol 1) 1914 Lah 444 : 52 P W R 1914 : 147 P L R 1914 : 59 P R 1914 : 24 Ind Cas 100 (DB).

——S. 13, Cls. (1) and (5)—Rival pre-emptors.

A co-sharer in a part of the property sold has a superior right of pre-emption under S. 13 (1) to the vendee whose claim falls under S. 13 (5). 50 P W R 1913 : 119 P L R 1913 : 19 Ind Cas 784.

——S. 13 (1), (Fifthly) — Pre-emption — House in Town—Common entrance.

To bring a case within S. 13 (fifthly) of the Act, there must be an entrance from the street common to both the proprietors. It is not enough to prove that each house has an entrance from the street. A public street leading from the road to the two houses cannot be taken as a "Common entrance from the street." 29 P L R 1912 : 254 P W R 1912 : 14 Ind Cas 494.

——S. 13 (1), (Fifthly) and Punjab Municipal Act (XX of 1891), S. 3 (4)—"Street"—Meaning of.

The word "Street" in the Act is used much in the same sense as in the Municipal Act as including an alley whether thoroughfare or not over which the public have a right of way.

Where it is shown that four houses opened into a blind alley which gave access to the houses from the street, that there was no arch or door, that the alley was not the private property of any one of the owners and that there was nothing to show that no one

other than the owner of those houses had a free access to or a right of way over the blind alley.

Held, that the blind alley was not a common entrance from the street within the meaning of S. 13 (1) fifthly of the Act. 70 P W R 1912 : 44 P R 1912 : 95 P L R 1912 : 13 Ind Cas 427 (DB).

——S. 13 (1) (Seventhly)—Right in whom vests.

The right of pre-emption under S. 13 (1) seventhly, vests only in the owner of adjacent property and the person not yet the owner but only the next heir to the owner cannot pre-empt. 8 P L R 1912 : 254 P W R 1911 : 12 Ind Cas 623.

——Ss. 13 (1), (2) (a) — Owner of shop, if can claim pre-emption'— Execution of agreement to sell his own property by pre emptor, effect of.

The fact that shops are excluded from pre-emption by S. 13 (2) (a) does not disentitle the owner of a shop from claiming pre-emption by virtue of being its owner. "Immovable property" in S.13(1) seventhly of the Act includes a shop while a pre-emptor may lose his right of pre-emption if he parts with the property as owner of which he claims the right. A mere agreement to sell such property does not destroy his right. 80 P R 1911 : 177 P L R 1911 : 93 P W R 1911 : 10 Ind Cas 404.

——S. 13 (1), cl. (5)—Scope of—Equal rights.

Section 13 lays down the order which several classes of pre-emptors can claim the property sold. But if the vendee and pre-emptor fall within the same clause, their rights are equal. The latter however, cannot claim precedence over the former only because he falls within one or more of the lower clauses also. 82 P W R 1909 : 62 P L R 1909 : 4 Ind Cas 483.

——S. 13 (1), (7)—Adjacent—Meaning.

Though the word "adjacent" in S. 13 (1), (7) may mean adjoining, it does not mean adjoining in all cases. Contiguity means contiguity in space. When two houses which adjoin each other are sold jointly the right of the owner of a house which adjoin only one of those two houses does not extend to both the houses sold. When the right of pre-emption depends upon contiguity, the plaintiff can pre-empt so much as adjoins his own property but not one which is entirely out of from his own property by some other property coming in. A person cannot be said to own property adjacent to the property, when he acquires that property simultaneously with the property to be pre-empted. 90 P R 1909 : 159 P W R 1909 : 4 Ind Cas 179 (FB).

——S. 13 (2) — Pre-emption, if exists in respect of shop with residential quarters.

There is no right of pre-emption in respect of a shop having residential quarters attached thereto. AIR (Vol 1) 1914 Lah 424 : 58 P L R 1914 : 93 PWR 1914 : 22 Ind Cas 960 (DB).

——S. 13 (2)—Custom.

There is a custom of pre-emption in respect of houses in Mohalla Sathan in the City of Lahore. The character of the property at the date of sale determines whether S. 13 (2) applies to the property. If at the date of the sale, the property sold is a house, it is immaterial whether subsequently to that date the house was converted into and used as a Dharmasala. 22 P R 1911 : 185 P L R 1911 : 52 PWR 1911 : 10 Ind Cas 848 (DB).

——S. 13 (2) — Land sold for building a Church or School — Pre-emptor not bound to erect such building.

Section 13 (2) does not exempt from pre-emption land sold for constructing thereon a church or school. Therefore a suit for pre-emption lies upon a sale of a plot of land by Sikh Jat to an Indian Christian, purchased for constructing such a building. The pre-emptor in the absence of any stipulation for rescission of the sale is not bound to carry out the said purpose in order to succeed. 24 P R 1901, Not app. 33 P R 1910 : 180 P L R 1910 : 52 P W R 1910 : 6 Ind Cas 658 (DB).

——S. 13 (2), (7) — Pre-emption — Suit for — Pre-emptor entitled to pre-emption under several clauses of S. 13 — Different portions of property—Omission to sue for whole bargain subject to pre-emption.

Where a person entitled to pre-empt under several clauses of S. 13 sues for pre-emption of property falling only under one clause and omits to sue for other property falling under a different clause but included in the same sale, he contravenes the vital canon of pre-emption law which prescribes that he must acquire entire bargain as far as his right extends, and consequently he forfeits his right altogether. 10 P R 1909 : 13 P W R 1909 : 24 P L R 1909 : 1 Ind Cas 397 (DB).

—S. 14.

——S. 14—Rival pre-emptors—Equal right as regards one portion and superior right as regards other.

Where a pre-emptor has, as regards one portion, an equal right with a rival pre-emptor and a superior right as regards another, the former portion must be shared by both equally according to S. 14 of the Act. 46 P W R 1913 : 95 P L R 1913 : 75 P R 1913 : 18 Ind Cas 453 (DB).

——S. 14—Lis pendens—Doctrine when applicable.

The section may be used where during the continuance of a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption, the doctrine of lis pendens does not apply if the right of the subsequent vendee subsists at the date of sale and is not time barred for no new right is created by the sale. 74 P L R 1911 : 175 P W R 1911 : 10 Ind Cas 842.

——S. 14—Rival pre-emptors.

Section 14 of the Punjab Pre-emption Act applies only to cases in which several pre-emptors in respect of one particular sale, are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor. 53 P R 1911 : 164 P L R 1911 : 166 P W R 1911 : 10 Ind Cas 367 (DB).

——S. 14, cls. (c) and (e)—Properties in three patties sold—Proprietor of three patties — Preference of, to proprietor in one patti only.

When lands situate in three Patties are sold, if one of the rival pre-emptors is a proprietor in all the three Patties he cannot have a preferential right to one who has land only in one of the Patties, so far as the land situate in that Patti is concerned.

Held, that such a case fell within cl. (c) of S. 14 and the fact that the vendor in the pleadings preferred one of the rival pre-emptors did not bring the case within cl. (e) of the section. AIR (Vol 1) 1914 Lah 269 : 218 P L R 1914 : 136 P W R 1914 : 24 Ind Cas 913 (DB).

——S. 14 (e)—Rival pre-emptors.

Section 14(e) entitles the vendor to elect between the rival pre-emptors having equal rights and the Court is bound to give effect to the decision of the vendor. 28 P L R 1909 : 88 P R 1908 : 154 P W R 1908 : 4 Ind Cas 920 (DB).

—S. 16.

——S. 16—Notice through Naib-Tahsildar—Effect.

Where an owner of land sold his land to a non-agriculturist after issuing a notice to the agriculturists of whom the plaintiff was one, through the Naib-Tahsildar, of his intended sale fixing the price

at a sum far in excess of the market value and which the plaintiff considered prohibitory and unfair :

Held, that (1) the notice served was not given through a Court under S. 16 "as a Naib-Tahsildar" was an executive officer only", (2) that there is no waiver by plaintiff of his right of pre-emption as he all along proclaimed his intention of suing to pre-empt the land on what he considered to be "the right price". AIR (Vol 2) 1915 Lah 157: 74 P R 1915: 159 P W R 1915 : 31 Ind Cas 199 (DB).

——Ss. 16 and 17—'Right to acquire'—Meaning.

The sections deal with the right of pre-emption which inheres in persons before the actual sale, and therefore the words 'right to acquire' in S. 4 of the Act can mean the right to acquire in preference to persons, as soon as the vendor proposes to sell the property and gives notice to pre-emptor according to Ss. 16 and 17. 147 P L R 1909 : 90 P L R 1909 : 159 P W R 1909 : 4 Ind Cas 179 (FB).

—S. 17.

——Ss. 17 and 16—Notice to pre-emptor—Waiver of right.

Where a pre-emptor receives a notice issued under S. 16 of the Act, but takes no action thereon he must be deemed to have waived his right to pre-empt. A notice under S. 16 need not be signed by the presiding officer of the Court, nor need it give minute details of title. The law of pre-emption interferes with the right to transfer and purchase property. AIR (Vol 1) 1914 Lah 537 : 250 P L R 1913 : 179 P W R 1913 : 14 P R 1914 : 20 Ind Cas 564 (DB).

—S. 18.

——S. 18—Scope of—Pre-emptor, meaning of.

The section deals with cases of the right being violated by a sale being made to a person other than the persons aforesaid and gives rise to the secondary right. The word "pre-emptor" has two meanings corresponding to the primary and secondary rights of pre-emption. 147 P L R 1909 : 90 P R 1909 : 159 P W R 1909 : 4 Ind Cas 179 (FB).

—S. 19.

——S. 19 — Pre-emption decree — Plaintiff allowed costs — Form of decree — Power of Court to grant time for payment of costs.

A pre-emption decree should direct that the purchase money together with the costs decreed against the plaintiff should be paid into Court within the specified time, but when the decree omits to direct the costs to be paid with the purchase money, the Court has inherent power to allow the pre-emptor further time for payment of the costs. 226 P L R 1913 : 3 P R 1913 : 18 Ind Cas 994 (DB).

——S. 19 — Rival pre-emptors — Money raised by mortgaging land to vendees—Effect of.

Where there are rival pre-emptors and the superior pre-emptor sues to establish his right, it cannot be defeated simply because the money for prosecuting the suit and making the deposit was secured by mortgaging the land to the vendees.

Where a deposit has been made by a pre-emptor by order of Court, the Court cannot reject the plaint simply because the deposit has been subsequently withdrawn. The penal provision of the sub-s. (3) applies only when the deposit has not been made within the fixed time. 58 P R 1912 : 240 PWR 1912 : 13 Ind Cas 662 (DB).

——S. 19 — Power of Court to enlarge period originally fixed — "Within the time fixed by the Court," interpretation of.

A Court can enlarge by a subsequent order, the period originally fixed by it, under S. 19 (1) even where the period so fixed has expired before the making of the subsequent order. Clause 3 of S. 19 does not debar the Court from exercising this power. The words "within the time fixed by the Court" do not preclude the Court from extending the period originally fixed by it, and this too even after the expiry of the time originally fixed, and of its own motion or on plaintiff's oral application. But the Court should not extend the period save for good and sufficient reason; the extension of the period cannot suffice to bring a claim within limitation when it would, otherwise, be barred under any statute of limitation. 78 P R 1909 : 144 P L R 1909 : 129 P W R 1909 : 3 Ind Cas 605 (DB).

—S. 20.

——S. 20 — Duty of Court to decide the issues suo motu.

The Court is bound to investigate and decide the issue specified in S. 20 and cannot be guided by the admissions of the parties nor does their omission to adduce evidence on the point relieve the Court from the obligation created by the law. AIR (Vol 3) 1916 Lah 208 : 14 P R 1916 : 195 P W R 1915 : 33 Ind Cas 813 (DB).

—S. 21.

——S. 21—Punjab Alienation of Land Act, S. 24.

The effect of Punjab Government Notification No. 84 of 14th May 1902 under S. 24 of Act 1 of 1900 is to bar the operation of S. 21 of the Punjab Pre-emption Act, but the provisions of the Act relating to the exercise of the right of pre-emption over agricultural land are not affected. The mere fact that land has been sold for building purposes does not affect the right of a pre-emptor in respect of agricultural land, if the pre-emptor is otherwise entitled to the right. 61 P W R 1909 : 7 P L R 1909 : 4 Ind Cas 551 (DB).

——Ss. 21 (1) and (2), 26 and 29 — Sale subject to sanction of Deputy Commissioner — Limitation — Starting point.

The starting point of limitation in a suit to pre-empt a sale which requires the sanction of the Deputy Commissioner under the Alienation of Land Act, is the date of sanction given by the Deputy Commissioner. A suit brought within a year of that date is in time. 82 P R 1912 : 219 P L R 1912 : 219 P W R 1912 : 16 Ind Cas 775 (DB).

—S. 22.

——S. 22 — Consideration entered in sale-deed actually paid—Good faith—Market value.

A pre-emptor must pay to the vendee the amount paid by the latter in good faith to the vendor the price mentioned in the sale-deed irrespective of the market value. The question of the market value of the property cannot be gone into in such a suit. 198 P W R 1912 : 114 P R 1912 : 14 Ind Cas 558 (DB).

——S. 22 — Pre-emption price—Consideration—Old debts.

If in a pre-emption suit, the price fixed for the sale is wholly made up of old debts, the real consideration for the sale is the actual value of the debts and the amount payable by the pre-emptor is the market value, if the total debts exceed it. 54 P R 1911 : 250 P L R 1911 : 168 P W R 1911 : 12 Ind Cas 501 (DB).

——S. 22—Purchase money—Interest on money pre-paid by vendee to vendor.

A pre-emptor has to pay to the vendee only the sum actually representing the purchase money. Interest chargeable on amounts prepaid by the vendee to the vendor before the date of sale cannot be levied from him. The fact that the pre-emptor is not bound to pay the interest, which is a part of the consideration for the sale does not mean that the parties did not fix the price in good faith within the meaning of S. 22. 54 P L R 1910 : 6 P W R 1911 : 8 Ind Cas 233 (DB).

——S. 22—Good faith—Test.

The test of good faith is that the money which is alleged to have been paid, shall have been paid finally. Where consideration for sale is old debts, the Court should ascertain whether the value of debts amounts to its face value. Where the actual value of debts used as consideration for sale is not equal to face value, the market value of the property must be ascertained by the Court. 47 P R 1909 : 71 P W R 1909 : 123 P L R 1909 : 2 Ind Cas 83 (DB).

——S. 22 (2)—Proviso—Applicability of.

The proviso to S. 22 (2) of Act II of 1905 does not apply to a case in which the price does not consist mainly of a debt greatly exceeding in amount the market value of the property. A I R (Vol 2) 1915 Lah 486: 72 P L R 1915: 94 P W R 1915: 29 Ind Cas 150.

——S. 22 (2)—Pre-emption price.

If a Court finds that the price was duly paid, it must fix such price for the suit, irrespectively of sums subsequently paid by the vendee to other pre-emptors to forego their claims. A successful pre-emptor is not the legal representative of the vendee and so he cannot rely upon agreements between the latter and the former claimants for pre-emption in a suit for a share of the property. 259 P L R 1911 : 182 P W R 1911 : 12 Ind Cas 497.

——S. 22 (4)—Security bond filed after the date fixed —Extension of time.

A security bond was filed after the date fixed for filing it and was placed on the record. This does not by implication extend the time for filing the bond and in such a case the plaint should be rejected under S. 22 (4). A I R (Vol 3) 1916 Lah 440 : 67 P W R 1916 : 33 Ind Cas 487 (DB).

—S. 28.

——S. 28—Sale before Act—Suit when to be brought.

A suit is within time under S. 28 of the Act, if brought within one year after the passing of the said Act, where the sale had taken place before the commencement of the Act. 92 P L R 1909 : 124 P W R 1909 : 4 Ind Cas 973 (D B).

—S. 29.

——S. 29 — Delivery of possession — Attornment of tenants—Limitation.

In a suit for pre-emption where the sale sought to be pre-empted was an oral one and had taken place some six months prior to 26th July 1907 and possession was delivered to the vendors in June 1907 by getting the tenants to attorn to the vendees and by pointing out on the spot each and every field which had been sold, the vendees were held to have come into physical possession of the land sold in June 1907 within the meaning of S. 29. A I R (Vol 4) 1917 Lah 269 : 97 P R 1917 : 113 P L R 1917 : 93 P W R 1917: 40 Ind Cas 618 (DB).

——S. 29—Applicability of—Rival pre-emptors.

Section 29 of the Act does not apply to pre-emption suits by rival pre-emptors in respect of the same sale but applies only to a case of contest between the pre-emptor and the original vendee. 186 P W R 1912 : 80 P R 1912 : 14 Ind Cas 328.

PUNJAB PRE-EMPTION ACT (1 of 1913).

——(As amended by Act III of 1943) — Amendment, whether retrospective.

The amendment in the law introduced by the Punjab Act III of 1943 cannot have any retrospective effect and it cannot affect the right to pre-empt accrued to the pre-emptor on the day the sale took place in 1942. A I R (Vol 32) 1945 Pesh 13 : 1945 Pesh L J 13 : 220 Ind Cas 175 (DB).

——Construction of Act—Reference to Muhammadan Law.

Though, in dealing with the technicalities of the Punjab Pre-emption Act, the Courts are not bound to follow the technical provisions of the Muhammadan Law of Shaffa and have to depend upon the Pre-emption Act alone, a reference to provisions of Muhammadan Law may be helpful. A I R (Vol 28) 1941 Lah 433 : I L R (1942) Lah 155 : 43 P L R 581: 197 Ind Cas 227 (FB).

——Government Notification No. 1718-R dated 14th August 1936 applies to sales effected after the date of issue of the .Notification. A I R (Vol 26) 1939 Lah 517 : 41 P L R 261 : I L R (1940) Lah 88 (DB).

——Accrual of title — Date of payment into Court—"Owner"—Meaning.

There is nothing in the Punjab Pre-emption Act which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction of O. 20, R. 14, Code of Civil Procedure, that Courts shall declare the title of the pre-emptor to be deemed to accrue from the date of payment into Court of the purchase money after decree. Nor has the Act qualified the term "owner" so as to mean a person who is not in danger of losing his ownership right at the suit of a pre-emptor. A I R (Vol 10) 1923 Lah 529 : 73 Ind Cas 444.

——Right to pre-empt—Proof of existence.

If the right to pre-empt exists at the time of sale, it does not matter if it does not exist at the time of suit. A I R (Vol 10) 1923 Lah 458 : 73 Ind Cas 797.

——Unregistered sale-deed — Right to claim pre-emption.

Where the sale price is Rs. 100 and the sale-deed is unregistered, the fact does not render the transfer something other than a sale within the meaning of the Punjab Pre-emption Act. A I R (Vol 10) 1923 Lah 310 : 73 Ind Cas 758.

—S. 2.

——S. 2 (2)—Sale—Right of collaterals or co sharers.

Plaintiffs, as collaterals of the vendor, have no right of pre-emption against the landlord vendees, who have purchased occupancy rights from their tenant, the vendor, and that this is so even though the said rights come under S. 6 and S. 8, Punjab Tenancy Act and not under S. 5. Section 2 (2), Punjab Pre-emption Act, enacts that nothing in that Act should affect Ss. 53 & 54, Punjab Tenancy Act, while Ss 53 & 54 refer only to rights of occupancy under S. 5, Punjab Tenancy Act. In spite of that the same principle is applied to holdings under S. 6 which are of a more limited nature and a sale to the landlords by a tenant holding under S. 6 could not be pre-empted by a collateral or a co-sharer in the occupancy khata. (1928) 108 Ind Cas 598 (Lah).

——Ss. 2 (3), 22 (4) (a)—Retrospective operation.

Where a pre-emptor withdraws the amount deposited by him in Court in compliance with a previous order of the Court, before he appeals, S. 22 (4) (a) does not retrospectively operate. Read with S. 2, sub-s. (3), it does not cause a forfeiture of pre-emptor's right to have his appeal adjudicated on the merits, when he withdraws the money since the Act I of 1913 came into force. A I R (Vol 2) 1915 Lah 160 : 75 P R 1915 : 157 P W R 1915 : 31 Ind Cas 202 (DB).

—S. 3.

——S. 3—Village and town.

Adampur, District Jullundur, is a 'town' for purposes of the Act. AIR (Vol 13) 1926 Lah 383 : 95 Ind Cas 130: 7 Lah 171: 27 P L R 318 (DB).

——Ss. 3 and 4 — Sardrakhati rights — Agricultural lands — Village immoveable property—Pre-emption.

Sardrakhati right is neither agricultural land nor village immoveable property within S. 3 of the Act and is not liable to pre-emption. A I R (Vol 7) 1920 Lah 310: 1 Lah 567 : 2 Lah L J 684 : 58 Ind Cas 321 (DB).

——S. 3 (1)—Agricultural land—Building of a hut in a small portion and utilising of the rest for growing fruits, vegetables and fodder.

Where land originally agricultural land is after its purchase utilised for building a hut in a small portion of it and the rest for raising fruits, vegetables and fodder, the primary purpose to which the land is put cannot be said to be anything other than agriculture. The hut, in the circumstances, cannot be held to be a separate property or a residential house. A I R (Vol 35) 1948 Lah 107 (DB).

——S. 3 (1) and (2) — Water rights, if agricultural land or village immovable property.

A right to water can be land only if it is enjoyed by the owner or occupier of land as such that is to say as an owner or occupier of some land. Where the water rights have been sold independently of the land to which they originally belonged, the land having been taken away by the Government, the water rights cannot be said to be "land" within the meaning of S. 2 (3), Punjab Land Alienation Act, and their sale is not a sale of "agricultural land." Village immovable property is defined in S. 3 (2), Punjab Pre-emption Act. But "water rights" are immovable property, for, they are rights to water which is attached to the earth. Water rights are, consequently, village immovable property as defined in S. 3 (2). AIR (Vol 29) 1942 Pesh 18: 199 Ind Cas 329 (DB).

——S. 3 (1)—Land lying waste—No specific use—Not used for grazing purposes — No grass sold for profit— Held, land not agricultural. A I R (Vol 24) 1937 Lah 755: 40 P L R 500: 173 Ind Cas 953.

——S. 3 (1) — Land under a garden is agricultural land. AIR (Vol 24) 1937 Lah 182 : 39 P L R 121: 172 Ind Cas 398 (DB).

——S. 3 (1) —Agricultural land, what is — Gopalpur Tea Estate.

The tea gardens of Gopalpur Tea Estate are agricultural lands within the meaning of S. 3, Sub-s. (1) of the Pre-emption Act. AIR (Vol 11) 1924 P C 1 : 79 Ind Cas 946: 22 ALJ 40: 33 MLT 470 : 1924 M W N 172: 51 I A 11 : 5 L R PC 55 : 5 Lah 50 : 29 C W N 395 : 46 M L J 536.

——S. 3 (1) — Fallow land — Sale as building site — Nature of land.

It is not a necessary implication that land is not agricultural land, merely because at the time of sale, it bears no crop; agricultural land often lies fallow in the ordinary course of agriculture and in this country often remains unsown by reason of paucity or excess of moisture, but each case must be decided on its own facts.

Where the land had not been used for agricultural purposes for the 6 years preceding the sale and was subsequently proposed for sale as a building site, held, the land is not agricultural land. A I R (Vol 11) 1924 Lah 657: 78 Ind Cas 443 (DB).

——S. 3 (1)—Levy of—Assessment if conclusive.

The mere fact that a plot of land is assessed to land revenue would not make it agricultural land. It must be proved that the plot is occupied or let for agricultural purposes or purposes subservient to agriculture. (1921) 60 Ind Cas 580 (Lah).

——S. 3 (1)—Sale of Sardhakhti rights.

Sale of Sardhakhti rights of a lessee is not sale of agricultural land under the Act. A I R (Vol 7) 1920 Lah 310: 1 Lah 567 : 2 Lah L J 684 : 58 Ind Cas 321 (DB).

——S. 3 (2)—"Village immovable property"— Right of ghair dakhilkar naqdi quzar.

The status of a ghair dakhilkar naqdi quzar is almost identical with that of a mukarraridar. His right is a benefit arising out of land, and consequently is "village immovable property" within the meaning of S. 3 (2), Punjab Pre-emption Act. A I R (Vol 37) 1950 Lah 62 (DB).

——S. 3 (2) — Question whether property forms part of village or urban immovable property — Second appeal.

Although the question whether a property is village immovable property or urban immovable property within the definition in S. 3 is one of law, the determination of the question wholly depends on a finding of fact and the legal definition necessarily follows from this finding of fact. Consequently, no second appeal lies on the question. A I R (Vol 24) 1937 Lah 284: 174 Ind Cas 136.

——S. 3 (2) (1) — Property in village included in Municipal area.

Where certain property which formed part of a village was included in a Municipal area, the land in the vicinity was converted into building plots and quite close to the area factories came into existence and whatever was left of the old village came to be occupied by persons who did not belong to the original community that inhabited the village:

Held, the land was not a village within the meaning of the Punjab Pre-emption Act and that it was not village immovable property and no right of pre-emption could be claimed. [Principles applicable in deciding as to under what circumstances village loses its character as such if it is included in Municipal area explained.) AIR (Vol 24) 1937 Lah 182: 39 P L R 121: 172 Ind Cas 398 (DB).

——S. 3 (3) — Notification declaring certain area to be town under Act—Meaning of.

A notification issued by the Government that a certain area would be considered to be a town for the purposes of the Pre-emption Act does not mean that the custom of pre-emption obtains in such town. The person relying on such custom must establish such fact. A I R (Vol 25) 1938 Lah 64 : 39 P L R 881 : 175 Ind Cas 492.

——S. 3 (3)—Tests to determine if a place is town or village.

A very important test as to whether a place is a town or a village is the presence or absence of a substantial bazaar and the avocations of the majority of the inhabitants. Though there are many features which may be relied upon as distinguishing a town from a village, a group of residences of a compact agricultural community relying mainly upon agriculture for livelihood will ordinarily form a village, whilst a large group of houses inhabited largely by a hetrogeneous population dependent upon trade, rather than agriculture, and in which relationships are contractual rather than customary, will, if of sufficient size, form a town:

Held, that Thal is a town and there is no right of pre-emption in respect of sale of land in the town of Thal. A I R (Vol 22) 1935 Pesh 114: 157 Ind Cas 769.

——S. 3 (3) — Town or village — Padhana in Lahore Tahsil—Pre-emption.

A town may be defined as an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade while a village appears to mean the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. The question whether a place is a town or village for the purposes of the Act is a question of law. Padhana in the Tahsil and District of Lahore is a village. A I R (Vol 7) 1920 Lah 388: 55 Ind Cas 520 (DB).

——Ss 3 (3) and 5 (a)—Pre-emption—Thaunsa—Town or village.

The Thaunsa is a town for the purpose of the Act. It is doubtful if the question whether a place is town or village can be raised in second appeal. A I R (Vol 7) 1920 Lah 118: 28 P R 1919 : 54 Ind Cas 646 (D B).

——S. 3 (3) — Pre-emption — Thaunsa — Town or village—Census Register.

Thaunsa is a town for the purposes of the Punjab Pre-emption Act. In deciding whether a place is a town or a village the fact that it is described as a town in the Census report is of importance. A I R (Vol 7) 1920 Lah 113 : 28 P R 1919 (Note) : 54 Ind Cas 642.

——S. 3 (3) — Mahatpur in Jullundur District — If town.

Mahatpur in Tahsil Nakodhar of the Jullundur District is not a "town" for the purpose of the Act. A I R (Vol 5) 1918 Lah 322 : 65 P W R 1918 : 46 Ind Cas 173.

——S. 3 (5)—Sale in execution of order—Meaning of.

Section 3 (5) of the Punjab Pre-emption Act lays down that a sale shall not include, inter alia, a sale in execution of a decree for money or of an order of a civil, criminal or revenue Court or of a Revenue Officer. The words "in execution" here are not used in that narrow technical sense in which execution of a decree takes place under the provisions of the Civil P. C., but they are very wide and simply mean "in obedience to", "in compliance with", or "in accordance with." Therefore, no suit for pre-emption lies in respect of a sale held in compliance with an order of Court.

The words "for money" were inserted for the first time in the present Act and the intention of the Legislature was to limit the operation of S. 3 (5) to decrees for money and the fact that no such words were used to qualify the term "order" would go to show that no such limitation was intended as regards orders. AIR (Vol 36) 1949 E P 22: 50 P L R 126 (DB).

——S. 3 (5) — Exemption from pre-emption — Sale effected in consequence of decree for specific performance—Civil P. C., O. 21, Rr. 32 and 34.

The provisions of O. 21, Rr. 32 and 34 make it plain that a sale effected in consequence of a decree for specific performance is entirely different from a voluntary sale, for the purposes of pre-emption. It is in fact an act of the Court, as statutory substitute for the person who is in default, and as such acts must be deemed to be performed by order of the Court, the consequent sale is clearly precluded from the mischief of the Punjab Pre-emption Act by virtue of the provisions of S. 3 (5) of that Act. A I R (Vol 36) 1949 Lah 72: Pak L R (1948) Lah 94 (DB).

——S. 3 (5)—Applicability and scope—Sale through some agency.

In order to attract the application of S. 3 (5) (a) the agency through which the sale is effected is immaterial. (1945) 47 P L R 62.

——S. 3 (5)—Sale held under S. 60, Provincial Insolvency Act—If pre-emptible.

A sale by collector in pursuance of the provisions of S. 60, Provincial Insolvency Act, is not a sale in execution of a decree for money or of an order of a Civil, Criminal or Revenue Court. Section 3 (5) (a), Punjab Pre-emption Act is not therefore applicable to such a case and the sale is pre-emptible. (1945) 47 P L R 62.

——S. 3 (5) (a) — Sale of insolvent's property by Receiver, whether a sale in execution of order of Court —Provincial Insolvency Act, Ss. 59, 68.

The sale of the property of an insolvent by the Receiver is not a sale in execution of an order of the Court within the meaning of S. 3, sub-s. (5) (a) and consequently, is subject to the right of pre-emption. A I R (Vol 22) 1935 Lah 268 : 16 Lah 173 : 37 P L R 402: 155 Ind Cas 693 (FB).

——S. 3 (5) — Sale exempt from pre-emption—Court sale.

The object of the exemption in S. 3 (5) of the Act appears to be to exclude those sales which are not made voluntarily but by an order of the Court, as every person who chooses to buy the property has the opportunity of bidding for it in the latter case. Mortgaged property, as such, sold in execution of a decree is exempt from the right of pre-emption. AIR (Vol 15) 1928 Lah 504: 110 Ind Cas 397.

——S. 3 (5) — Sale liable to pre-emption — Sale by guardian of minor with sanction of Court.

A sale effected by guardian of a minor and approved of and sanctioned by Court under Guardians and Wards Act, S. 29, is not a sale in execution of a decree of Civil Court and not therefore exempt from pre-emption. AIR (Vol 11) 1924 Lah 48 : 4 Lah 164 : 5 L L J 406 : 73 Ind Cas 442 (DB).

——S. 3 (5)—Under the Act, a sale during the course of a suit and a sale in execution of a decree not for money, are liable to pre-emption. (1921) 3 U PL R (Lah) 37 : 61 Ind Cas 331.

——S. 3 (5) — Sale by guardian of minor with sanction of Court.

In a suit for pre-emption, it appeared that terms of the sale were settled between the parties privately but to complete a sale on behalf of a minor permission had to be obtained under S. 29 of the Guardians and Wards Act. It was therefore obtained by the guardian and the sale was completed by the guardian privately in favour of the vendee.

Held, that the sale was a private sale and a claim for pre-emption was not prohibited by S. 3, clause 5 (a). AIR (Vol 7) 1920 Lah 482: 2 L L J 261 : 67 Ind Cas 924.

—S. 4.

——S. 4—Pre-emption suit—Allegation that exchange is in fact sale—Duty of Court.

In a pre-emption suit, it is open to the plaintiff to establish that the transaction in suit which has the appearance of an exchange is in fact a sale. It is not only open to the Courts to enquire into the true nature of the transaction but it is also their duty to give effect to their finding on the point, in relation to the right of pre-emption. A I R (Vol 34) 1947 Lah 320.

——S. 4 — Sale or exchange — Transaction of mixed character—Right of pre-emption.

Where a transaction is of a mixed character, consisting of two parts, that of sale and exchange, and the property consideration is not negligible either absolutely or in relation to the cash consideration, and both parts are so connected together that it is not possible to separate them, the transaction cannot be regarded as a sale which is subject to the law of pre-emption.

It is settled law that the right of pre-emption may be defeated by all legitimate means. If parties enter into a transaction of a mixed character consciously with a view to avoid pre-emption, there is nothing in law to prevent them from doing so. AIR (Vol 34) 1947 Pesh 29 (DB).

——S. 4—Sale of property to one of collaterals—Whether other collateral can become pre-emptor.

Even under custom if a vendor sold his property to one of his collaterals who would succeed to part of his estate on his death, no other collateral with a similar right to inherit could succeed as a plaintiff in a pre-emption suit. AIR (Vol 32) 1945 Pesh 45 : 221 Ind Cas 625 (DB).

——S. 4—Land not used for agricultural purposes for over 20 years—Land, held not agricultural. A I R (Vol 26) 1939 Lah 554 : 185 Ind Cas 422.

——S. 4 — Litigant agreeing to transfer portion of land in case of success to others in consideration of services and expenses rendered by them in conducting litigation :

Held, that the transfer in pursuance of agreement is sale and subject to pre-emption suit. AIR (Vol 26) 1939 Lah 343 : 41 P L R 409 : ILR (1939) Lah 500 : 184 Ind Cas 805.

——S. 4—Where the pre-emptor has a superior right and the vendee improves his status during the pendency of the suit, i.e., before the adjudication of pre-emptor's claim, the pre-emptor's suit must fail. I L R (1938) Lah 93 : 40 P L R 1035.

——S. 4—Scope of.

The policy of the Act is to keep out strangers and thus maintain the exclusiveness of the estate. If a vendee, therefore, having an equal right of pre-emption associates with himself in a joint purchase, a stranger or a person having no right to the first refusal under the Act, he loses his right of resistance and cannot be allowed to retain even his own share of the purchase. A I R (Vol 22) 1935 Lah 529 : 37 P L R 873 : 16 Lah 921 : 160 Ind Cas 826.

——S. 4 — Pre-emptor must have preferential right when the decree is passed. A I R (Vol 22) 1935 Lah 529 : 16 Lah 921 : 37 P L R 873 : 160 Ind Cas 826.

——S. 4 — What is sale — Alienation of land on nazarana, nominal rent and full powers of transfer.

Where the alienee paid the alienors by way of nazarana or premium a sum in excess of what alienors had paid a few months before for acquiring the land and the rent reserved was purely nominal, namely, one anna per annum for a rupee of the land revenue assessed on the land, and the alienees were given power to sell, mortgage or gift the property without any veto by the so-called landlord :

Held, that the transaction though ostensibly a lease was really a sale. AIR (Vol 16) 1929 Lah 583 : 119 Ind Cas 734 (DB).

——S. 4—The expression "village" connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. When they are occupied by persons who are engaged mainly in commercial pursuits rural areas in the vicinity of a town grow into a suburb of the town. Such areas are governed by rules applying to urban properties. AIR (Vol 11) 1924 Lah 662 : 78 Ind Cas 991 (DB).

——S. 4—Question of fact.

The question whether a certain place is a town for the purposes of the Punjab Pre-emption Act is a question of fact and cannot be raised in second appeal. It is to be decided upon the evidence and the particular circumstances of each case. It is not necessary that a custom prevailing in the town should apply to the mohallas or suburbs. AIR (Vol 10) 1923 Lah 443 : 75 Ind Cas 610.

——S. 4—Adhalpi tenure—If sale.

The creation of an Adhalpi tenure in which no money consideration passed at all does not amount to a sale. A I R (Vol 10) 1923 Lah 70 : 68 Ind Cas 1008.

——S. 4—Intikalnama—Sale of decree.

A decree-holder for possession of land conditional on his paying Rs. 300 sold the decree to the defendant together with all right, title and interest in the land, the subject-matter of the decree. The deed of sale was described as intikalnama.

Held, that what was sold was not land or immoveable property but a right to obtain the property by complying with the decree. The sale did not therefore give rise to a right of pre-emption. A I R (Vol 4) 1917 Lah 256: 42 P R 1917 : 51 P W R 1917 : 38 Ind Cas 658.

—S. 5.

——S. 5 (a)—'Katra'—Term is not restricted to trade Katras but includes residential Katras also.

The statute of pre-emption restricts the freedom of contract and in the absence of a clear definition of the term 'Katra' in the Act, the term cannot be given a restricted or special meaning. The application of S. 5 cannot be restricted to trade Katras only and residential Katras in a city built in Katra form structurally cannot be held to fall outside the section. The term is to be given the ordinary dictionary meaning and that meaning is of an enclosure. In other words where within an enclosure a number of trade or residential buildings are constructed with one entrance and the quarter is styled as a Katra it falls within the exemption provided in S. 5 of the Act. A I R (Vol 33) 1946 Lah 432 : 48 Pun L R 156 : 223 Ind Cas 474.

——S. 5 (a) — Building — Transfer of property to superior pre-emptor to defeat pre-emptor's right — Lis pendens, whether applies, if such transfer is within limitation.

The question whether a building is a dwelling house or shop is a question of fact to be decided upon the peculiar circumstances of every case.

The building was situated in a lane which opened into a bazar. No such business was being carried on in these premises as would convert it into a shop. Its upper storey was used for residential purposes and it had always been described as a dwelling house. It was so described even in the sale-deed executed by the vendor himself :

Held, that the building was not a shop but a house subject to the right of pre-emption.

Obiter. — A vendee can defeat a pre-emptor by parting with the property in favour of a superior pre-emptor even during the pendency of the pre-emption suit, but in order to avoid the applicability of the doctrine of lis pendens, such transfer must take place within the period of limitation, otherwise the transfer will be bad in law and not sufficient to defeat the claim of the pre-emptor. A I R (Vol 22) 1935 Lah 808 : 37 PLR 630 : 160 Ind Cas 349.

——S. 5 (a)—Shop—House in which carpenter works —If shop.

A shop is primarily a place where goods are bought and sold and does not include "business premises" in the general sense of the word. The fact that a carpenter works in the place where he resides does not turn the building into business premises or into a shop. AIR (Vol 14) 1927 Lah 328 : 100 Ind Cas 910.

——S. 5 (a)—Determination of —Principles.

In deciding whether a particular building is to be considered as a house or as a shop for the purposes of pre-emption the primary use to which the building is put at the time of the sale, has mainly to be considered. The length of its use is no doubt an important factor to be considered, but that is not the only consideration. That question mainly enters into consideration for the purpose of determining whether the character of the property has bona fide and definitely been established. The requisite duration of user must accordingly depend on the facts of each case and other circumstances that may be proved. The nature of the locality in which the building is situated is another factor to be considered along with other circumstances. If the building is used for more than one purpose, then the primary or more important of such purposes is to be considered. Structural appearance of the building must also be taken into consideration.

Where a building was situated in an area which was essentially a business one, and for at least 10 or 12 years it had been occupied by the tenants who carried on the actual sale of goods in quantities not less than a bag to their customers, and before that also the premises had been used for purposes of business, and the upper storey of the building was not separately rented for residential purposes, but had

been occupied by customers, dependants and occasionally by the members of the firm who carried on business in the lower flat, and the building had a frontage on the bazar, and there were a number of other premises similarly situated in that bazar where similar business was carried on :

Held, that all the above facts led to an irresistible conclusion that the building is essentially a shop and not a house. 95 Ind Cas 675 : 6 Lah 359 : 26 P L R 535 : AIR (Vol 12) 1925 Lah 544 (DB).

——S. 5 (a)—Right of pre-emption.

A pre-emptor can only pre-empt a house and not a shop though both form the subject of one sale. 82 Ind Cas 596 : 6 L L J 345 : A I R (Vol 12) 1925 Lah 126 (DB).

——S. 5 (a) — Building used for storage of goods — No shop.

Shop denotes a building or an apartment which is primarily used for buying and selling goods and therefore a building used for storage of goods is not a shop. 72 Ind Cas 591 : AIR (Vol 11) 1924 Lah 213.

——S. 5 (a)—Determination of—Purpose or use.

The question whether a building is a shop or a residential house must be decided with reference to the chief or most important purpose to which the building is devoted. Where the two principal rooms of the house had been made into shops and the primary value of the building lay in those shops and the rest of the house was neglected and was of comparatively insignificant value, and the shops opened into a regular bazar full of other shops, and they had been occupied continuously as shops for many years :

Held, the building thus became a block of shops. The mere fact that the owner or owners continued to live in the uncared for upper storey which could not be put to commercial purposes does not take away from the building such a character, and although the upper storey may not be occupied by the lessees of the shops, it is none the less a mere appendage to the shops in its present condition. 71 Ind Cas 746 : 3 Lah 433 : 5 L L J 193 : A I R (Vol 10) 1923 Lah 262 (DB).

——S. 5 (a)—Pre-emption —Building—Shop house.

In a suit for possession by pre-emption of a house it appeared that the plaintiff when mortgagee of this property described it as consisting inter alia of shops. The buildings in dispute were suited for use as shops as well as for use of residential buildings. Held, that in the presence of two lease deeds which show that the buildings were leased as residences and in the absence of any clear evidence that they were ever actually used as shops, the inference drawn from the facts by the learned District Judge was correct. 2 Lah L J 302 : AIR (Vol 7) 1920 Lah 483 (DB).

——S. 5 (a) — Purpose for which building is used guides the determination of its nature for pre-emption purposes.

The main purpose for which a building is used guides the determination of the question of its being a shop or residence, for pre-emption purposes. Thus a building, the lower storey of which was used for more than 50 years for shops, the upper storey being a Balia Khana, was held to be a shop of an indivisible nature. 30 P W R 1917 : 37 Ind Cas 843 : A I R (Vol 4) 1917 Lah 413 (DB).

——S. 5 (a) — Shop building site — Part used as shop and part as residential quarter.

The building in suit was situated in a lane not a bazaar and was originally purely residential. There had been some subsequent alteration in the structure and three rooms abutting on the lane were used as shops. The upper storey had been used as residential quarters by different persons including the owner :

Held, that at the time of the sale the building was not used for commercial purposes, it was not a shop and the plaintiff was entitled to pre-empt. 47 P L R 1915 : 239 P W R 1915 : 27 Ind Cas 799 : AIR (Vol 7) 1915 Lah 442.

——S. 5 (b) — Dharmasala, what is.

Where Sadhus were allowed to live in a house with owner's special permission and no dedication of the house was ever made though once contemplated and the house had been the subject of sales on several occasions:

Held, it was not a Dharmasala within S. 5 (b). 83 Ind Cas 180 : 5 Lah 109 : A I R (Vol 11) 1924 Lah 495 (DB).

—S. 6.

——S. 6 — Mahazi malikana land — Right of pre-emption.

Right of pre-emption extends also to "mahazi malikana" land which is waste land adjoining cultivated land and appropriated under rules by the owner of the cultivated land. 11 Lah 287 : 12 L L J 119 : 31 P L R 592 : AIR (Vol 17) 1930 Lah 740 (DB).

——S. 6—Sale of house on abadi site — Right to pre-emption.

Even where the site of a house in village abadi belongs to the proprietary body the sale of the house is one of immovable property and is pre-emptible. In such a case no question of consent by proprietors arises. 100 Ind Cas 901 : AIR (Vol 14) 1927 Lah 283.

——S. 6 — Effect — Notification under old law — If affected by new S. 6.

Section 7 of the former Act is not cancelled by Section 6 of the latter as is clear from Punjab General Clauses Act (I of 1898), S. 22. Therefore a notification made under Section 7 of the former Act, excluding an area from the scope of the Act, is still in force and not automatically cancelled by Section 6 of the latter Act. 68 Ind Cas 729 : AIR (Vol 9) 1922 Lah 474 (DB).

——S. 6 — Sale of house apart from site — Right to pre-emption.

A standing building in a village was held to be village immovable property and liable to pre-emption even apart from the site; but the pre-emptor would hold just on the same terms as the vendor did. 88 Ind Cas 193 : 2 L L J 345 : AIR (Vol 7) 1920 Lah 486.

—S. 7.

——S. 7 — Custom of pre-emption — Existence in particular sub-division — Proof of existence in adjacent sub-division — If enough — Judicial instances —Value of.

The right of pre-emption is of a piratical nature and the Courts accordingly require that the existence of the right should be proved by clear and cogent evidence. When a question arises whether the custom of pre-emption prevails in a particular sub-division of the town, it is not enough to establish that it prevails in neighbouring or even adjacent sub-divisions but it must be proved affirmatively that it exists in the particular sub-division in which the property is situate.

Judicial instances provide the best method of establishing the existence or non-existence of the custom in a particular locality. Decisions in contested cases which have been arrived at after examination of the evidence bearing on the point are obviously much more trustworthy and reliable than decisions which are based on compromise. 52 P L R 282 : AIR (Vol 38) 1951 Punj 392.

——S. 7— Custom of pre-emption — Proof required.

Section 7 of the Punjab Pre-emption Act requires that a custom of pre-emption in respect of urban immovable property must be proved to exist in regard to either the whole of the town in question or at least in regard to a sub-division of the town. A mere street or lane or mohalla cannot be regarded as, by itself, a sub-division of the town of which it forms part, unless it be that such mohalla or street is in fact one of the main parts into which the town is divided.

Suits decided on the basis of compromise do not afford proper proof of the assertion and acknowledgment of a custom of pre-emption. Instances from neighbouring mohallas or sub-divisions are of little or no value for the purposes of S. 7. Such instances are at best supplementary proof and cannot by themselves be regarded as sufficient to establish the existence of the custom in the sub-division in question. 49 P L R 36 : 230 Ind Cas 446 : AIR (Vol 34) 1947 Lah 265.

——S. 7—Custom of pre-emption—Nature of enquiry.

In a suit to pre-empt the sale of a house situated in a town, the points for determination are : — (1) whether the town has sub-divisions within the meaning of the Act, (2) whether, if the house in suit is situate within such a division, the custom of pre-emption is shown to prevail within it in respect of house property (3) whether, if the town has no recognised sub-divisions, the custom of pre-emption prevails generally in the town in respect of residential houses. 49 P L R 36 : 230 Ind Cas 446 : AIR (Vol 34) 1947 Lah 265.

——S. 7—Town founded by Moghuls — Presumption is in favour of existence of custom of pre-emption.

Principles of the Law of Pre-emption were introduced in this country by the Mahomedan Conquerors as the law of pre-emption is essentially a part of Mahommedan jurisprudence and a custom of pre-emption must be presumed to exist in a town founded by the Moghuls.

The City of Delhi is mainly a Mahomedan city of Mahomedan origin and this fact by itself affords a presumption that the custom of pre-emption exists there. AIR (Vol 33) 1946 Lah 432 : 48 Pun L R 156 : 223 Ind Cas 474.

——S. 7—Sub-divisions—Existence in city—Burden of proof.

There is no presumption that a city has for purposes of pre-emption recognised sub-divisions. It is a matter of proof in each case and it is for the person alleging the existence of sub-divisions to prove that they do exist. A I R (Vol 33) 1946 Lah 432 : 223 Ind Cas 476 : 48 P L R 156 (DB).

——S. 7 — Sub-division — Meaning of, explained — Mohalla is not synonymous with sub-division.

The word 'sub-division' has not been defined in the Act. It is, however, well settled that it is not in all cases synonymous with a Mohalla. The term implies a quarter of a town well-known and recognised, and does not mean the streets and lanes of the town. A city may have Mohallas and Bazars and lanes with specific names but from this it does not follow that they are recognised sub-divisions for purposes of pre-emption law. A I R (Vol 33) 1946 Lah 432 : 48 Pun L R 156 : 223 Ind Cas 474.

——S. 7—Sub-division—Test of.

The test of a place being a sub-division is that there should be something in its structure, situation and character which makes it a recognised unit for pre-emption law. Because the name of a quarter is well-known that fact does not necessarily make it a sub-division for the purposes of the Act. AIR (Vol 33) 1946 Lah 432 : 48 Pun L R 156 : 223 Ind Cas 474.

——S. 7—Custom of pre-emption—Proof required.

A person claiming pre-emption under S. 7 of the Pre-emption Act must show that the custom of pre-emption existed in "such town or sub-division" at the time of the commencement of the Act. These words clearly imply a condition that the town must have existed at the time of the commencement of the Act. If, therefore, the place was a village and not a town, no right of pre-emption can be claimed. The fact that a right to pre-emption was either claimed or enforced after 1913 would not show that the custom of pre-emption existed in 1913. AIR (Vol 33) 1946 Pesh 5 : 224 Ind Cas 461 (DB).

——S. 7—Village or town.

The expression "village" connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. When they are occupied by the persons who are engaged mainly in commercial pursuits, rural areas in the vicinity of a town grow into a suburb of the town. Such areas are governed by rules applying to urban properties. AIR (Vol 14) 1927 Lah 799 : 99 Ind Cas 1008.

——S. 7—Burden of proof—Existence of custom.

What the plaintiff has to prove is that the custom of pre-emption was in existence in the town in 1913. AIR (Vol 8) 1921 Lah 279 : 4 L L J 371 (DB).

——S. 7—Naraingarh in Ambala District.

Naraingarh in the Ambala District is rather a petty town than a village within S. 7. AIR (Vol 8) 1921 Lah 121 : 62 Ind Cas 808.

——S. 7—Town sub-divided — Proof of custom as to pre-emption.

Where a town is sub-divided, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub division in which the property is situate, and the onus is not discharged by proof of the custom in neighbouring sub-divisions. The custom of pre-emption does not exist in Mohalla Mahian of Ludhiana City. The question as to whether a particular Mohalla is a separate sub-division of a town is a question of fact. (1921) 63 Ind Cas 766 (DB) (Lah).

——S. 7 (2) — Notification declaring that no pre-emption right exists in local area to which Government Tenants Act, 1893 has been made applicable—Whether ceases to be operative on repeal of Act of 1893.

There is nothing to indicate that the power conferred by S. 7 (2) of the Punjab Pre-emption Act, 1905, was intended to have but a transitory effect when exercised. Notification No. 771 issued in accordance with that section on 6th December 1910, directing that no right of pre-emption should exist in any local area to which the Government Tenants Act, 1893, has been made applicable, did not cease to be effective when the Act of 1893 ceased to be law on its repeal by the Punjab Colonization of Government Lands Act, 1912. A I R (Vol 35) 1948 P C 45 : 50 P L R 1.

—S. 8.

——S. 8—Auction sale—Notification in respect of — Officer holding power reserving right not to accept highest bid — Highest bid accepted after auction — Sale if one otherwise than by auction.

An auction sale does not become any the less an auction sale otherwise than by auction, merely because the officer holding the sale reserves a right not to accept the highest bid, when in fact the highest bid is accepted by the officer holding the sale. A I R (Vol 35) 1948 E P 14 (DB).

——S. 8 — Scope — Notification with retrospective effect in respect of sale already held—Validity.

An auction sale does not become any the less is to say, in respect of sale that had already taken place, is not illegal or ultra vires as being outside the scope of S. 8 of the Punjab Pre-emption Act. The section clearly contemplates the promulgation of a notification in respect of sales that have already been completed. The Local Government is given power under the section to make a declaration by Notification in respect of any sale, i.e., in respect of any class of sales or in respect of a particular sale. It cannot, therefore, be contended that the Local Government has no power to issue a notification in respect of a past sale so as to take away a right of pre-emption that had already accrued. AIR (Vol 35) 1948 E P 14 (DB).

——S. 8 — Notification No. 1718 R. of August 14, 1936 under S. 8 (20), if retrospective.

Per Skemp J., in Order of Reference.—Notification of the Governor of the Punjab in Council in exercise of the powers conferred by sub-s. (2) of S. 8, Punjab Pre-emption Act that no right of pre-emption shall exist with respect to any land or property that may be sold by public auction under the orders of the Court of Wards refers clearly to future sales and does not affect the suit by a pre-emptor to enforce his right in respect of sale held before. AIR (Vol 26) 1939 Lah 517 : 42 P L R 696 and 41 P L R 261 : ILR (1940) Lah 88 and 90 : 186 Ind Cas 450.

——S. 8—Applicability to cantonments.

Section 8 can only apply to a cantonment and not to an area which, in fact, is not a cantonment but for certain purposes, subjected only to restrictions which applied in the neighbouring cantonment. The fact that the rules and bye-laws framed under the Act as also many of the provisions of the Act can be extended to an area beyond a cantonment will not convert that area into a cantonment. AIR (Vol 26) 1939 Lah. 59 : 41 P L R 369 : ILR (1939) Lah 159 : 182 Ind Cas 563.

——S. 8—Punjab Government Notification No. 15926 of May 11, 1920—Exempting land within municipal limits of Lahore, application of.

The notification of the Punjab Government No. 15926 dated May 11, 1920 exempting the limits of the Lahore Municipality from the operation of the Pre-emption Act is wide enough to cover the areas which may be included within the limits of the Lahore Municipality after the date of the above notification. AIR (Vol 23) 1936 Lah 145 : 17 Lah 426 : 38 P L R 876 : 161 Ind Cas 660.

——S. 8 — Notification under — Effect on existing rights.

A notification issued by the Punjab Government under S. 8 (2) of Act I of 1913 cannot be held to deprive a person of a right which he possessed at the date of the sale and at the date of the institution of the suit, and cannot, therefore, have any effect on pending suits.

A notification cannot have a greater effect than a Repealing Act for the purpose of causing the dismissal of all pending suits to enforce pre-existing right of pre-emption. 10 P R 1913, Diss. from. A I R (Vol 9) 1922 Lah 344 : 67 Ind Cas 625 : 3 Lah 267 (DB).

—S. 9.

——S. 9—(as applied to N.-W. F. P.), Ss. 9 and 24 — Sale by member of notified agricultural tribe in favour of non-agriculturist — Sanction of Deputy Commissioner obtained even before sale was negotiated — Effect of — Suit for pre-emption — If maintainable—Punjab Alienation of Land Act, S. 3 (2).

In order to validate a sale by a member of a notified agricultural tribe in favour of a non-agriculturist, the latter has to obtain the sanction of the Deputy Commissioner under S. 3 (2) of the Punjab Alienation of Land Act, read with para. 19 (vii) of Revenue Circular No. 39. A sanction obtained from the Deputy Commissioner long before the sale in question was effected or even negotiated cannot relate to the sale in question so as to bring S. 9 of the Pre-emption Act into play and save the sale from being pre-empted. But as the sale in question has not been sanctioned under S. 3 (2) of the Alienation of Land Act, the sale is in contravention of that Act, and S. 24 of the Pre-emption Act makes it obligatory on Courts in such circumstances, to dismiss the suit for pre-emption. AIR (Vol 34) 1947 Pesh 25 (DB).

——Ss. 9, 21 (2), 24—Punjab Alienation of Land Act (XIII of 1900), Ss. 3 (2), 5, 21 (2) — No right of pre-emption when sale sanctioned by Deputy Commissioner.

Whether a sale is sanctioned by the Deputy Commissioner under S. 3 (2) of Punjab Alienation of Land Act, no right of pre-emption exists in respect of such a sale as S. 9 of the Act of (1913) repeals S. 5 of Punjab Alienation of Land Act (1900). A I R (Vol 4) 1917 Lah 361 : 124 P R 1916 : 37 Ind Cas 763 (DB).

—S. 11.

——S. 11—Attachment of deposit.

In execution of their money decree, the decree-holders applied for attachment of a house purchased by the judgment-debtor. Before the attachment, however, a suit for pre-emption of sale was instituted by the pre-emptor. The suit was decreed and a certain sum was deposited by the pre-emptor in the Court. The judgment-debtor did not draw this sum :

Held, that under S. 11, the money could not be attached by the decree-holders. A I R (Vol 23) 1936 Lah 698 : 38 P L R 906 : 165 Ind Cas 658.

—S. 12.

——S. 12—Waiver.

Mere presence of the pre-emptor at the time of the sale-deed does not debar him from bringing the pre-emption suit. The fact that he was a minor then makes the case of the vendee weaker in this respect. A I R (Vol 30) 1943 Pesh 76 : 209 Ind Cas 113.

——S. 12—Burden of proving custom.

Where the onus lies on the plaintiff to prove that the custom of pre-emption prevails in a certain town at the time of the commencement of the Punjab Pre-emption Act, and this onus he fails to discharge even though the custom has been found to exist in other sub-divisions of the town, that fact, though relevant to the issue, does not discharge the onus. A I R (Vol 17) 1930 Lah 528 (DB).

——S. 12 — Sale, what is — Transfer for cash consideration.

A transaction cannot be considered to be a sale for purposes of Pre-emption Act unless consideration consists mainly if not wholly of cash. Where the real consideration for a transaction is services rendered, the transaction cannot be considered a sale. A I R (Vol 17) 1930 Lah 141:31 P L R 338:120 Ind Cas 683.

——S. 12—Transfer of occupancy rights — If sale — Question of law.

Whether a transfer of occupancy right is a sale within the meaning of the term as used in the Punjab Pre-emption Act is a question of law. A I R (Vol 17) 1930 Lah 141:31 P L R 338:120 Ind Cas 683.

—S. 13.

——S. 13—Suit by one co-sharer—Maintainability.

One co-sharer in a house is entitled to maintain a suit for pre-emption on the ground of vicinage although the other co-sharers do not join in the suit. A I R (Vol 8) 1921 Lah 363 : 19 P L R 1921 : 59 Ind Cas 243.

—S. 14.

——S. 14 — Decision of question whether vendor belongs to same agricultural group as vende — Jurisdiction of civil Court — Punjab Alienation of Land Act, Ss. 4 and 21.

There is nothing in the Punjab Pre-emption Act which either expressly or impliedly limits the jurisdiction of the civil Court, and it is competent to the civil Court to decide all points necessary for the determination of the suit, including the point under S. 14 as to whether the vendor belongs to the same agricultural group as the vendee. The jurisdiction of the civil Court to decide questions under S. 14, Punjab Pre-emption Act is not ousted by the provisions of the Land Alienation Act. AIR (Vol 37) 1950 E P 246 : 52 P L R 220.

——Ss. 14, 15 — Vendor and pre-emptor Awans — Pre-emptor residing in Peshawar and holding land

there — His right to bring pre-emption suit under S. 14.

The present district of Mardan should be considered a part of the old Peshawar District for the purposes of the Punjab Alienation of Land Act, and the whole should be considered as one unit. The old notification under the Punjab Alienation of Land Act, therefore obtains for the whole of it, and where the plaintiff is a resident of Peshawar and holds land there, he shall be deemed to be resident of the district comprising the present Peshawar District and the present Mardan District, and where he is also a member of the Awan tribe, which is an agricultural tribe in that district and to which the vendors belong too, there is no bar to his bringing the pre-emption suit under S. 14, Punjab Pre-emption Act. AIR (Vol 32) 1945 Pesh 29 : 1945 Pesh L J 29 : 220 Ind Cas 55.

——Ss. 14 and 3 — Afridi is Pathan—Right to pre-emption.

An Afridi is a Pathan within the meaning of the N.-W. F. P. Government Notificatic n No. 5345 dated November 21, 1908 issued under Punjab Alienation of Land Act and if he owns agricultural land in the Peshawar District at the time when the question of his being a member of an agricultural tribe arises, he is a member of an agricultural tribe within the meaning of S. 14 read with S. 3 and is entitled to pre-emption. AIR (Vol 31) 1944 Pesh 32: 217 Ind Cas 25.

——S. 14 — Civil Court has jurisdiction to decide under S. 14, whether vendor belongs to same agricultural group as vendee.

There is nothing in the Act itself which either expressly or impliedly limits the jurisdiction of the civil Court. It is competent to the civil Court to decide all points necessary for the determination of the suit, including the point under S. 14 as to whether the vendor belongs to the same agricultural group as the vendee and merely because the Legislature has enacted that, for the purposes of the Land Alienation Act, the Deputy Commissioner should be the sole authority for deciding whether a person is or is not a member of a notified agricultural tribe, it cannot be assumed that it intended a similar procedure in the case of S. 14, even 'though this section of the Pre-emption Act may be 'in pari materia' with the Alienation of Land Act. A I R (Vol 30) 1943 Lah 48: 45 P L R 31 : I L R (1943) Lah 826 : 205 Ind Cas 421 (DB).

——Ss. 14, 21, 23 — Scope and object — Act, if contemplates date of sale as only crucial date for determining pre-emptor's right to oust vendee — Vendee improving his status before decree — Pre-emptor's right, if can be defeated.

Section 14 is merely intended to safeguard that no non-agriculturist can, by means of pre-emption, acquire any land which he could not do under the provisions of the Land Alienation Act. By using the words "at the date of sale" it further confines the acquisition of property to tho-e persons alone who are members of an agricultural tribe at the time of the sale and thus prohibits, in a way, the retrospective effect of a person's acquiring this status at a subsequent period.

Sections 14, 17, 19, 20, 21, 23 and 25 are rather intended to circumscribe the rights of pre-emptors within certain limits than to confer any privilege on them. Section 21 merely indicates the stage at which a suit for pre-emption can be brought and S. 23 is complementary to S. 14. It cannot, therefore, be said that the Act, as it stands, contemplates the date of sale as the only crucial date or that it prohibits a vendee from defeating the rights of a pre-emptor in any legal manner that may be available to him at any later period.

A vendee can defeat the right of the pre-emptor by improving his status at any time before the passing of the decree in the pre-emption suit by the trial Court as the rights of the parties are adjudicated upon by the trial Court alone and the function of the Court of Appeal is only to see what was the decree which the Court of first instance should have passed.

A vendee can improve his status effectively right upto the adjudication of the suit against him even after the expiry of one year from the date of the original transaction of sale. This improvement can, in certain circumstances, be effected even by dealing with the land which is the subject-matter of the suit. A I R 1919 Lah 10 : 91 P R 1909: 4 Ind Cas 337 (FB) and A I R 1914 Lah 240 : 23 Ind Cas 908, Overruled. A I R (Vol 28) 1941 Lah 433 : 43 P L R 581 : I L R (1942) Lah 155 : 197 Ind Cas 227 (FB).

——S. 14 — Member of alienor's tribe, if has preferential right of pre-emption.

A member of the alienor's tribe has a preferential right of pre-emption in respect of a sale of agricultural land by a member of an agricultural tribe to that of a vendee who, though an agriculturist, was not a member of an agricultural tribe. If a man vested with the right of pre-emption chooses to exercise it, the vendee who has already purchased the land cannot resist it if his right is not on a part with the right of the person claiming the land. A I R (Vol 24) 1937 Lah 504 : 39 P L R 762 : I L R (1937) Lah 143 : 170 Ind Cas 271 (DB).

——S. 14 — Descent from common ancestor — Evidence.

The mere fact that two persons belong to the same caste and gote does not necessarily lead to the inference that they are descended from the same common ancestor so as to give them a right of pre-emption. (1928) 108 Ind Cas 378 (Lah).

—— S. 14—Unborn child—Right to pre-emption.

A child begotten but not born at the time of a sale does not acquire rights enforceable later under the Pre-emption Act. AIR (Vol 12) 1925 Lah 369:7 L L J 145 : 26 P L R 111 : 86 Ind Cas 594.

——S. 14—Non-agriculturist—Right to pre-empt.

A non-agriculturist cannot pre-empt a sale of agricultural land by an agriculturist to a non-agriculturist although the land is situate within the limits of a Municipality. AIR (Vol 8) 1921 Lah 161: 3 L L J 430 : 67 Ind Cas 816.

—S. 15.

——Ss. 15, 14—Superior right.

Once it is established that the plaintiff is a cousin of one of the vendors and the nephew of the husband of another, no doubt remains that for the purposes of pre-emption, the plaintiff belongs to the same agricultural tribe to which the family of the vendors belongs and he has, therefore, a superior right of pre-emption under S. 15. A I R (Vol 32) 1945 Pesh 29 : 1945 Pesh L Jour 29 : 220 Ind Cas 55 (DB).

——S. 15—Second appeal.

Point that suit land not being agricultural, was not subject to pre-emption cannot be raised for the first time in second appeal. A I R (Vol 31) 1944 Pesh 31 : 215 Ind Cas 170 (DB).

——S. 15—Whether ultra vires.

Under S. 15, Punjab Pre-emption Act, the pre-emptor does not succeed on the ground of descent alone. He succeeds, firstly, because on the date of the sale, he is a member of an agricultural tribe in the same group of agricultural tribes as the vendor and secondly, because he is a descendant of the vendor. Hence, S. 15, Punjab Pre-emption Act does not fall within the express language of S. 298, Government of India Act and is valid and binding and has not been invalidated on the ground that it is repugnant

to the provisions of S. 298, Government of India Act. A I R (Vol 30) 1943 Lah 233 : 45 P L R 253 : I L R (1943) Lah 461 : 209 Ind Cas 296 (DB).

——S. 15 — Explanation — Agnates of Mahomedan widow.

Where a Mahomedan widow holds lands in her own right, i. e., as full owner, the agnates of her husband are not necessarily her agnates.

The explanation to S. 15 applies only in the case of sale by a female of land to which she has succeeded on a life tenure through her husband, son, brother or father. It follows, that the female vendor's agnates must necessarily be the same as those of her brother or father, but the agnates of her husband are not her agnates. A I R (Vol 14) 1927 Lah 105 : 9 L L J 12 : 28 P L R 90 : 100 Ind Cas 168.

——S. 15 — Determining factor — Right at time of sale.

The plaintiff's right should be determined by the situation existing at the time of the sale; this may lead to strange results, but the whole law of pre-emption is an anachronism. A I R (Vol 12) 1925 Lah 56 : 79 Ind Cas 43.

——S. 15 (a)— Scope and effect — Right of pre-emption — If reserved in favour of whole line of would-be heirs.

Under S. 15 (a), Punjab Pre-emption Act, the right of pre-emption is reserved in favour not of any particular individuals in existence at the date of the sale or suit but in favour of "the whole line of would-be heirs." Any two lines which derive from the same common ancestor with the vendor would be placed on an equal footing, and as between the members or representatives of any such line, the failure of any member to sue for pre-emption would not debar any descendant of his from suing. A I R (Vol 37) 1950 Lah 48.

——S. 15 (a) — Right of pre-emption — Priority of right between claimants—How determined.

The effect of S. 15 (a), Punjab Pre-emption Act, which has been adopted by Sirmur Darbar, is to confer the right of pre-emption in respect of agricultural land and village immovable property upon the whole line of the heirs of the vendor and not merely on the nearest heir at the time of the sale, but the priority of right between claimants is to be determined according to the order of succession. AIR (Vol 36) 1949 H P 31.

——Ss. 15 (a), (b) and (c), 28 — Words "seeks to exercise it" in S. 15 (c)—Meaning of.

In view of the provisions of S. 28, it is not correct to say that if a person having a right of pre-emption under S. 15 (a) or (b) seeks to exercise it by suit, a person entitled to pre-empt under S. 15 (c) would have no right at all. The words "seeks to exercise it" in S. 15 (c) mean no more than that persons entitled to pre-empt under S. 15 (c) are postponed to persons entitled to pre-empt under S. 15 (a) and (b). Therefore, where person claiming under S. 15 (a) or (b) and a person claiming under S. 15 (c) both brought pre-emption suits and in the suit by the person claiming under S. 15 (a) or (b) it was held that he had waived his right to pre-empt, the person claiming under S. 15 (c) would be entitled to succeed. AIR (Vol 31) 1944 Pesh 31 : 215 Ind Cas 170 (DB).

——S. 15 (a)—Applicability and scope.

The Act is a substantive law for the Province of Punjab. The Act cannot be said to be merely a recognition of the existence of the right of pre-emption according to the Customary Law of the Province so as to come within the safeguard provided by S. 298(2), Government of India Act. A I R (Vol 30) 1943 Lah 233 : 45 P L R 253 : I L R (1943) Lah 461 : 209 Ind Cas 296 (DB).

——S. 15 (a)—Coparcener.

Subject to the right of the co-parceners to challenge a sale on the ground that it was not made for legal necessity or for the benefit of the estate, a sale by a karta validly passes to the vendee not only the share of the karta himself but also of all the co-parceners. Each co-parcener is the vendor and as it cannot be that he should be a pre-emptor and a vendor at the same time, he cannot maintain a suit for pre-emption. When a co-parcener sues for pre-emption, he impliedly admits that the sale is valid and that he does not wish to impugn it on the ground that there was no legal necessity for it or that it was not for the benefit of the estate. A I R (Vol 30) 1943 Pesh 49 : 212 Ind Cas 465 (DB).

——S. 15 (a) — Legal representative can continue suit.

Where a plaintiff in a suit under S. 15 (a) dies, it is just and equitable that his legal representatives should be permitted to continue the suit. A I R (Vol 29) 1942 Pesh 23 : 201 Ind Cas 83.

——S. 15 (a) — The Act contemplates a reasonable chance of succession as an heir, and not one based on traditional membership of the same tribe. It does not, therefore, apply to a person who may be one of the proprietary body of the village and may, perhaps under some customary rule, succeed the vendor in case of failure of all his heirs. A I R (Vol 22) 1935 Pesh 80 (DB).

——S. 15 (a)—Near and distant collateral.

In the absence of a custom to the contrary it is only a near collateral who can succeed to the house of a non-proprietor and so where no custom is proved a collateral in the seventh degree has no right to pre-emption under S. 15 (a). A I R (Vol 13) 1926 Lah 239 : 91 Ind Cas 443.

——S. 15 (a)—Vendor's widow—Right to pre-empt.

A widow is not an heir and therefore she is not entitled to pre-empt. The mere fact that a portion of the shamilat land only has been sold cannot deprive a co-sharer of the right to maintain a suit for pre-emption as a co-sharer. A I R (Vol 11) 1924 Lah 333 : 69 Ind Cas 191 (DB).

——S. 15 (a)—Reversioner and owner of site.

Reversioners have a better claim to pre-empt a standing house than owner of the site. AIR (Vol 10) 1923 Lah 394 : 76 Ind Cas 844.

——S. 15 (a)—Successive heirs.

Under S. 12A of the Act the whole line of heirs of the vendor and not merely the nearest heir at the time of sale has the right of pre-emption in respect of agricultural land. The priority of the right between the claimants must be determined according to the order of succession. AIR (Vol 9) 1922 P C 139: 20 A L J 427 : 3 Lah 48 : 35 C L J 514 : 7 P W R 1922 : 30 M L T 237 : 49 I A 74 : 43 M L J 49 : 67 Ind Cas 264.

——S. 15 (a)—Relationship—Proof.

A pre-emptor claiming by relationship must prove it by some specific evidence; the mere fact of his being of the same gote as the vendor is not sufficient. A I R (Vol 4) 1917 Lah 350 : 8 P W R 1917 : 39 Ind Cas 717.

——S. 15 (b), thirdly — Persons entitled to inherit — Persons having right of reversion.

The right of pre-emption has been given by the statute to all persons who might inherit the land on the death of the vendor and not merely to the nearest heir or to the person having an immediate right to succeed. Accordingly where the property sold has come to the vendor by means of a revertible gift, or has devolved upon him from a lineal descendant who acquired it by means of such a gift, all descendants or collaterals of the donor who may

possess the right to claim the benefit of the doctrine of reversion must be regarded as falling within the category of "the persons who but for such sale would be entitled on the death of the vendor, to inherit the land or property sold" who have been given, by sub-clause "thirdly" of Cl. (b) of S. 15 of the Punjab Pre-emption Act, a right to pre-empt the sale. AIR (Vol 35) 1948 E P 43 : 50 P L R 148.

——S. 15 (b) —"Co-sharer," meaning of.

The word "co-sharer" postulates that there are some other persons as well who have a right in the property. The very conception of "joint property" as used in cl. (b) pre-supposes that it also belongs to a person or persons other than the vendor. All the persons who so own a property among themselves are the co-sharers of each other. Their relationship is mutual. It would be a contradiction in terms if A is the co-sharer of B but B is not the co-sharer of A. The word "co-sharer" signifies persons owing a share or shares in the whole of the property or properties of which another share or other shares were the subject of sale. In other words, the word co-sharer denotes a person who holds an existing joint proprietary interest whether absolute or limited in an undivided property. Where therefore the land sold is the sole property of the vendor in which the plaintiff has no share whatsoever the mere fact that he is entitled to the Shamilat appertaining to the land sold does not make him a "co-sharer" in the said land so as to confer on him the right of pre-emption. A I R (Vol 34) 1947 Lah 184 : 48 P L R 441.

——Ss. 15 (b) and 4 — Sharers and residuaries — Rights of.

The estate of a deceased Muhammadan vests immediately in all his heirs on his death, whether they be sharers or residuaries. In other words, the sharers and residuaries do not inherit in order one after the other, but simultaneously and the law in this respect has not been in any way affected by the passing of the Shariat Act in N. W. F. Province. Even under custom, if a vendor sold his property to one of his collaterals who would succeed to part of his estate on his death, no other collateral with a similar right to inherit this property could succeed as a plaintiff in a pre emption suit.

Where a Muhammadan sold some land to a residuary, a sharer cannot pre-empt the sale. Section 15 (b) thirdly of the Punjab Pre-emption Act, cannot apply. AIR (Vol 32) 1945 Pesh 45 : 1945 Pesh L Jour 45 : 221 Ind Cas 625 (DB).

——S. 15 (b), (c)—Superior right.

Where, in a pre-emption suit, the plaintiff and the vendee are equally entitled under a higher right, e.g , under S. 15 (b), than the possession of a lower right, e.g. under S. 15 (c) in addition, by the plaintiff, does not entitle him to a pre-emption decree. A I R (Vol 30) 1943 Pesh 75 : 211 Ind Cas 202 (DB).

——S. 15 (b), (Secondly) — Conditions for operation of—Expression "in order of succession," meaning of.

The requisites in order to bring cl. (b) secondly, of S. 15, into action are that the plaintiff must be a co-sharer and an agnate and if he has those qualities which the vendee has not, then he must succeed. The words "in order of succession" in that clause refer to a case where there may be more than one person who is both a co-sharer and an agnate in which case the nearer agnate would have preference over the more remote. A I R (Vol 30) 1943 Pesh 64 : 209 Ind Cas 329.

——S. 15 (b), thirdly—Superior right.

When deciding the question of the superiority of the right of pre-emption under S. 15, cl. (b), thirdly, the Courts have only to keep in view the plaintiff and the vendee and no other relations of the vendor. They have to take it that the vendor has died and have to find out as to who of the parties before them —the pre-emptor and the vendee — is entitled to inherit his property to the exclusion of the other. The person who is so entitled has a superior right of pre-emption. If he is a pre-emptor, he gets a decree. And if he is a vendee, the pre-emptor's suit is dismissed. On the other hand, if it is discovered that they are entitled to inherit equally, their right to pre-empt is declared to be equal and the pre-emptor fails. AIR (Vol 29) 1942 Pesh 22 : 199 Ind Cas 353.

——S. 15 (b)—Muquarridari right in joint land.

Where the sale is not a sale of joint land but simply a sale of muquarridari rights in such land, cl. (b) of S. 15 does not apply. A I R (Vol 27) 1940 Lah 17 : 188 Ind Cas 272.

——S. 15 (b)—Effect of — Priority, how to be determined — Legatees under will, whether heirs during lifetime of testator.

The effect of S. 15 (b) is to confer the right of pre-emption in respect of agricultural land upon the whole line of heirs of the vendor, and not merely on the nearest heir at the time of the sale, but the priority of right between claimants is to be determined according to the order of succession.

Where a widow sells property belonging to her husband, her husband's collateral is an heir and is entitled to pre-empt under S. 15 (b), in absence of nearest heirs. AIR (Vol 25) 1938 Lah 646 : 40 P L R 508 : 178 Ind Cas 741 (DB).

——S. 15 (b), thirdly—Scope of.

Two brothers sold a land to a stranger. Neither of the brothers had children and one had a wife. On their death, the wife and their mother who were entitled to succeed the brothers respectively brought a suit for possession of the land by pre-emption :

Held, that under S. 15 (b), thirdly, the right of pre-emption vests in order of succession in the persons, who, but for such sale, would be entitled on the death of the vendor to inherit the land and being entitled to succeed them respectively on their death, the plaintiffs had a right of pre-emption. A I R (Vol 24) 1937 Lah 237 : 17 Lah 373 : 168 Ind Cas 628 (DB).

——S. 15 (b)—Cognates of vendor.

A cognate of the vendor is entitled to pre-empt the sale of the property. Every person who is entitled to succeed under the law is entitled to maintain a suit for pre-emption, but if a preferential heir chooses to exercise the right, then the right of the remoter heir is defeated. AIR (Vol 23) 1936 Lah 477 : 38 P L R 774 : 163 Ind Cas 513.

——S. 15 (b) — Collateral not proving possession of disputed land by common ancestor.

Under the Punjab Ten. Act, a collateral is not an heir to occupancy rights unless the common ancestor was in possession of the land. Consequently, where a collateral brings a suit to pre-empt a sale, but there is no proof that the ancestor was in possession of the disputed land, he is not a reversionary heir and cannot pre-empt. AIR (Vol 23) 1936 Pesh 157 : 164 Ind Cas 149.

——S. 15 (b), thirdly—Sister's son of last male-holder, if governed by this clause — Explanation to S. 15, meaning of.

Where immovable property is acquired by a female through her husband, son, brother or father, the right of pre-emption of sister's son of the last male-holder has to be determined by the fact of his being heir of last male-holder and not to the female vendor for he, as a distant kindred, is a recognised heir according to the Muhammadan Law and his chances of succession are within a measurable distance. Hence the sister's son cannot claim only a partial pre-emption basing his claim on his right of ownership of estate.

The Explanation to S. 15 provides for both cases, namely, where a female has succeeded as a life-tenant

and where she has acquired property in full proprietary rights. AIR (Vol 21) 1934 Pesh 72 : 151 Ind Cas 581 (DB).

——S. 15 (b)—Co-sharer in well—Right to pre-empt.

A co sharer in a well has no right to pre-empt a sale of land merely because it was sold with right to irrigate it by the water of that well. A I R (Vol 13) 1926 Lah 527 : 8 L L J 346 : 95 Ind Cas 258.

——S. 15 (b) Pre-emption—Right to—Co-sharers in well and not agricultural land—Adjunct—Appendage.

The fact that the plaintiff is a co-sharer in a well with path attached to it would not give him a right of pre-emption to other land held separately being a mere appendage or adjunct to the other land. The well and the path to the well being clearly an adjunct or appendage to the other land the plaintiff cannot treat it as a property separable from the rest of the land and claim a right of pre-emption in it alone on the strength of his being a co-sharer therein when he has no such right in the other land sold.

There has been no change in the law by the passing of the Pre-emption Act. The omission of the word "undivided" which occurred in S. 12 (a) of the Punjab Laws Act is in no way material. AIR (Vol 6) 1919 Lah 437 : 1 Lah L J 238.

——S. 15 (c)—Sub-division—What constitutes—Test.

In order to determine whether a particular Patti or a sub-division of a Patti was a recognised sub-division of a village in the true sense of that term for the purposes of the Punjab Pre-emption Act, reference must be made to the kaifiyat-i-dehi of the village and it should be ascertained whether the sub-division of the village was between various branches of one family or whether these sub-divisions were made by the revenue authorities for fiscal purposes only. The kaifiyat-i-dehi is an all important document to determine the nature of the foundation of the sub-divisions and the subsequent history of ownership in them is not the determining factor in order to find whether the sub-divisions were homogeneous in descent as well as in area when originally founded. AIR (Vol 35) 1948 Lah 199.

——S. 15 (c), thirdly—Estate—Ceasing to be part of —Test.

If an area does not fall within the definition af of the term "Land" as defined by the Punjab Alienation of Land Act it would still remain a part of an "estate" as long as its owner had not, by converting it into a building site in a village or in a town, walked, so to say, out of the estate. An area of land although lying fallow and useless in any estate and although not occupied for purposes either agricultural or subservient to agriculture or for pasture does not cease to be part of the estate within the meaning of the Punjab Pre-emption Act as long as it has not in fact ceased to be a part of the estate by being translated into other category permanently, that is, either by becoming village immoveable property or urban immoveable property. A I R (Vol 35) 1948 Lah 103 (DB).

——S. 15 (c), secondly—Thulla—If a sub-division of village.

The mere mention of thulla in one or two places in the Revenue records is not sufficient to show that the village is in fact divided into thullas or that a thulla possesses those attributes which are necessary for holding that it constitutes a distinct sub-division in the village for the purposes of S. 15 (c), secondly, Punjab Pre-emption Act. AIR (Vol 34) 1947 Lah 322.

——S. 15 (c), thirdly—Owner of house in village abadi is not owner of estate. AIR (Vol 30) 1943 Pesh 93 : 210 Ind Cas 612.

——S. 15 (c), fourthly — When the vendee of an occupancy land acquires proprietary rights n the land, his status becomes that of an "owner of estate" from the date of his acquisition of the proprietary rights so as to defeat the claim for pre-emption of his rival occupancy tenant. AIR (Vol 29) 1942 Lah 243 : 44 P L R 382 : 203 Ind Cas 404 (DB).

——S. 15 (c) — Water rights.

Where the land revenue is paid for the water rights, the right to use water must be regarded as an estate within the meaning of S. 15 (c). AIR (Vol 29) 1942 Pesh 18 : 199 Ind Cas 329 (DB).

——S. 15 (c) — Water right — Patti or other sub-division of estate — Meaning, if can be taken as unit for comparing rights.

The patti or other sub-division of the estate contemplated by S. 15 (c) secondly, connotes the existence of a homogenous group of persons cultivating a block of land. When the land to which the water, rights belong has been sold, the existence of a kandi in relation to mere water rights is a mere fiction and hence the kandi in which the land to which the water rights were attached was situate cannot be taken as a unit, for comparing the rights of the pre-emptor and the vendee in a claim for pre-emption in respect of the water rights. The water rights in such a case must be regarded as independent of the land to which they belonged. Hence the plaintiff cannot be said to have a superior right merely because he was the owner in the kandi and the vendee was not. AIR (Vol 29) 1942 Pesh 18 : 199 Ind Cas 329 (DB).

——S. 15 (c) — "Owners of estate," meaning—Owner of small plot unassessed to revenue destined as building site, is not an owner of estate. AIR (Vol 27) 1940 Lah 344 : 190 Ind Cas 503.

——S. 15 (c) — Co-parcener.

Land recorded in revenue records in name of heir of joint Hindu family — Member of family whose name is not recorded can be considered as an owner so as to be entitled to pre-empt. A I R (Vol 27) 1940 Lah 340 : 191 Ind Cas 174.

——S. 15 (c)—Owner of estate.

The word 'estate' as defined in the Punjab Land Revenue Act applied to agricultural lands only and that unless such land was converted into building sites, its owners did not cease to be owners of the estate. (1940) 42 P L R 108.

——S. 15 (c), Firstly — Person having ala milkiyat rights in wells not attached to lands.

The words 'superior' and 'inferior' proprietors as used in S. 15 (c), are usually taken to refer to ala and 'adna' milkiyat rights, which have a different connotation.

A pre-emptor who has ala milkiyat rights in wells in a village but the lands sought to be pre-empted are not attached to these wells, the pre-emptor is not a superior proprietor within the meaning of S. 15(c), Firstly, Punjab Pre-emption Act. AIR (Vol 26) 1939 Lah 37 : 41 P L R 241 : 182 Ind Cas 448.

——S. 15 (c)—Tarfs created for fiscal purposes.

Tarfs which were only created for fiscal purposes and in no way represent homogeneity of area or descent of the proprietors, cannot be held to be sub-divisions of a village within the meaning of S. 15 (c), any more than it can be said that scattered buildings in a town constitute a sub-division of a town. AIR (Vol 24) 1937 Lah 703 : 39 P L R 836 : 173 Ind Cas 539 (DB).

——S. 15 (c) — Superior right — For pattis to be distinct sub-divisions they must be distinct entities, having nothing in common, and each having homogeneity of area and descent—In absence of this right of proprietor of one to pre-empt cannot be superior to the right of the proprietor of the other. AIR (Vol 24) 1937 Lah 82 : 39 P L R 171 : 169 Ind Cas 830.

——S. 15 (c),thirdly and S. 16—'Owner of the estate', meaning of—Agricultural land converted into building site — Effect — Urban immovable property — Distinction from other kinds.

The law of pre-emption deals with three kinds of immovable property, viz. agricultural land, village immovable property and urban immovable property. The word 'estate' as defined in the Punjab Land Revenue Act applies to agricultural lands only and does not include any other class of property. As soon as agricultural land is converted into building sites, whether in a village or in a town, its owner, so to say, walks out of the estate and ceases to have any connection with it any longer. He establishes a new character for his possession and is, therefore, to be treated on that basis. The term "owner of the estate" in S. 15 imports ownership of agricultural land only and as soon as an area of land, which was admittedly agricultural before, is converted into a building site, it at once ceases to be a part of the estate and its owner, therefore. is deprived of all those privileges which he could otherwise enjoy under the law :

Held, that a person who is an owner of urban immovable :property' was not entitled to pre-empt the sale of the agricultural land within the limits of the Multan town. AIR (Vol 23) 1936 Lah 202 : 17 Lah 322 : 38 P L R 664 : 166 Ind Cas 408 (2) (DB).

——S. 15 (c) (secondly)—Superior right.

The fact that one party is owner in a Tal, which is a sub-division of a Kandi, does not give him a superior right over a person, who is also an owner in the Kandi, but not in the particular Tal. AIR (Vol 23) 1936 Pesh 133 : 163 Ind Cas 124 (DB).

——S. 15 (c) — Owner of estate — Owner of building site within abadi assessed to revenue.

In deciding whether a person is an owner of an estate for purposes of pre-emption, the determining factor is whether the area owned by him is or is not assessed to land revenue. Its extent, situation and the purpose for which it was bought or to which it may be devoted are absolutely immaterial. AIR (Vol 20) 1933 Lah 213 : 34 P L R 227 : 141 Ind Cas 363.

——S. 15 (c), thirdly—'Owner of an estate', meaning of.

The expression 'owner of an estate' in S. 15 (c), thirdly, does not necessarily mean the owner of agricultural land in the estate. If a person owns property which is assessed to land revenue, and for which, as an owner, he is responsible to pay the amount assessed, he is an owner within the meaning of the clause.

Therefore, the owner of land which was once agricultural but which has been built upon and which has, in consequence, been included in a separate revenue record kept for lands built upon is still an 'owner of estate.' AIR (Vol 20) 1933 Pesh 33: 141 Ind Cas 643 (DB).

——S. 15 (c)—Right to pre-empt.

A "chakdar kasurkhawar" being an inferior tenant is entitled to pre-empt the sale by the zamindar of the "milkiyat zamindari" rights in the land held by him on 'Chakdari' tenure under cl. (c), S. 15 (1). which confers a right on an inferior proprietor to pre-empt a sale by the superior proprietor of his proprietary rights. AIR (Vol 17) 1930 Lah 740 : 11 Lah 287 : 12 L L J 119 : 31 P L R 592 (DB).

——S. 15 (c) — Chakdar kasurkhawar — Status of.

A "chakdar kasurkhawar" is an inferior proprietor of the land held by him in a zamindari and is not a mere occupancy tenant, The 'Chakdari' tenure occurs in the Multan and other adjoining districts of the South Punjab. AIR (Vol 17) 1930 Lah 740 : 11 Lah 287 : 12 L L J 119 : 31 P L R 592 (DB).

——S. 15 (c) — Priority of right — Landowner one with and another without rights in shamilat.

A pre-emptor who is a landowner with rights in the shamilat has no right of pre-emption superior to that of a landowner who owns no share in the shamilat. AIR (Vol 17) 1930 Lah 304 : 120 Ind Cas 789.

——S. 15 (c)—Interpretation—"Superior landowner" and "inferior landowner."

The words "superior landowner" and "inferior landowner" as used in S. 15 are usually taken to refer to ala maliks and adna maliks respectively and there is a clear distinction between the nature of the proprietary rights held by them. AIR (Vol 17) 1930 Lah 304 : 120 Ind Cas 789.

——S. 15 (c)—Sharer in Shamilat—If owner of estate.

A person has no land in the khewat but owns a share in the shamilat, he would be an owner of the estate within the meaning of that expression under S. 15 (c) thirdly. (1928) 107 Ind Cas 619 (Lah).

——S. 15 (c) — Secondly — Co-owner — One having additional qualification of being occupancy tenant.

Where the two rival claimants are co-owners the fact of one of them having an additional inferior qualification of being occupancy tenant will not improve his status. A I R (Vol 13) 1926 Lah 300 : 7 Lah 306 : 27 P L R 460 : 94 Ind Cas 253 (DB).

——S. 15 (c)—Patti and Taraf—Meaning.

Where at the Settlement of 1864 two tarafs or pattis were created but they were nominal divisions created for purely fiscal purpose and in fact there was no real sub-division of the village except that some proprietors had been allotted to one lambardar and some to another merely for the convenience of collecting land revenue, they are not pattis or tarafs within the meaning of S. 15 (c) of the Punjab Pre-emption Act. (1922) 67 Ind Cas 48 (Lah).

——S. 15 (c)—Owners of estate—Right to pre-empt —Malik Kabza.

A man is not debarred from pre-empting though he is only a malik kabza and owns no share in the village Shamilat, or only an owner by purchase. A person is not necessarily one of the owners of the estate merely because he owns some immoveable property in the village. The words "Owner of the Estate" in S. 15 (c) refer to the village proprietary body. A man who owns only a small plot of 8 maralas unassessed to revenue, and almost uncultivated and destined to be a building site, is not one of the owners of the estate. A I R (Vol 7) 1920 Lah 94: 1 Lah 503 : 2 Lah L J 565 : 57 Ind Cas 159 (DB).

——S. 15 (c)—Pattis—Sub-division—Question of fact.

The question whether a patti is a real sub-division of a village is a question of fact under S. 15 (c) of the Act. A I R (Vol 6) 1919 Lah 292 : 109 P R 1918 : 23 P L R 1919 : 48 Ind Cas 379.

——S. 15 (c)—Rupar—Pattis—Whether sub-divisions.

Rupar is divided into well-recognised pattis which are 'sub-divisions' within S. 15 (c) of the Punjab Pre-emption Act. A I R (Vol 6) 1919 Lah 113 : 40 P R 1919 : 81 P L R 1919 : 51 Ind Cas 394.

—S. 16.

——S. 16 (firstly) — Waiver by manager of a joint Hindu family.

The right of pre-emption can be waived by a pre-emptor when property is offered to him for sale before a definite contract of sale with any other person has come into existence and such person has refused to purchase the property or intimated his intention of not purchasing the property.

The word "co-sharer" is not the right word to use as regards the joint property of a joint Hindu family. The members of the family are co-parceners but have no "share" until there is disruption of the family.

A waiver of the right to pre-empt by the manager of a joint Hindu family operates as a complete waiver by all the members of the family. A I R (Vol 25)

1938 Lah 273 : 40 P L R 10 : I L R (1938) Lah 246 : 176 Ind Cas 925 (DB).

——S. 16 (firstly)— Co-sharer, who is — Part-owner of front wall.

The intention of the Legislature is that "firstly" in S. 16 should apply only to the sale of an undivided share in joint urban immovable property and that "co-sharers" should signify persons owning a share or shares in the whole of the property or properties of which another share or other shares were the subjects of sale. A person who is a part-owner of a small portion of one of the walls of a house but has no rights of any kind in any other part whatsoever either of the building or of the site is not entitled to call himself a co-sharer in the whole property within the meaning of S. 16 of the Act. When a house with a share in a common staircase was sold, the other owners of the staircase should not be regarded as co-sharers in the property sold. A I R (Vol 12) 1925 Lah 223 : 5 Lah 298 : 84 Ind Cas 960 (DB).

——S. 16 (secondly)—'Building'—'Structure', meaning—'Structure and building', difference between.

What the law contemplates is that the owner of the building or other structure on a site is like a co-owner in the property sold and therefore his right of pre-emption is inferior only to a co-sharer therein. The word 'building or structure' is not defined in the Act but it may be stated that every building is a structure though every structure is not a building and the word 'structure' can be applied to a wall or a shed or any other unsubstantial erection for which the word 'building' cannot be used. Therefore not only the owner of a building on a site but also of an erection of less substantial kind has a right of pre-emption in respect of it. A I R (Vol 11) 1924 Lah 172 : 5 Lah L J 548 : 73 Ind Cas 911 (DB).

——S. 16 (secondly)—Joint wall—Right to pre-emption.

Where the rafters and beams of a shop and adjoining house rest upon a party wall, the owner of the shop can pre-empt a sale of the latter. A I R (Vol 8) 1921 Lah 181 : 5 Lah L J 53 : 70 Ind Cas 901 (DB).

——S. 16 (secondly)—Pre-emption — Sale of a house —Rights of owner.

The owner of a site cannot exercise the right of pre-emption if a non-proprietor effects a sale with respect to his house standing on the site. A I R (Vol 7) 1920 Lah 99 : 2 Lah L J 252 : 55 Ind Cas 609.

——S. 16 (thirdly)—Co-owner, who is—Person using staircase for repairing roof and wall of his house.

A person using a staircase for the purpose of repairing the roof and walls of his house is a co-owner of the staircase and his case falls within cl. 3, S. 16.

Under cl. 3, S. 16, it is not necessary that the pre-empting co-owner should own property on the upper storey to which the staircase should lead. The words used by the Legislature are clear and confer the right of the owner of property which has a staircase common to the property sold, irrespective of the purpose for, or the manner in which, it is used. A I R (Vol 17) 1930 Lah 677 : 121 Ind Cas 377.

——S. 16, (fourthly) — "Street" — Whether means public street—"Kucha khas", meaning of.

The expression "street" as used in S. 16 (4) means a public street. Kucha khas implies a private street and the section applies to cases where two houses abut on a lane which is private street owned by the owners of the houses in lane and opens into a public street. A I R (Vol 24) 1937 Lah 120 : 38 P L R 969 : 169 Ind Cas 259.

——S. 16, (fifthly)—User of—Easement.

The existence of a joint wall between two houses is not an easement within the meaning of S. 16 (fifthly) of the Punjab Pre-emption Act.

The owner of a house having a joint wall with another house can use that wall in any reasonable manner, but by such user he does not acquire any right of easement over the other house. (1921) 59 Ind Cas 939 (Lah).

——S. 16, (sixthly)—Pre-emption custom.

In the town of Bhera, Shahpur district, there is a custom of pre-emption based on contiguity. 8 Lah L J 600 : 28 P L R 50 : (1927) 99 Ind Cas 958 (DB).

—S. 17.

——S. 17—Interpretation.

Section 17 of the Punjab Pre-emption Act merely lays down the method of distribution amongst rival pre-emptors or persons equally entitled to the right of pre-emption. That section cannot be interpreted in a manner so as to destroy completely the right of one who has been held to be equally entitled to it with the other. A I R (Vol 35) 1948 Lah 71 : 49 P L R 160 (DB).

——S. 17—"Pre-emptor", meaning — Sale to person having right of pre-emption—Rights of.

The word "pre-emptor" in S. 17 cannot be taken to include a person who has already purchased property through Court in the exercise of his right of pre-emption. It means a person seeking to enforce his right of pre-emption through a Court. Where, therefore, during the pendency of a pre-emption suit the property in suit is sold by the vendee to a person possessing a right of pre-emption equal to that of the plaintiff, the plaintiff cannot share the property with the second vendee. A I R (Vol 17) 1930 Lah 356 : 31 P L R 342 (FB).

——S. 17—Vendee with equal status — Right to pre-empt.

In a suit to pre-empt a sale the vendee, who on the date of sale in dispute had an equal status with the pre-emptor derived by reason of his ownership of other immovable property, can defeat the pre-emptor's right, even though, subsequent to the sale, he has lost in another pre-emption suit the property by virtue of the ownership of which he claimed that status. A I R (Vol 17) 1930 Lah 273 : 31 P L R 274 : 11 Lah 129 (FB).

——S. 17 (c) and (e) — Applicability — Rival pre-emptors having equal right of pre-emption — One of them having no share in shamilat being only malik qabza.

Clause (c) of S. 17 of the Punjab Pre-emption Act has application only to cases where two conditions are fulfilled (i. e.) (1) where both sets of pre-emptors are owners in a sub-division, and (2) where both of them are entitled to take a share in the shamilat in a certain proportion. Where only one of them is an owner in the patti with a share in the shamilat while the other is only malik qabza, cl. (c) has no application. The rights of the parties in such a case have to be determined in accordance with the rule laid down in Cl. (e) of S. 17. A I R (Vol 35) 1948 Lah 71 : 49 P L R 160 (DB).

—S. 19.

——Ss. 19 and 20—Sale of lands with shamilat rights —Notice, validity of.

A person sold his lands with shamilat rights and rights in the abadi. In the notice issued under S. 19, it was stated that the vendor wished to sell his entire share in lands and gave details of khataunis, field numbers and land revenue. It was argued that these terms did not give notice that the vendor was going to sell shamilat :

Held, that the notice was sufficient. It was the duty of the pre-emptor to take action upon it and failing to do so, he lost his right under S. 20. A I R (Vol 26) 1939 Lah 139 : 184 Ind Cas 158.

——S. 19—Definite refusal to purchase land by person having right of pre-emption is complete waiver of the right. A I R (Vol 23) 1936 Pesh 204 : 166 Ind Cas 220.

——S. 19—Offer to pre-emptor—Waiver—Effect.

Under the customary law of the Punjab, the right of pre-emption can be exercised or waived by a pre-emptor, when property is offered to him for sale before a definite contract of sale with any other person has come into existence. 50 P R 1918; 27 All 670, not Foll. A I R (Vol 16) 1929 Lah 265 : 115 Ind Cas 767 : 30 P L R 88 (DB).

——S. 19—Scope.

Sections 19 and 20 only provide a convenient method for giving notice to all the pre-emptors concerned and do not preclude the possibility of "waiver" resulting from the conduct of an individual in other ways. A I R (Vol 16) 1929 Lah 265 : 115 Ind Cas 767 : 30 P L R 88 (DB).

——Ss. 19 and 20 — Notice to pre-emptor — Non-specification of property or price—Omission to reply—Effect of.

Held, that under the circumstances there was sufficient notice of the sale given to plaintiff who attended the Court and inspected the application etc., under S. 19 of the Pre-emption Act and that the plaintiff had failed to prove that he had complied with the provisions of S. 20. The right of pre-emption had been extinguished before the suit was instituted and the plaintiff was, therefore, not entitled to any relief. A I R (Vol 5) 1918 Lah 19 : 104 P W R 1918 : 45 Ind Cas 935.

——Ss. 19 and 20—Notice—Defective—Suit whether barred.

Where a notice issued by the vendor to the pre-emptor under S. 19 of the Act does not state the price at which the vendors are willing to sell and the vendor sells the land before three months after the issue of notice, the right of suit of the pre-emptor is not barred. A I R (Vol 4) 1917 Lah 190 : 53 P R 1917 : 115 P W R 1917 : 41 Ind Cas 266 (DB).

—S. 20.

See also S. 19.

——S. 20 — Waiver of right of pre-emption—Pre-emptor stating before issue of notice under S. 19 that he has no objection to purchase by vendee—Estoppel.

The right of pre-emption is provided by statute and it cannot be held to be waived unless by word or action, the pre-emptor has debarred himself from exercising it (i. e.) has undertaken not to exercise it, or has performed some act which is entirely inconsistent with an intention to exercise it, or in consequence of any act done by him, the vendee has been directly induced to enter upon the sale, in the bona fide belief that the pre-emptive right would not be exercised.

Where when no notice had been issued by the vendor under S. 19 of the Punjab Pre-emption Act the vendee asked the pre-emptor whether he would object to his buying the land to which the pre-emptor replied that he had no objection and that the vendee was at liberty to make the purchase:

Held, that as the pre-emptor's reply did not affect any present right vested in him and did not refer either directly or indirectly to the exercise or non-exercise of his future rights, it did not amount to waiver by the pre-emptor of his right of pre-emption. Nor did it operate as estoppel against him. As the pre-emptor's reply was clearly non-committal in relation to his future rights, the vendee could not be supposed to have acted on the faith of any assurance derived from it. A I R (Vol 34) 1947 Lah 299.

——S. 20—Waiver — Writing of sale-deed by pre-emptor petition writer—Effect.

The mere writing of a document of sale by a professional deed-writer does not amount to a waiver of his right to pre-empt the sale. A I R (Vol 30) 1943 Pesh 60 : 208 Ind Cas 56 (DB).

——S. 20—Omission of prayer of notice—Effect.

The mere fact that there is no specific prayer in an application under S. 20 to issue notice to the vendor is a wholly immaterial omission. A I R (Vol 14) 1927 Lah 506 : 102 Ind Cas 12.

——S. 20—Written notice.

Section 20 does not lay down that a written notice should be served on the vendor. A I R (Vol 14) 1927 Lah 506 : 102 Ind Cas 12.

—S. 21.

——S. 21—Right of pre-emption—Pre-emptor agreeing to sell property to third person before filing suit.

The Court is not concerned with how a pre-emptor raises the money or what he proposes to do with the property pre-empted. The mere fact that a pre-emptor before getting a decree has entered into a contract whereby he has agreed to part with the property would not contravene the provisions of the Punjab Pre-emption Act. (1950) 52 P L R 387.

——S. 21—Vendee making gift before suit—Donees' right to resist suit tor pre-emption.

A donee from the vendee acquiring property between the date of the sale under pre-emption and that of the suit for pre-emption can successfully resist the suit for pre-emption by showing his superior right of pre-emption to that of the plaintiff. A I R (Vol 31) 1944 Lah 463 : 46 P L R 307 : 217 Ind Cas 311 (DB).

——S. 21 — Section 21 lays down that it is only a person entitled to a right of pre-emption who may bring a suit; from this it follows that the plaintiff in the pre-emption suit must prove his right of pre-emption in order to bring a suit. A I R (Vol 23) 1936 Pesh 157 : 164 Ind Cas 149.

——S. 21—Landlord of occupancy holding—Right to pre-empt.

The landlord of an occupancy tenancy is not entitled to sue under S. 21 of the Act for pre-emption of that tenancy against a person having a right of pre-emption under S. 15 (a) or (b) of the Act. AIR (Vol 11) 1924 Lah 210 : 72 Ind Cas 316 : 27 P W R 1923.

——S. 21—Nature of right.

A pre-emptor does not claim through or under either the vendor or vendee but his right is a right to be substituted for the vendee. A I R (Vol 10) 1923 Lah 31 : 69 Ind Cas 409.

—S. 21A.

——S. 21-A—Applicability—Gift in favour of vendee—Execution prior to suit for pre-emption but registration subsequent to such suit.

Since a deed would according to law be operative from the date of its execution and not of its registration, a gift in favour of the vendee executed prior to the suit for pre emption but registered after the filing of the suit cannot attract the provisions of S. 21-A of the Punjab Pre-emption Act. AIR (Vol 35) 1948 Lah 103 (DB).

——S. 21-A — Vendee getting joint land partitioned, pending pre-emption suit by co-sharer—Effect on pre-emption suit.

Where during the pendency of a suit for pre-emption by a co sharer, the vendee gets the portion of the land which he had purchased partitioned from the khata, the plaintiff loses his right of pre-emption as the khata had ceased to be joint and he has lost his status as a co-sharer. It cannot be said that the

case was one of improvement in the status of the vendee within the meaning of S. 21-A of the Punjab Pre-emption Act. (1948) 50 P L R 78.

—S. 22.

—— S. 22—One-fifth of price ordered to be deposited before peshi Kham—Propriety of — No such deposit made—Time, if to be extended.

In a pre-emption suit, the Court ordered that one-fifth of the price should be deposited before peshi kham. The deposit was not so made and the Judge rejected the plaint immediately :

Held, that instead of recording that 1-5th of the price should be paid before peshi kham, the Court ought to have mentioned a particular day for the deposit of the price.

Held, also that when objection was taken by the defendants' Counsel, the Court ought not to have rejected the plaint immediately. The Court ought to have considered whether the circumstances were such as to justify an extension of time for the deposit of 1-5th of the price. AIR (Vol 26) 1939 Lah 25 : 41 P L R 236 : 182 Ind Cas 406.

——S. 22—Where in a pre-emption suit, Court proceeds to record findings on all issues and dismissing the suit against plaintiff on merits directs him to pay the deficiency of court-fee within time the procedure is not proper. This being so, the subsequent order directing that the amount be deducted from one-fifth of purchase price which had been deposited by plaintiff under S. 22, Pre-emption Act cannot stand. AIR (Vol 22) 1935 Lah 75 : 152 Ind Cas 799.

——Ss. 22, 2—The amount deposited under S. 22, by a pre-emptor cannot be attached in execution of a decree against him after the pre-emption suit has been dismissed. AIR (Vol 21) 1934 Lah 350 : 16 Lah 390 : 36 P L R 250 : 153 Ind Cas 126 (1).

——S. 22—Withdrawal of deposit — Maintainability of appeal.

Where money ordered to be deposited by the trial Court is withdrawn on dismissal of the suit the appeal should be dismissed although the Appellate Court itself had not ordered such deposit. 120 Ind Cas 426 : AIR (Vol 16) 1929 Lah 387.

——S. 22—Extension of time—Minority.

The mere fact that the plaintiff is a minor is no reason for extending time. Section 22 must be strictly construed. 105 Ind Cas 533 : 26 P L R 435 : A I R (Vol 14) 1927 Lah 776.

——S. 22 — Non-compliance with security order—Effect.

In a pre-emption suit the plaintiff was directed to put in before 9th December 1920 a security bond for Rs. 12,000, the price mentioned in the sale-deed or in cash one-fifth of the amount. On the 8th of January 1921, a security bond in the amount of Rs. 11,000 was filed which bore an endorsement which showed it was accepted.

Held, plaintiff had failed to carry out the order of the Court which required the filing of a security bond for the full amount o the sale-price, and that the suit must therefore be dismissed. A I R (Vol 10) 1923 Lah 257 : 4 L L J 526.

——S. 22—Pre-emption money—Money deposited by co-pre-emptor — Decree in favour of other pre-emptor.

According to S. 22 one of the two co-plaintiff pre-emptors deposited Rs. 1,000 in Court on behalf of both the plaintiffs but decree was passed in favour of the other plaintiff conditional on his paying the Court Rs. 6,000 before a certain date. A parcha was given to him to pay Rs. 500 on or about 31st July 1915 and it was stated that Rs. 1,000 were already in Court on his behalf, he i.e, the other plaintiff paid Rs. 5,000 on 25th June 1915 and on 29th July 1914 the plaintiff depositing Rs. 1,000 made an application for refund.

Held he was entitled to a return. AIR (Vol 4) 1917 Lah 121 : 10 P L R 1917 : 39 Ind Cas 57.

——S. 22 (1), (5) — Where the Court asks for security bond under S. 22 (1), and the security bond furnished becomes void, the Court should ask for another security bond instead of cash under S. 22 (5) (b) of the Act. A I R (Vol 25) 1938 Lah 452 : 40 P L R 758 (1) : 177 Ind Cas 452.

——S. 22 (1)—Time for deposit.

Under Section 22 (1) it is imperative for the Court to fix a time within which the deposit must be made and where the Court failed to do so the pre-emptors could not be penalized for having disobeyed an order which was not made. A I R (Vol 8) 1921 Lah 392 : 67 Ind Cas 795 : 3 L L J 545.

—— S. 22 (2) — Extension of time for deposit—Discretion—Appellate Court.

Held under the circumstances of the case, the lower Appellate Court ought not to have gone out of its way to exercise the discretion of extending time in favour of the plaintiff, to deposit the sale price. An Appellate Court has all the powers which the original Court has and can do all that the original Court can do. Section 22 (2) of the Punjab Pre-emption Act was enacted rather to enlarge the powers of an Appellate Court authorising it to make, the same orders with respect to an appeal as the original Court can with regard to the original suit. AIR (Vol 7) 1920 Lah 47 : 55 Ind Cas 621.

——S. 22 (4)—Discretion of Court—Revision—Interference.

There is nothing to justify an interpretation of sub-S. (4) of S. 22 of the Punjab Pre-emption Act which would restrict the exercise of the discretionary power thereby conferred in regard to extension of time, to cases of a rare or extreme kind. Discretion is absolute and unqualified and cannot be interfered with unless it has been arbitrarily exercised or the Court has acted under misapprehension of facts or on wrong or inadequate materials. Where the extension granted by the Court is strictly within its powers and no injustice is likely to flow from its order, the High Court will not interfere in revision. A I R (Vol 34) 1947 Lah 72 : 225 Ind Cas 339 : 48 P L R 323.

——S. 22 (4)—Deposit and security bond—Plaintiffs ordered to deposit purchase money filing security bond instead — Acceptance of the security bond — Effect.

On the institution of a pre-emption suit the Court ordered the plaintiffs to deposit one-fifth of the purchase money but they filed a security bond for the payment of the purchase money. Thereupon the Court passed the following order : "Zamanat manzur hai, Shamil misal howe". The Judge trying the case was then transferred. His successor finding that the order for deposit was not complied with rejected the plaint under S. 22 (4), Punjab Pre-emption Act. The District Judge on appeal held that the Judge by accepting the security bond had by implication varied his previous order as regards the cash deposit and the plaint was not liable to be rejected.

Held, that the acceptance of the security by the Court did not imply that the previous order for cash deposit had been varied.

Held also, that the finding of the District Judge could not be treated as one of fact because it was based on a mere inference drawn from the acceptance of the security bond. A I R (Vol 17) 1930 Lah 567 : 31 P L R 327 (DB).

——S. 22 (4) Provisions, mandatory.

The provision in sub-s. (4) that the plaint shall be rejected is a mandatory one and the trial Court's

omission to pass an order in accordance therewith is an illegality such as cannot be covered by S. 99, Civil P. C. A I R (Vol 12) 1925 Lah 209 : 5 Lah 492 : 6 L L J 538 : 85 Ind Cas 200 (DB).

——S. 22 (4) — Implied extension — Acceptance of security bond.

The mere fact that a Court receives, attests and places on the record a security bond filed after the date fixed by the Court for putting it in, does not by implication extend the time within which the security was to be furnished, and in such a case the plaint should be rejected under S. 22 (4). AIR (Vol 12) 1925 Lah 209 : 5 Lah 492 : 6 L L J 538 : 85 Ind Cas 200 (DB).

——S. 22 (4) — Interpretation—'Shall be rejected'—Meaning.

The phrase "his plaint shall be 'rejected' " read with the provision as to an extension of time means that the plaint shall be rejected if the Court should not deem it proper to allow further time and though the Court may not extend time suo motu it should not, all the same, act with such celerity in rejecting the plaint as not to allow the plaintiff even a moment for reflection or action. AIR (Vol 10) 1923 Lah 643 : 5 L L J 454 : 78 Ind Cas 61 DB).

——S. 22 (5) (b)—Extension of time.

Had the Legislature intended to empower the Court to extend time under sub-s (5) (b) of S. 22, it would have conferred this power in explicit terms as it had done in sub-s. (4). The omission cannot be due to inadvertence as the Legislature was alive to the importance of the question Consequently, the Court has no power to extend the time once fixed by it under sub-s. (5) (b) of S. 22. AIR (Vol 25) 1938 Lah 606 : 40 P L R 907 : ILR (1938) Lah 598 : 179 Ind Cas 110 (DB).

——S. 22 (5) (a) — Plaintiff can withdraw deposit without leave of Appellate Court and yet prosecute appeal—On object on of vendee Appellate Court can ask him to redeposit the amount. AIR (Vol 22) 1935 Pesh 143 (DB).

——S. 22 (5) (1) and (2) — Object and scope—Withdrawal of deposit after decree - Effect.

The word "so" in clause (a) refers to the preceding section and in the case of an appeal obviously relates to an action taken by an Appellate Court under sub-s. (2). The object of an order under S. 22 (1) is to guarantee vendee against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree the need for a deposit no longer exists so far as the trial Court is concerned. No doubt such deposits are available for the discharge of costs [S. 22 (3)] but such satisfaction is n t the raison d'etre of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind. AIR (Vol 11) 1924 Lah 68 : 79 Ind Cas 448 (DB).

——S. 22 (5) (a) — Withdrawal of deposit—Dismissal of suit.

Where, in a pre-emption suit the money deposited by the plaintiff is withdrawn, the suit is liable to be dismissed. AIR (Vol 7) 1920 Lah 46 : 7 P W R 1920: 54 Ind Cas 268.

—S. 23

——S. 23 — S. 23 is complementary to S. 14. AIR (Vol 28) 1941 Lah 433 : 43 P L R 531 : I L R (1942) Lah 155 : 197 Ind Cas 227 (FB).

—S. 24

——S. 24 — Sale to non-agriculturist—Effect—Right of pre emption.

M mortgaged a plot of land to B. After M's death his widow K sold the land to the mortgagee B. M's reversioners brought a suit impeaching the alienation and to get funds for the litigation they entered into an agreement with L and S on 24th June 1897, in pursuance of which half the land was to be given to L and S in the event of success. The reversioners succeeded and L and S obtained possession of the land in June 1921. C sought to pre-empt the land.

Held, that even if the transaction of 24th June 1897 by the reversioners was only an agreement to sell and not a sale, the sale took place on the date when L and S took possession of the land and as on that date 'the Punjab Land Alienation Act was in force and as L and S were not members of agricultural tribe, the sale to them by reversioners of M who were members of agricultural tribe could not take place. A suit for pre-emption in respect of such sale was, therefore, liable to be dismissed under S. 24, Punjab Pre-emption Act. 27 P L R 1906, Diss. from. A I R (Vol 17) 1930 Lah 140 : 30 P L R 747 : 121 Ind Cas 72 (DB).

——S. 24—Sale opposed to Alienation of Land Act—Effect.

Where a sale is opposed to the Alienation of Land Act a suit for pre-emption in respect of the sale is liable to dismissal, under S. 24 of the Pre-emption Act. A I R (Vol 4) 1917 Lah 361 : 124 P R 1916 : 37 Ind Cas 763 (DB).

—S. 25

——S. 25 Vendor selling property belonging partly to himself and partly to pre-emptor — Suit for pre-emption—Price to be paid.

The right of pre-emption is a right of substitution. Hence, where a vendor sells property which only partly belongs to him, the rest being the property of the pre-emptor himself the pre emptor can sue for pre-emption in respect of property belonging to the vendor and for possession on the basis of title to the property belonging to himself but included in the sale by the vendor subject to the condition that he must pay the full price paid by the vendee. A I R (Vol 32) 1945 Lah 11 : 46 P L R 341 : 218 Ind Cas 110 (DB).

——S. 25—In a suit for pre-emption when the Court finds that the price had not been paid or fixed in good faith the Court should proceed to consider the market value of the property in dispute. AIR (Vol 20) 1933 Lah 332 : 34 P L R 199 : 144 Ind Cas 306 (1).

——S. 25 — Good faith—Question of market value—When material.

Under S. 25 the Court has to determine whether the price has been fixed in good faith, or paid. It is only if it is found that the price was not fixed in good faith or paid that the market value is to be fixed as the price.

The Court is debarred from going into such questions as fancy price source of the purchase money, etc., if the price has been fixed in good faith or paid. A vendee can pay a fancy price out of all proportion to the real price if he so wishes. The only question arising in the first instance is : Was the price paid? The fact that the price paid differed very substantially from the market value would not lead to the inference that the price was not paid. A I R (Vol 14) 1927 Lah 878 : 9 L L J 417 : 104 Ind Cas 318 (DB).

——S. 25 — Good faith - Meaning of—Paying more than market value to deter pre-emptors.

The words "in good faith" in S. 25 do not cover the word' paid' so that where final payment is proved, the question of good faith need not be discussed. In order to deter pre emptors a purchaser may pay more than the market value of the property purchased. AIR (Vol 5) 1918 Lah 215 : 2 P R 1918 : 138 P L R 1917 : 67 P W R 1917 : 39 Ind Cas 735

——S. 25 (2), Proviso — The property sought to be pre-empted was stated to be in the sale-deed, of the value of Rs. 10,000. The consideration included an

item of Rs. 7,600 due to an old debt, out of which Rs. 2,600 was stated to be interest. The Commissioner found the market value of the property to be Rs. 7 500 :

Held, that the amount due on the old debt was not greatly in excess of the market value of the property and Proviso to S. 25 (2) had no application. AIR (Vol 26) 1939 Lah 59 : 41 P L R 369 : I L R (1939) Lah 159 : 182 Ind Cas 563 (DB).

——S. 25, proviso—Payment by redemption of debts —Determination of market value—Appeal, court-fee.

When a decree for pre-emption is passed and the vendee appeals, if he challenges the right of the pre-emptor to bring the suit, he has to pay only the same court-fee as that paid by the pre-emptor, namely, on ten times the land revenue, even though the challenge is a complete formality and not intended to be pressed.

Where a vendee pays by redemption of debts and not in cash, the proviso to S. 25 applies and the market value is to be ascertained, though the option described in the section might or might not be given. AIR (Vol 18) 1931 Lah 490 : 131 Ind Cas 751 (DB).

—S. 26

——S. 26—Price representing old debt—Procedure.

Where the sale price represents mainly old debts which greatly exceed the market value of the property the Court should fix the market value as the price and may put the vendee to the option specified in the proviso. A I R (Vol 11) 1924 Lah 716 : 6 L L J 295 : 83 Ind Cas 1042.

—S. 27

——S. 27—Determination of market value.

If a portion of the entire area sold is pre-emptible, then it is the real market value of that portion that is to be determined, and it is not fair to work out the value of the portion according to the total price paid for the whole area. AIR (Vol 16) 1929 Lah 140 : 112 Ind Cas 452.

—S. 28

——S. 28—Scope.

In view of the provisions of S. 28, it is not correct to say that if a person having a right of pre-emption under S. 15 (a) or (b) seeks to exercise it by suit, a person entitled to pre-empt under S. 15 (c) would have no right at all. AIR (Vol 31) 1944 Pesh 31 : 215 Ind Cas 170 (DB).

—S. 28-A

——S. 28-A—Scope—Vendee's allegation of improved status not challen ed by pre-emption suit—Plaintiff, if should be non-suited.

S. 28-A of the Punjab Pre-emption Act specifically provides for the case in which a vendee, who relies on improvement of status pendente lite, in case he loses the land on which his improved status depends, as a result of being pre-empted, is non-suited in respect of his plea of improved status. There is no corresponding provision providing for non suiting of the plaintiff in case the vendee's allegation of improved status is not challenged by a pre-emption suit. AIR (Vol 34) 1947 Lah 259 : 49 P L R 14 : 231 Ind Cas 72.

—S. 29

——S 29—Sale—Dispute about validity—Limitation.

A plaintiff in a pre-emption suit could not, for the purpose of bringing his suit within limitation, claim that time should be computed from the date of the decision of previous suit in which the validity of the sale was in question A I R (Vol 6) 1919 Lah 79: 15 P R 1919 : 43 P L R 1919 : 49 Ind Cas 358 (DB).

—— S. 30 — Pre-emption suit prima facie barred by time — Burden of proving that it is within time— Limitation Act, Art 10.

If a suit for pre-emption is prima facie barred by time, the burden lies heavily on the plaintiff to prove that he brought his suit within time, either under Art. 10 of the Limitation Act or under S. 30 of the Punjab Pre-emption Act. AIR (Vol 34) 1947 Lah 322.

——S. 30—Starting point — Agreement to transfer share in immovable property—Agreement registered on one date—Mutation of name effected on another date—Date of mutation.

A mahomedan lady entered into an agreement with certain persons to transfer a share of her immovable property, to which she might become entitled, in consideration for an advance of money required for litigation. The agreement was registered on 29th January 1918. She succeeded in establishing her claim and on 5th December 1921 a mutation was sanctioned by which the particular share was recorded in the name of those persons. On 5th December 1922 M brought a suit of pre-emption.

Held, that the suit was within time, limitation running from the date of the mutation. AIR (Vol 17) 1930 Lah 33 (DB).

—— S. 30—Limitation—Oral sale followed by mutation—Subsequent registered sale—Starting point for limitation.

Where an oral sale is completed and mutation is effected in pursuance of such sale, limitation for a suit for pre-emption begins to run from that date. The fact that subsequently a registered sale-deed is executed does not give a fresh start for limitation under Art. 10 of the Limitation Act, time having once begun to run continues to run. A I R (Vol 14) 1927 Lah 388 : 9 L L J 285 : 28 P L R 192 : 102 Ind Cas 423.

——S. 30—Physical possession—Report to Patwari — If amounts to taking possession.

As the law of pre-emption requires strictly physical possession, S. 30 of the Pre-emption Act is not satisfied by the mere reporting to the Patwari that the vendor has relinquished possession and that the vendee has taken the same up. The reason is that physical possession would be a notice to all would-be pre-emptors of the fact that the enjoyment and possession of the land has changed hands and puts them to enquiry, because physical possession is a thing which can be seen by anybody that wants to do so. But, where symbols are employed, cultivated land may be taken physical possession of symbolically. AIR (Vol 12) 1925 Lah 165 : 82 Ind Cas 203.

——S. 30—Vendee in possession as lessee — Date of mutation.

Where the vendee is already in physical possession as lessee, of the land sold, possession under the sale cannot pass before the mutation is sanctioned. Hence, time for a suit for pre-emption begins to run only from the date when mutation is effected and not before. A I R (Vol 12) 1925 Lah 152 : 78 Ind Cas 57 (DB)

——S. 30—Vendee in possession before sale—Date of mutation.

Where the vendee was already in possession of the land in suit before the sale as a lessee, he should not be deemed in law to have taken possession of the land under the sale when the sale was effected. It is impossible for a person to take physical possession of property of which he has already got the physical possession and consequently time must run from the date of mutation under S. 30 of the Pre-emption Act. AIR (Vol 11) 1924 Lah 695 : 76 Ind Cas 206.

——S. 30—Limitation Act, Art. 10—Vendee already in possession as tenant—Date of mutation.

Where prior to the sale the vendee was already in physical possession of the property sold, as a tenant, and no physical possession could be given to him.

Held, that the subject of the sale did not admit of physical possession and that whether Art. 10 of the

Limitation Act or S. 30 of the Punjab Pre-emption Act is to be applied, the date from which limitation runs is the date when the mutation was effected. AIR (Vol 11) 1924 Lah 394 : 71 Ind Cas 823.

——S. 30—Meaning.

The term "physical possession" used in S. 30 means personal and immediate possession and not merely proprietary possession. Land in possession of tenants is not capable of physical possession. AIR (Vol 10) 1923 Lah 94 : 68 Ind Cas 811.

——S. 30—Sale of undivided share in joint holding—Possession thereof taken—Date of possession.

As a co-sharer in a joint undivided property has a right to every part of that property until partition, what he sells is his share or a fraction of his share in the whole of that undivided property ; in other words, he sells (to the extent of his interest or a portion of his interest therein) the whole property, and if his Assignee takes possession under the sale of any portion of that joint property, time begins to run under the second clause of S. 30 of the Pre-emption Act from the time of such assumption of possession. AIR (Vol 10) 1923 Lah 75 : 68 Ind Cas 895.

——S. 30 — Undivided share of mahal — Physical possession not possible—Date of mutation.

A share of an undivided mahal is not susceptible of physical possession and therefore the time for pre-emption runs from the date of mutation. A I R (Vol 10) 1923 Lah 74 : 68 Ind Cas 906.

——S. 30 — Sale including a share in the Shamilat—Limitation Act, Art. 10.

A suit for pre-emption in respect of a sale including a share in the shamilat is covered by Art. 10 of the Limitation Act and not by S. 30 of the Act. AIR (Vol 5) 1918 Lah 383 : 68 P R 1918 : 158 P W R 1918 : 108 P L R 1918 : 47 Ind Cas 359.

——S. 30 (1)—Pre-emption—Vendor not in exclusive possession.

The vendors sold certain land belonging to them and their nephew, who was a minor, ignoring his rights. The land being free of crop, the vendors stated to the Patwari that they had placed the vendee in possession.

Held, that under the circumstances it must be held that vendee took possession on the date of sale from which period of limitation began to run. A I R (Vol 6) 1919 Lah 426 : 9 P L R 1919 : 52 Ind Cas 48.

PUNJAB PRE-EMPTION (AMENDMENT) ACT (1 of 1944)

——Act is intra vires.

The subject of pre-emption is not one of the items in List II of Sch. VII, Government of India Act, but it is clearly covered by Item No. 21 in List II as a right of pre-emption can well be described as a right, if not in land, certainly over it and further it is a right in connexion with transfer of agricultural land. In List II, Item No. 21 is wide enough to give the Provincial Legislature power to legislate on the matters concerning pre-emption and that being so, Punjab Pre-emption (Amendment) Act (I of 1944) is intra vires the Provincial Legislature. A I R (Vol 32) 1945 Lah 104 : 47 P L R 35 (DB).

NJAB PUBLIC SAFETY ACT (2 of 1947)

——If ultra vires — Government of India Act, Sch. VII, List. II, Item 1.

The Punjab Public Safety Act which authorises an arrest with a view to preventing a person from acting in any manner prejudicial to the public safety, is not ultra vires the Provincial Legislature. The true nature and character of the Act brings it within Item 1, Provincial Legislative List. The expression "public order" in this list must in its context be taken in its comprehensive sense so as to include "public safety", except in so far as preventive detention in Pakistan for reasons of state connected with defence and external affairs is concerned. A I R (Vol 36) 1949 Lah 207: Pak L R (1949) Lah 205: 50 Cr L J 976.

—S. 3.

——S. 3—Arrest of detenu for purposes of interrogation—Legality.

If the real object in effecting the arrest of a detenu is to have him available for interrogation in connection with certain matters which are not then under investigation under the Criminal P. C., and not because the authority directing the arrest feels that the detenu is about to do something prejudicial to public safety or the maintenance of public order, the arrest and subsequent detention of the detenu are both illegal. AIR (Vol 37) 1950 Lah 49: 51 Cr L J 498: Pak L R (1949) Lah 497 (DB).

——S. 3 — Official record of arrest — Recital in—Presumption—Nature of.

An official record which recites that the authority which directed the arrest of a detenu was satisfied that it was necessary to arrest him with a view to preventing him from acting in a manner prejudicial to the public safety, may give rise to the presumption that the detenu was arrested for the reason stated therein. But the presumption is not one of law and the Court need not raise it in all cases. Further, the presumption if raised is rebuttable by proof to the contrary. A I R (Vol 37) 1950 Lah 49: 51 Cr L J 493: Pak L R (1949) Lah 497 (DB).

——S. 3 — Additional District Magistrate — If duly authorised to act under.

Section 3 of the Punjab Public Safety Act contemplates the conferment of power as officers other than the District Magistrate. So an Additional District Magistrate can be authorised to act under the section. AIR (Vol 36) 1949 Ajmer 61 : 1949 A M L J 49: 51 Cr L J 227.

——S. 3 — Detention of members of Association declared unlawful—Propriety.

Where the only charge against a person is that he is a member of an association which has been declared to be unlawful, the appropriate course for the Government to adopt is to put him on his trial in a Court of Law on such charge. Where, however, an association has been declared to be unlawful by reason of the prejudicial activities of its members and any members of such association are reasonably believed to have themselves participated in such activities, it is not objectionable to use against such persons the emergency powers of the executive under S. 3 of the Punjab Public Safety Act for the prevention of such activities. AIR (Vol 36) 1949 E P 130: 50 P L R 306: 50 Cr L J 370 (DB).

——S. 3 — Whether properly extended to Delhi Province.

The Punjab Public Safety Act was properly extended to the Province of Delhi with effect from 7th September, 1947. AIR (Vol 36) 1949 E P 130: 50 P L R 306: 50 Cr L J 370 (DB).

——S. 3—Acts prejudicial to public safety — Dissuading persons from joining Pakistan army —Dissuading Government servants from taking oath of loyalty.

The activities of a person in dissuading persons from joining the Pakistan armed forces, and dissuading Government servants from taking an oath of loyalty to the Pakistan Government until they are assured that the Pakistan constitution would be based on Islamic laws, are prejudicial both to the maintenance of public order and public safety. A I R (Vol 36) 1949 Lah 207: Pak L R (1949) Lah 205 : 50 Cr L J 976.

——S. 3—Order of detention under — Validity—Presumption of good faith and of compliance with requirements of law.

Where the Governor who is the Provincial Government in S. 93, Government of India Act, regime, says that he is satisfied, his order is sufficient prima facie proof that he has acted lawfully and that the detention of the person detained under the order is not illegal, because in the absence of proof to the contrary, credit should be given to public officers who have acted prima facie within the limits of the authority for having done so with honesty and discretion.

Where an article by a newspaper reporter was published in a newspaper on a certain day and on the same day the Governor issued an order for his arrest under S. 3 and the detenu, who applied under S. 491 Criminal P. C., alleged in an affidavit that the order was not made in good faith because of this fact:

Held that the fact was not sufficient to rebut the presumption of good faith which had arisen and therefore did not necessitate the filing of a counter affidavit. AIR (Vol 35) 1948 Lah 87.

——S. 3—Arrest and detention under—Conditions of legality — Duty of prosecution to prove facts raising presumption of legality — Application under S. 491, Criminal P. C. – Burden of proof—Non-production of record of official act—Effect.

Every arrest or detention is illegal unless authority for it is shown by the arresting or detaining officer. Where an application is made to the High Court under S. 491, Criminal P. C., on behalf of a person arrested and detained under S. 3 of the Punjab Public Safety Act, the High Court has to issue a rule requiring the Crown to show the authority for the arrest and detention. If the Crown wants to maintain the legality of the arrest and detention in question, it is for the Crown to produce before the Court a record of the official act containing a recital that the authority arresting or directing the arrest was satisfied that it was necessary to arrest the person with a view to prevent him from acting in a manner prejudicial to the public safety or the maintenance of public order. What is questioned in such cases is the original arrest and therefore the order of committal to custody cannot raise any presumption in favour of the original arrest. If only an order of detention under S. 3 (2) or an affidavit of the officer who arrested the detenu is produced, the applicant is entitled to require the attendance of the officer arresting or directing the arrest of the detenu with a view to cross-examining him in regard to the contents of the affidavit, as only after such cross-examination can the Court be in a position to determine whether the arrest was or was not within the limits of S. 3 (1) of the Act. The affidavit itself is not the record of an official act.

The original onus being on the Crown to show that the applicant had been arrested with a view to preventing him from acting in a manner prejudicial to the public safety, it is for the Crown to produce the official act, namely an order by the authority concerned, reciting that he was satisfied that the detenu was acting or about to act in a prejudicial manner and that with a view to prevent him from acting in a prejudicial manner, he has ordered his arrest and detention. The moment this order is produced the presumption arises that what is stated in the order was on the face of it correct, and the condition precedent to the arrest was fulfilled. This presumption cannot arise where no proper record of the official act of arrest is made, or if made, does not contain the necessary recital. If a proper record is produced, the necessity for the attendance of the authority in Court for cross-examination disappears. The applicant has then to show that the recital in the record as to the satisfaction of the authority was wrong and that the detention had been ordered with some ulterior motive.

When no such record is produced, and the officer arresting or ordering the arrest does not, in his examination in Court, state that he was personally satisfied that the detenu was acting or about to act in a prejudicial manner, the detention must be held to be illegal, and the detenu ordered to be released and set at liberty. A I R (Vol 35) 1948 Lah 84 : 49 Cr L J 156 (DB).

——S. 3 (1) and (4)—Scope and effect — Detention—Extension of period—Recommendation for — Acceptance by same individual acting in capacity to Chief Commissioner—Legality of.

The provisions of S. 3 (1) and 3 (4) of the Punjab Public Safety Act do not envisage a procedure by which the same individual can act in the dual capacity of District Magistrate and Provincial Government, nor is such a procedure in keeping with the spirit of the Act. Where the District Magistrate ordering detention under S. 3 (1) makes a recommendation to the Chief Commissioner (Provincial Government) that a detenu, under detention may be kept in custody under further orders, and subsequently the same individual who as District Magistrate made the recommendation acts as the Chief Commissioner and accepts the recommendation, and passes an order authorising the continuance of the detention of the detenu until further orders, the order so made is not a valid and proper order, as it violates the spirit and the principle underlying the provisions of S. 3 (4), and the detention must be held to be wrong and improper. A I R (Vol 36) 1949 Ajmer 58: 1948 A M L J 22: 51 Cr L J 90.

——S. 3 (1)—Scope — Detenu already in custody — Fresh arrest and detention under Act — If necessary for validity.

Where a detenu is already in custody there is no need to physically re-arrest him under the Act and place him under custody again. The mere fact that the initial order of arrest and detention was not made under the Act, would not make the detention wrong and illegal. AIR (Vol 36) 1949 Ajmer 58: 1948 A M L J 22: 51 Cr L J 90.

——S. 3 (1) — Notification dated 2nd July 1947 — Superintendent of Police, C. I. D. — Power of arrest —Punjab Police Rules, Rr. 1-8.

The exercise of the powers under S. 3 Punjab Public Safety Act, by Superintendents of the C. I. D who have jurisdiction throughout the Province, is clearly envisaged by the Notification, dated 2nd July, 1947, issued by the Punjab Government under S. 3 (1) of the Act. A Superintendent of Police does not cease to be a Superintendent of Police because he is serving the C. I. D. branch of the Police Department. Rules 1-8 of the Punjab Police Rules, which lays down that the Superintendent of Police is the executive head of the District Police Force, does not contain an exhaustive definition of "Superintendent of Police." AIR (Vol 36) 1949 Lah 207: Pak L R (1949) Lah 205: 50 Cr L J 976.

——S. 3 (1) — Detention order on mere police report Impropriety.

It can never have been the intention of the Legislature that persons should be clapped in jail on vague reports of Police Officers. The District Magistrate should pass a formal order under S 3 (1) of the Punjab Safety Act after scrutiny of the Police report. 1948 A M L J 11.

——S. 3 (1) — Order under, depriving person of his liberty—Contents.

When a person is deprived of his liberty under an order of the District Magistrate under the Punjab

Public Safety Act, 1947, it should be clear from the wording of the order that it was passed after careful and deliberate consideration and that the satisfaction was arrived at after weighing and considering the material that was available to the arresting authority. 1948 A M L J 7.

——S. 3 (1)—Order of arrest and detention—Recital that officer arresting was satisfied about the necessity for arrest — Sufficiency — If can be considered or gone into by Court in application under S. 491, Criminal P. C.

In determining whether an order of arrest and detention under S. 3 of the Punjab Public Safety Act, 1947, was legal or regular, the Court is not to substitute its own judgment for the judgment of the arresting officer, who is personally satisfied as to the necessity for the arrest of the detenu; nor can the Court go into the question whether the grounds on which the arresting officer acted were reasonable or sufficient, inquiry into any such question being barred. The Court has only to read the mind of the arresting officer, and if it can accept that officer's averments that he was satisfied that it was necessary to arrest the detenu with a view to preventing him from acting in a manner prejudicial to the public safety, it must hold the detention legal and dismiss the application by the detenu under S. 491, Criminal P. C., however poor illogical or absurd the grounds on which the officer acted may be. A I R (Vol 35) 1948 Lah 84 : 49 Cri L J 156.

——S. 3 (2)—Order of detention — Proper authority to make.

According to the provisions of sub-s. (2) of S. 3 of the Punjab Public Safety Act it is the authority who reports the arrest to the Provincial Government that can make an order committing the person arrested to such custody as the Provincial Government may specify. When it is made by a different person the detention is illegal. A I R (Vol 36) 1949 E P 17 : 50 P L R 76 : 49 Cri L J 631.

——S. 3 (4)—Special order—Necessity.

Whenever a detention beyond one month is considered necessary, it must be set out in a special order. Mere signature to a recommendation for detention beyond one month is not an acceptance of the recommendation. 1948 A M L J 7.

——S. 3 (5) — Extension of period of detention — Power of Provincial Government.

Under S. 3 (5) of the Punjab Public Safety Act, it is open to the Provincial Government to extend the period of detention from time to time up to the maximum period of six months. A I R (Vol 36) 1949 E P 130 : 50 P L R 306 : 50 Cri L J 370 (DB).

—S. 4.

——S. 4 and Criminal P. C. (V of 1898), S. 10 (2) — Power of Additional District Magistrate to pass order of detention under Punjab Public Safety Act.

An Additional District Magistrate is empowered to pass an order under S. 4 of the Punjab Public Safety Act. A I R (Vol 37) 1950 Ajmer 12 : 51 Cri L J 771.

—S. 35.

——S. 35 — Evidence recorded by Sessions Judge as required by S. 356, Criminal P. C. — Legality of trial.

Section 35, Punjab Public Safety Act, does not say how the evidence should be recorded but merely states that "in all cases the procedure prescribed for the trial of summons cases by Chap. XX of the Code, shall be adopted." A trial is not illegal if the Sessions Judge records the evidence, not as required by S. 355 but as prescribed by S. 356, Criminal P. C. A I R (Vol 37) 1950 Lah 123 : Pak L R (1950) Lah 209 : 51 Cri L J 1022 (DB).

—S. 37.

——S. 37—Evidence recorded by committing Magistrate — Use under S. 288, Criminal P. C., or under S. 33, Evidence Act—Permissibility.

If the Punjab Public Safety Act had been extended to a district at a time when the accused persons were produced before the committing Magistrate in that district, the Committing Magistrate could have no legal authority, by virtue of S. 37 of that Act, to record the statements of witnesses and any such record could not be utilized either under S. 288, Criminal P. C. or S. 33, Evidence Act.

If however the statements of witnesses were recorded by the Committing Magistrate before the extension of the Act to the district, there could be no legal objection to their being read as evidence at the Sessions trial under S. 33, Evidence Act. A I R (Vol 37) 1950 Lah 34 : Pak L R (1950) Lah 121 : 51 Cri L J 419.

——S. 37 (1) — Case made over by Magistrate to Sessions Court — District ceasing to be dangerously disturbed area before trial — Procedure to be followed.

When a case is made over by a Magistrate to the Court of Session under the provisions of S. 37 (1) of the Punjab Public Safety Act at a time when the district is declared to be a dangerously disturbed area by a notification issued by the Provincial Government under S. 2 (b), and before the trial in the Court of Session actually commences that notification is cancelled the district ceases to be a dangerously disturbed area, the Sessions Judge should continue with the trial under the provisions of S. 37 (1) of the Act, and the trial is not to be governed by the ordinary provisions of Criminal Procedure Code regarding sessions trials. The Magistrate having duly made over the case to the Sessions Judge in accordance with the provisions of the law then in force and the Code containing no provision for the remission of the case by the Sessions Judge to the Magistrate with a direction for taking commitment proceedings under Chap. XVIII, the Sessions Judge cannot be deemed to have any power to make an order to that effect. AIR (Vol 37) 1950 E P 25 : 51 P L R 317 : 51 Cri L J 459 (FB).

PUNJAB PUBLIC SAFETY ORDINANCE (14 of 1946)

——If ultra vires.

The Punjab Public Safety Ordinance is not ultra vires the powers of the Governor and was properly promulgated. (1948) 50 P L R 34 (FB).

—S. 3.

——S. 3 — Arrest by Provincial Government — Its power of detention.

Per Abdul Rashid C. J. and Munir, J. :—The Provincial Government has been given the power to arrest under sub-s. (1) of S. 3 of the Public Safety Ordinance but it has not been given the power to detain after arrest, as the only provision for detention in custody made in sub-s. (2) of that section only applies to persons arrested by an authority other than the Provincial Government. The power to arrest given to it cannot be interpreted to include the power to detain for an indefinite period, although it may connote a power to detain for a reasonable period depending upon the particular circumstances of each case. While every arrest necessarily implies some detention, committal to another custody for a definite or indefinite period and detention in a particular place are not necessary incidents or consequences of the power to arrest. Section 3 of the Ordinance contains a hiatus and the intention to authorise the Provincial Government to commit a person arrested by it to custody has not been expressed. Therefore, a warrant under which a person arrested under the orders

of the Governor of the Punjab has been committed by him to the custody of the officer in charge of the jail until further orders, is unauthorised and the detention of the arrested person in Jail is illegal.

Per Ram Lal, J., Contra:—The term "arrest" must be construed to include the power of detention and the Provincial Government is entitled to detain the person arrested by it in such custody as it thinks fit up to a period of 6 months which is the duration of the ordinance. (1948) 50 P L R 34 (FB).

——S. 3—Order of detention—Sufficiency of grounds —Power of Court to examine.

It is not open to the law Courts to examine the sufficiency of the grounds on which an order of detention is based. (1948) 50 P L R 34 (FB).

PUNJAB PURE FOOD ACT (8 of 1929)

—S. 7.

——S. 7—Inspector under Act taking possession of tins of ghee suspecting contents to be adulterated — Ghee found by Magistrate not adulterated and release of tins ordered and its return directed — Inspector destroying tins—Suit to recover tins or their value :

Held, the detention of the tins by the Inspector after the order of release by the Magistrate was unlawful :

Held, further that since the Magistrate had found in his order directing the return of the tins that the ghee was not adulterated, the Inspector could not be said to have destroyed the tins in the belief that he was authorised to do it according to the Pure Food Act which contained no provision for the destruction of goods after they were directed to be returned.

Consequently, the suit to recover the tins or the value thereof was governed by Art. 49 and not by Art. 2, Limitation Act and the limitation began to run from the date of the order of release by the Magistrate :

Held, also that the suit for the recovery of tins or their value lay against the Government and not against the Municipality. AIR (Vol 29) 1942 Pesh 57: 202 Ind Cas 218.

—S. 10.

——S. 10 — Whether procedure under S. 10 was followed—Presumption as to, if can be made.

The presumption under S. 114, Illust. (e), Evidence Act, applies to procedure only there being no presumption that the law has been observed. When the Food Inspector has deposed in evidence that he took samples of ghee from the shop of the accused (out of which two samples were found to be adulterated), the Court is entitled to presume under S. 114, Illus. (e), Evidence Act, that the procedure adopted by the Inspector under S. 10 was correct, especially when the accused, so far from objecting to the procedure, accepted it in requesting that the samples of ghee should be sent for further analysis to the Chemical Examiner to Government Bengal, at Calcutta, as provided by the proviso to Cl. (5) of S. 11 of the Act. A I R (Vol 31) 1944 Lah 420 : I L R (1944) Lah 240:46 Cri L J 135:216 Ind Cas 190 (DB).

—S. 11.

——S. 11—Whether food is adulterated or not is for Court to decide and not for Public Analyst. A I R (Vol 29) 1942 Pesh 47 : 43 Cri L J 728 : 200 Ind Cas 880.

—S. 12.

——S. 12—Possession of ghee.

Where a halwai who does not sell ghee as such but sells sweetmeats, is found in possession of ghee below standard, he comes under S. 12 of the Act. A I R (Vol 24) 1937 Lah 702 : 39 P L R 459 : 38 Cri L J 1026 : 171 Ind Cas 16.

—S. 13.

——S. 13 — No proof of sale of adulterated milk — Conviction—Legality.

There is nothing in the Punjab Pure Food Act which makes the act of exposing adulterated milk an offence. So in the absence of a proof that milk so exposed was sold, there can be no conviction under S. 13 of the Act. A I R (Vol 37) 1950 Ajmer 47 : 51 Cri L J 1296.

——Ss. 13 (1) (a), 16 (3) (i)—Adulterated ghee—Commission agent selling or exposing for sale such ghee.

The definition of "sale" read with the explanation in S. 16 is so widely worded that it covers not only actual sale but almost any transaction which a seller, be he a retailer or a commission agent, undertakes provided only that the ghee is intended "for sale for human consumption or use." Once a commission agent receives for sale or has in his possession for sale or exposes for sale or sends or delivers for sale or causes or allows to be sold, offers or exposes for sale, ghee, which is proved to be adulterated, he commits an offence under the Act. AIR (Vol 26) 1939 Lah 14 : 179 Ind Cas 1008, Overruled. AIR (Vol 31) 1944 Lah 420 : ILR (1944) Lah 240 : 46 Cri L J 135 : 216 Ind Cas 190 (DB).

——S. 13 (1) (a) — Conviction under — When can be had.

For a conviction under S. 13 (1) (a), it is essential to prove inter alia that the ghee was sold. Conviction cannot be based on the fact that the ghee was exposed for sale. AIR (Vol 28) 1941 Lah 158 : 43 P L R 93 : 42 Cri L J 523 : 194 Ind Cas 160.

——S. 19.

——S. 19—Inspector not authorised to lay complaint by Director of Public Health — Conviction on such complaint, if can stand.

It is necessary that the Inspector should be authorized by the Director of Public Health for laying complaints under the Pure Food Act and a conviction on a complaint without such authorization cannot stand. A I R (Vol 22) 1935 Pesh 24 : 36 Cri L J 624 (1) : 154 Ind Cas 873 (1).

PUNJAB REDEMPTION OF MORTGAGED LANDS ACT (2 of 1913)

—S. 4.

——S. 4 - Redemption—Time for—Deed providing for redemption at any time in a month of Jeth—Right to redeem when accrues—Limitation Act, Art. 148.

It is a well-known principle of law that in the absence of a stipulation to the contrary the right to redeem and the right to foreclose are co-extensive. Where the deed of mortgage does not specify the number of years for which the mortgage is to be in force, but it empowers the mortgagor to redeem the property at any time in a month of Jeth on payment of the mortgage money, the mortgagor is at liberty to repay the money on the 1st day of Jeth immediately succeeding the date of the agreement and to redeem the mortgage. The right to redeem, therefore accrues on that date; an application for redemption must therefore be presented before the expiry of sixty years from that date, under Art. 148, Limitation Act. AIR (Vol 36) 1949 E P 389.

——Ss. 4, 13 — Petition under S. 4 dismissed as premature—S. 13, if bars another application.

Per Full Bench; Din Mohammad, J. contra.—No doubt a petition under S. 4 for redemption of mortgage can succeed only if the conditions laid down in the section are found to exist. But if the Collector finds that one or other of these conditions is non-existent, (e. g., the petition is premature) and for these reasons dismisses the petition, his order is nonetheless "under the Act" and S. 13 would clearly bar another application under the Act.

Per Din Mohammad, J.—A petition, which is presented before the principal money becomes payable cannot, in any circumstances, be said to have been 'duly presented' and no process under S. 5 can, in

such circumstances, issue. In this view of the case, the first application would be no bar to the presentation of the second applicatian under S. 13 of the Act. AIR (Vol 30) 1943 Lah 176 : 45 P L R 292 : ILR (1944) Lah 1 : 208 Ind Cas 441 (FB).

——S. 4—Scope of.

The provisions of S. 4 are mandatory. According to it, the deposit must be made at least before a suit for redemption is barred by time and Court's inherent powers cannot be invoked for extending limitation. Where, therefore, an application for redemption was presented to the Collector within limitation but the deposit was made after the limitation had expired, the redemption could not be allowed. I L R (1938) Lah 498 : 40 P L R 1062.

—S. 6.

——Ss. 6 (a) and (b) and 11—Order for redemption—Remedy of aggrieved party.

A mortgagee aggrieved by an order of redemption passed by the Collector under the Punjab Redemption of Mortgages Act, 1913, may sue for a declaration that there is a further charge on the mortgaged land and is not bound to sue for recovery of the additional mortgage money to which he claims to be entitled and S. 42 of the Specific Relief Act is no bar. AIR (Vol 5) 1918 Lah 391 : 85 P R 1917 : 157 P W R 1917 : 5 P L R 1918 : 39 Ind Cas 451.

—S. 9.

——S. 9 — Powers of Collector — Procedure as to enquiry or dismissing petition — Exercise of discretion.

In the event of the mortgagee joining issue with the mortgagor petitioner, it is not incumbent on the Collector to make an investigation into the dispute. He may, if he so likes, make a summary enquiry and give his finding as a result of it, or he may refuse to do so and dismiss the petition forthwith. No particular grounds are specified in the section on which alone he might adopt the latter course. His discretion in this matter is not limited in any way but is absolutely unfettered. He may stay his hands for the simple reason that difficult questions of fact and law are involved and on this ground alone, he might dismiss the petition. All that is necessary is that he should record his reasons for the course adopted. A I R (Vol 14) 1927 Lah 461 : 102 Ind Cas 418 : 28 P L R 289.

—S. 10.

——See Punjab Redemption of Mortgages Act, 1913, S. 12.

—S. 11.

——S. 11 — Limitation for suit — Starting point — Order dismissing petition.

Where the mortgagors applied to the Collector for redemption of their mortgage on payment of a certain sum under S. 4 but the Collector ordered a higher sum to be paid by a certain date and on failure dismissed the application, the suit for redemption brought a year after the order of the Collector is barred as the order of the Collector should be set aside within a year under S. 12. The cause of action is not the original contract but the order of the Collector which aggrieved them. A person who takes advantages of a summary procedure must suffer its disadvantages as well as enjoy its benefits. (1928) 114 Ind Cas 447 : 10 L L J 514.

——S. 11—Summary proceedings—If bar to suit for declaration.

Where the mortgagee was in possession of the land and in an application for redemption under Act II of 1913, the Revenue Court passed an order for redemption on payment of Rs. 400, whereupon the plaintiff sued for a declaration that the charge on the land was not Rs. 400 but Rs. 1,338 and he was entitled to retain possession until that sum was paid.

Held, the summary proceedings taken by the Revenue authorities cannot affect the rights of the parties and a suit for declaration of charge and for possession until payment of the charge money is thus virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances the question of limitation does not arise and the provisions of Order 2, Rule 2 are inapplicable. AIR (Vol 10) 1923 Lah 648 : 78 Ind Cas 103 : 4 Lah 346 : 5 L L J 513 (DB).

—S. 12.

——S. 12 — "Dismissal" order — Mere use of word "rejected" is immaterial.

Per Tek Chand J. — The words 'rejected' 'dismissed' 'consigned to the record room', etc., are used inter-changeably in reference to applications, appeals, and other proceedings, and, their effect has to be ascertained with reference to the attendant circumstances and not merely from the form of the order. If the order is clearly one of 'dismissal', the mere use of the word 'rejected' at the end does not make any difference. AIR (Vol 30) 1943 Lah 176: 45 P L R 292 : ILR (1944) Lah 1 : 208 Ind Cas 441 (FB).

——S. 12 — Orders under S. 12 are not confined to those made on merits — Order dismissing petition as premature — Suit after 12 months does not bar right to redeem.

Per Full Bench. Din Mohammad, J. contra. — The orders contemplated under S. 12 are not confined to those orders only which are made on the merits of the case but cover other orders passed under Ss. 6 to 11 of the Act according to their nature and character regard being had to the substance of the order and not merely to its form. Where the Collector has dismissed the petition for summary redemption on the ground that the principal money has not become payable, the omission to sue under S. 12 within the period prescribed by Art. 14, Limitation Act, does not bar the right of the mortgagor to redeem the mortgage. A I R (Vol 30) 1943 Lah 176 : 45 P L R 292 : ILR (1944) Lah 1 : 203 Ind Cas 441 (FB).

——S. 12 — Disposal of petition without touching merits, whether warranted by Act.

Under S. 12, a party against whom an order of dismissal is made under any of the sections of the Act enumerated there, is bound to institute a suit to establish his rights in respect of the mortgage within one year under Art. 14, Limitation Act and if he fails to do so, his right is lost for ever.

The law contemplates the disposal of petitions under the Redemption of Martgages Act on grounds other than those which touch the merits of the petition and it empowers the Collector to dispose of those petitions on those grounds. For a Collector, therefore to dismiss an application on grounds other than the merits is not to refuse jurisdiction inasmuch as this is a manner of exercising jurisdiction permitted by the Act. AIR 1938 Lah 512 : 181 Ind Cas 63, Reversed: A I R (Vol 25) 1938 Lah 638 : 40 P L R 886 : 181 Ind Cas 522 (DB).

——S. 12—Person aggrieved.

Any person against whom any order is made under Ss. 6 to 11, is a person aggrieved within the meaning of S. 12. AIR (Vol 25) 1938 Lah 638 : 40 P L R 886 : 181 Ind Cas 522 (DB).

——S. 12—Co-sharer mortgagors— One co-sharer redeeming whole property — Attempts by the other — Subsequent partition — Other co-sharers' right to possession.

The appellants and the respondent were co-mortgagors. The respondent redeemed to whole land and since then had been in possession to the exclusion of the appellants. The appellants made an infructuous attempt under the Act. When proceedings for the partition of land including this area, commenced be-

tween the parties, the respondent claimed ownership of the area in dispute, mainly contending that the appellants were not entitled under the law to deny his right of ownership. He was referred to a Civil Court :

Held, (i) that the respondent could not, under any circumstances, be deemed to be a mortgagee of the land so as to attract the operation of the Act, his legal position being merely that of a charge-holder ;

(ii) all that the appellants claimed from the Revenue Authorities under the provisions of the Act, was an adjudication of the rights of the co-mortgagors inter se and all that the Revenue Authorities decided was that such complicated questions would be better decided in a regular suit ;

(iii) that no question of adverse possession could arise between the parties, they being co-sharers.

A co-sharer who merely denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of the charge on the property which he had defrayed, cannot be considered to hold "adversely" to the others. A I R (Vol 23) 1936 Lah 290 : 37 P L R 103 : 159 Ind Cas 633 (DB).

—— S. 12— Suit under, by person aggrieved by order of Collector to establish his right in respect of the mortgage —Limitation.

A suit under S. 12 instituted by a party aggrieved by an order passed by the Collector under Ss. 6, 7, 8, 9, 10 or 11 of the Act to establish his right in respect of the mortgage is governed by Art. 14, Limitation Act and it makes no difference that the suit is merely a declaratory one and no relief to set aside the order of the Collector has expressly been asked in plaint.

Once a dispute has been raised and decided by the the Collector under the Act, it should not remain in suspense longer than one year, within which the party aggrieved is given the right to go to the Civil Court to have it set aside, and if he fails to do so, the summary order becomes final and conclusive as between the parties. A I R 1933 Lah 648 : 78 Ind Cas 103. Overruled. AIR (Vol 21) 1934 Lah 384 : 15 Lah 389 : 36 P L R 337 : 149 Ind Cas 661 (FB).

—— Ss. 12, 10—Suit under S. 12—Death of one plaintiff—Abatement — Nature of such suit — Applicability of O. 34, R. 1—Burden of proof.

Order 34, R. 1, Civil P. C. is not applicable to a suit by the mortgagees instituted under S. 12 to get rid of the order of a Collector passed under S. 10 directing redemption to take place on payment of a certain sum of money. Each of the plaintiffs aggrieved by the order of the Collector has an individual right to sue to set it aside and the death of one of them does not cause the suit to abate in toto.

In a litigation arising out of proceedings under Punjab Act II of 1913, as in a suit for redemption a mortgagee can put the party who seeks to redeem the mortgage to proof of his title, unless such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny his grantor's title. A I R (Vol 20) 1933 Lah 79 : 34 P L R 149 : 14 Lah 218 : 141 Ind Cas 264.

——S 12—Suit for possession by occupancy tenant— Applicability of S. 12 — Limitation — Jurisdiction to decide status.

During partition of certain shamilat land M in 1893 brought a suit against the co-sharers for declaration that he was occupancy tenant of the land in dispute or, in the alternative was entited to compensation for disturbance. A and F admitted the claim and the Collector gave a declaration as to M being an occupancy tenant of such land as might fall to A and F on partition. The suit was dismissed as against the others. M thus became occupancy tenant of the land allotted to F on partition. Later on in 1895 F mortgaged the land with possession to M. In 1928 the descendants of F obtained redemption and possession of the land under the Punjab Redemption of Mortgages Act (1923). In 1928 M brought suit for possession of the land as an occupancy tenant.

Held, that the suit did not fall under Art. 14, Limitation Act, and was therefore not barred by time. The nature of suit contemplated by S. 12, Redemption of Mortgage Act, was entirely different to that of the present suit. Under S. 12, the suit must relate to rights arising out of or based on the mortgage. The present suit concerned rights created about a year before the mortgage and which established quite a different relationship between the parties. The fact that M, in the redemption proceedings might have and should have set up his occupancy rights as a bar to his dispossession and the Collector notwithstanding such object could and did order his possession could not alter the nature of the present suit and bring it within the purview of S. 12. The Collector's order dispossessed M as mortgagee, and not as an occupancy tenant.

Held further, that the Civil Court had jurisdiction to decide the status of M. M was tenant as his right to possession was declared in 1893 by a Revenue Court and his status was altered by his wrongful dispossession as a mortgagee in 1926 by the order of the Collector under the Punjab Redemption of Mortgages Act. M's status having been determined by the Civil Court in suit qua possession fell under cl. (g), S. 77 (3), and the claim must be heard and determined by a Revenue Court. The decree of the Revenue Court declaring M to be the occupancy tenant of the land in suit must be treated as res judicata on the point and subsequent conduct of either party did not create estoppel or affect the decree in any way. 123 Ind Cas 273 : AIR (Vol 17) 1930 Lah 506.

——S. 12—Suit for redemption of mortgage — Collector's decision not on merits — Applicability of Art. 14.

Where the suit is for redemption and in the orders passed by him under S. 9 the Collector refrained from coming to any decision on the merits of the dispute between the parties, inasmuch as the case is neither in terms nor in effect a suit to set aside the order the case is not governed by Art. 14, Limitation Act. A I R 1927 Lah 461, Reversed. 121 Ind Cas 379 : 30 P L R 440: 11 L L J 431 : AIR (Vol 16) 1929 Lah 513 (DB).

—— S. 12—Collector's order not on merits — Suit for redemption — Setting aside order, if necessary.

Rejection of an application by a Collector under S. 9 without considering the merits of the dispute and after recording the objections raised by the defendants on the ground that the dispute cannot be settled summarily practically amounts to denial of jurisdiction and in order to enable the plaintiff to succeed in his suit for redemption it is by no means necessary to set aside any order passed by the Collector. 121 Ind Cas 379 : 30 P L R 440 : 11 L L J 431: A I R (Vol 16) 1929 Lah 513 (DB).

——S. 12—Person aggrieved, who is.

A applied for redemption of mortgage under S. 4, Act II of 1913, to the Collector. The Collector acting under S. 9 (a) dismissed the application.

Held, that A was a "party aggrieved" by the order of the Collector. 121 Ind Cas 379 : 30 P L R 440 : 11 L L J 431 : AIR (Vol 16) 1929 Lah 513 (DB).

——S. 12—Limitation for suit.

Act II of 1913 is a miniature Code in itself. Section 12 governs all cases in which an order under certain sections (including S. 9) has been passed. The policy of the Legislature is that a person, who chooses to move the Collector under the Act, but fails, cannot be allowed to leave the matter in suspense for a period

which may extend to another 60 years, but that the order is final, except that it is subject to the result of a suit, which he must (if at all) institute within one year of it. 102 Ind 418 : 28 P L R 289 : AIR (Vol 14) 1927 Lah 461.

——S. 12—Person asking for relief—Relief refused.

A person, who asks for a relief, which he is authorized to ask under the Act, but to which his application is refused, must be considered to have suffered a legal grievance and is a person aggrieved. 102 Ind Cas 418: 28 P L R 219: AIR (Vol 14) 1927 Lah 461.

——S. 12—Mortgagor applying under Punjab Act II of 1923—Order passed against him—Limitation.

A mortgagor's right to redeem, which would otherwise be within limitation, is barred if the action is brought later than a year of the date of an order passed to the plaintiff's detriment by the Collector on an application under Punjab Act II of 1923. When an order passed under a special Act is declared by that Act to be conclusive, it cannot be ignored and no relief is open to the aggrieved party unless that order be set aside. An individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits. The suit referred to in S. 12 of the Punjab Redemption of Mortgages Act is a suit to set aside an order of an officer of Government within Art. 14. 88 Ind Cas 945 : 6 Lah 206 : 26 P L R 383 : AIR (Vol 12) 1925 Lah 385 (DB).

——S. 12—Applicability of Art. 14.

Section 12 of Redemption of Mortgages Act II of 1913 merely points out the results which would ensue if the procedure laid down in that section is not followed. In order to ascertain the period of limitation for such a suit it is necessary that reference should be made to the provisions of the Indian Limitation Act and the only Article in that Act under which the suit could fall is Art. 14, which provides a period of one year's limitation from the date the order complained against is passed. 75 Ind Cas 885 : AIR (Vol 11) 1924 Lah 690.

——S. 12—Mortgagee's suit for declaration — Maintainability.

A suit for a declaration only that the mortgagor is not entitled to redeem can be instituted under S. 12, though the mortgagor has obtained possession. 68 Ind Cas 557 : 3 Lah 239 : A I R (Vol 9) 1922 Lah 363 (DB).

——S. 12—Suit by dispossessed mortgagee — Mortgagee dispossessed by Collector — Power of Civil Court to order restoration.

A mortgagee, who has been illegally dispossessed by the Collector, may be restored to the position which he previously occupied, and the provisions of S. 12 are sufficiently wide to allow a Civil Court to right a wrong done by the Collector in the summary proceedings, and if necessary, to restore possession of the land to the mortgagee. 63 Ind Cas 899 : 2 Lah 234 : 95 P L R 1921 : AIR (Vol 8) 1921 Lah 132 (DB).

——S. 12— Collector's order — Effect on rights of parties— Right to remain in possession — Duty to restore benefits.

Proceedings under Act II of 1913 are summary and in a disputed case neither party should be prejudiced by the Collector's act when the matter is later on submitted to the decisions of the civil Courts. A suit under S. 12 of the Act is merely declaratory.

In a suit under S. 12 by a usufructuary mortgagee of the property of a Mahomedan minor from his de facto guardian for declaration of the validity of his mortgage.

Held, that as the minor must before he recovers possession restore the benefits he has derived under mortgage, the mortgagee would be entitled to remain in possession even in case of the invalidity of the mortgage provided the minor is under a duty to restore benefits. 36 P R 1918 : 7 P W R 1918 : 152 P L R 1917 : 44 Ind Cas 219 : AIR (Vol 5) 1918 Lah 348.

—S. 13.

—— S. 13 — Per Full Bench, Din Mohammad, J. contra. — If an application under S. 4 is premature and the Collector dismisses it, the order is "under the Act" and S. 13 bars another application under the Act. A I R (Vol 30) 1943 Lah 176 : 45 P L R 292 : I L R (1944) Lah 1 : 208 Ind Cas 441 (FB).

—S. 15.

——S. 15—Attachment of deposit—When legal.

The provisions of Section 15 of Act II of 1913 are primarily for the protection of the person depositing the money and the intention of the Legislature is that the money deposited under the provisions of this Act should be exempt from attachment in execution of a decree against the depositor. But where the depositor has been given possession of the land, the money becomes the property of the judgment-debtor, and is therefore attachable in execution of a decree against him. AIR (Vol 9) 1922 Lah 290 : 3 Lah 141 : 28 P W R 1922 : 67 Ind Cas 718 (DB).

PUNJAB REGISTRATION OF MONEY-LENDERS' ACT (3 of 1938)

—S. 2.

—— Ss. 2 (8), 3—Applicability—Loan, what is.

In order to be a "loan," as defined in S. 2 (8), it is essential that the advance should be "at interest." An advance of money without interest is, therefore, not a "loan" as defined in Act and the provisions of S. 3 are therefore, inapplicable in such a case, and hence a suit to recover such an advance cannot be dismissed simply because the plaintiff was not registered as a money-lender or that he had not applied for registration or that he did not hold a valid licence. AIR (Vol 29) 1942 Lah 30 : 43 P L R 670 : 198 Ind Cas 263.

—S. 3.

——Ss. 3, 13—Person residing outside Punjab and obtaining decree out of Punjab but seeking to execute decree in Punjab :

Held, that the Act does not apply. A I R (Vol 31) 1944 Lah 129 : 46 P L R 75 : 214 Ind Cas 329 (DB).

——S. 3—Applicability and scope.

The Act applies only to suits instituted after the date on which it came into force.

Where the plaintiff has been registered as a money-lender and holds a license before the passing of the decree, he satisfies the requirements of the law and his suit is not liable to dismissal under S. 3 although the plaintiff had no such certificate at the time of the institution of the suit. A I R (Vol 29) 1942 Lah 298 : 44 P L R 529 : I L R (1943) Lah 84 : 203 Ind Cas 564 (FB).

——S. 3—Applicability.

Section 3 does not apply where there is an advance of money without interest as such advance is not "loan" as defined in the Act. AIR (Vol 29) 1942 Lah 30 : 43 P L R 670 : 198 Ind Cas 263.

PUNJAB REGULATION (17 of 1806)

—S. 7.

—— Ss. 7 and 8—Scope and effect — Mortgagee seeking to enforce forfeiture and possession of the estate —Duty to prove strict compliance with procedure prescribed by law.

A mortgagee suing for possession of the property mortgaged on the ground that he has become the owner thereof under the terms of the conditional sale clause in the deed of mortgage must prove affirmatively that all the conditions prescribed by Ss. 7 and 8 of Regulation XVII of 1806 have been duly fulfilled. He has to prove not only that year of grace

has expired, but the procedure prescribed by law, both preparatory to, and in connection with, the notice of foreclosure has been duly observed. It is only then that he gets the right to enforce forfeiture of the mortgagor's estate. It is not however necessary that the details of the mortgage debt should be specified in the parwana under S. 8 of the Regulation. AIR (Vol 36) 1949 E P 283 (DB).

PUNJAB REGULATION OF ACCOUNTS ACT (1 of 1930)

——Applicability.

Whether when a repayment is made after the commencement of Act I of 1930 in respect of a loan advanced before that Act came into force, the creditor is not required to comply with the provisions of the Act as the Act does not apply in such a case. (1938) 40 P L R 435.

——Applicability.

The Act has no application to a case where no transaction has taken place between the parties relating to the loan in question after the commencement of the Act. AIR (Vol 24) 1937 Lah 16: 38 P L R 944: 164 Ind Cas 844 (DB).

——Notices—Form of.

The object of the Act is to ensure that the accounts are kept in a clear and intelligible manner and that the notices of the balance due are also sent in a similar manner so as to be easily intelligible to the debtor. A mere admission by a debtor on the back of the notices that the statement of account is correct cannot absolve the creditor from his responsibility for keeping accounts and sending notices in the prescribed form. AIR (Vol 24) 1937 Lah 565 : ILR (1938) Lah 310 : 40 P L R 1037 : 174 Ind Cas 930.

——Applicability.

Obiter. — There is no presumption that the provisions of the Act are applicable to every suit for recovery of a loan. (AIR (Vol 23) 1936 Lah 469 : 38 P L R 164 : 160 Ind Cas 883.

—S. 2.

——S. 2—Applicability.

Provisions of S. 2 do not apply where the defendant was a trader at the time of the advance of the loan as well as when the new balance was struck. (1938) 40 P L R 471.

——S. 2 (5) — Plaintiff admitting he had advanced loans to many—Held, he was a 'creditor' within the meaning of S. 2 (5). AIR (Vol 23) 1936 Lah 469 : 38 P L R 164 : 160 Ind Cas 883.

——S 2 (7)—Loan—Sale on credit.

The essential idea of a 'loan' is that cash or something in kind is lent or advanced to another person with the intention that it will be returned, and its equivalent in cash re-paid with interest. A sale on credit is not an advance in cash or kind at interest and is therefore, not a loan, as defined in S. 2 (7). AIR (Vol 26) 1939 Lah 104.

——S. 2 (9)— A "money-lender" does not fall within the definition of a "trader" as given in Act I of 1930. AIR (Vol 25) 1938 Lah 322 : 40 P L R 32 : 177 Ind Cas 824.

—S. 3.

——Ss. 3, 4 (b)—Costs.

Owing to the operation of Act I of 1930, the Court cannot grant costs in any proceeding arising from the suit in which costs could not be granted. Where, therefore, in a suit on a promissory note, the plaintiff did not comply with the provisions of S. 3 :

Held, that he was not entitled to any costs in revision from a decree dismissing his suit, although he succeeded, notwithstanding the objection of the respondent. The ordinary rule as to costs does not apply. A I R (Vol 24) 1937 Lah 58 : 39 P L R 138 : 169 Ind Cas 697.

——S. 3—Costs.

The question of costs in a case covered by the Act stands on a different basis from that of ordinary cases as the Court is bound to disallow costs if the case falls within the purview of S. 3. Court-fee on costs is therefore necessary to set aside the order of costs. AIR (Vol 23) 1936 Lah 469 : 38 P L R 164 : 160 Ind Cas 883.

—S. 4.

——S. 4—Applicability.

Provisions of S. 4 are inapplicable to a case where the defendant is a contractor, and not a money-lender. AIR (Vol 24) 1937 Lah 756 : 39 P L R 974 (2) : 169 Ind Cas 966.

—S. 5.

——S. 5, Proviso — Part payment of debt, whether amounts to fresh transaction.

Mere part payment of a debt does not amount to a "fresh transaction" within the meaning of the proviso to S. 5, Punjab Regulation of Accounts Act, and the provisions of the Act do not become applicable to a loan advanced before the commencement of the Act merely because the debtor repaid a part of the loan after it had come into force. AIR (Vol 26) 1939 Lah 265 : 41 P L R 388 : 184 Ind Cas 164.

——S. 5, Proviso—Fresh transaction.

The mere part payment of a debt does not amount to a fresh transaction within the meaning of the proviso to S. 5 and this is clear from the limitation imposed upon the application of the Act to the transaction which has taken place after the commencement of the Act. AIR (Vol 24) 1937 Lah 16: 38 P L R 944: 164 Ind Cas 844 (DB).

——S. 5, Proviso—Retrospective effect.

The Act has no retrospective effect as it is clearly provided in S. 5 that the provisions of the Act shall not apply to any loan advanced before the commencement of the Act. AIR (Vol 24) 1937 Lah 16 : 38 P L R 944 : 164 Ind Cas 844 (DB).

PUNJAB RELIEF OF INDEBTEDNESS ACT (7 of 1934)

——Applicability—Decree passed by Court in Sind—Decision of Punjab Debt Conciliation Board—Whether can be pleaded as discharge of decretal debt.

The Punjab Relief of Indebtedness Act has no application to the Province of Sind, and a decision of a Debt Conciliation Board of the Punjab cannot be pleaded as a discharge of a debt decreed by a Court of competent jurisdiction in Sind. AIR (Vol 35) 1948 Sind 129 (DB).

——Retrospective effect.

The enactment of the Act subsequently cannot revive a right which has already been extinguished. A I R (Vol 23) 1936 Lah 842 : 39 P L R 6 : 165 Ind Cas 358 (1).

——S. 5 — (Amendment by Act XII of 1940) — Retrospective effect.

Section 6 of Act XII of 1940 has made the application of S. 5 retrospective. A I R (Vol 33) 1946 Lah 6 : 47 P L R 259 : 222 Ind Cas 406 (DB).

——S. 5 — (As amended by Act XII of 1940) — Decree under appeal—Effect of amendment.

At the time when the suit on mortgage was decided the plaintiff mortgagee was entitled to claim interest at the rate of 12 per cent. per annum on a secured debt so that this could not be questioned by itself in the trial Court. While the decree passed in the suit was under appeal, the rate of interest was reduced to 7½ per cent. per annum by an amendment to S. 5 :

Held, that the amendment was applicable and the plaintiff mortgagee was only entitled to interest at the rate of 7½ per cent. per annum. A I R (Vol 32) 1945 Lah 177 : 47 P L R 143 : 221 Ind Cas 510 (DB).

——Ss. 5, 6—Applicability.

The provisions of the Usurious Loans Act or those of the Punjab Relief of Indebtedness Act do not apply to the debt which has been incurred in 1914 and hence the interest due in respect of such debt cannot be curtailed under the provisions of the Usurious Loans Act. AIR 1940 Cal 275 : 189 Ind Cas 590, Reversed. AIR (Vol 31) 1944 Lah 115 : 46 P L R 191 : 214 Ind Cas 325 (DB).

——Ss. 5, 6—Suit pending on date of commencement of Act—Interest excessive—Duty of Court to reopen transaction.

By S. 6, the provisions of part 3 of the Act have been made applicable to all suits pending on or instituted after the commencement of the Act. Accordingly, S. 5, which amends S. 3 of the Usurious Loans Act is clearly applicable to a suit pending at the time of coming into force of the Act. Under that section as amended, the Court is bound to re-open the transaction, if the rate of interest was "excessive". The transaction must be re-opened from the beginning and it cannot be said that payment of interest made during the first three years after the execution of the mortgage amounts to "part transactions already settled between the parties." A I R (Vol 24) 1937 Lah 936: 170 Ind Cas 911.

——S. 5 (4)—Reduction of interest.

Under S. 5 (4), the Court has power to reduce interest below 12 per cent. per annum, if the circumstances of the case justify a lower rate being allowed. A I R (Vol 28) 1941 Lah 212 : 43 P L R 88 : 195 Ind Cas 157.

——S. 5 (4)—Interest.

A Court can reduce the rate of interest if it is found excessive. (1940) 42 P L R 47 (DB).

—S. 6.

—— S. 6—Usurious Loans Act (10 of 1918), Ss. 4, 3—Insolvency Court, if can exercise powers under S. 3 Whether entitled to reduce interest.

Section 6 does not refer to civil proceedings other than suits and it is doubtful if the amendments made in S. 5 would apply to insolvency proceedings at all ; but whether they would or would not, even the provisions of S. 4 of the Usurious Loans Act as they stood before Act VII of 1934 came into force, did confer jurisdiction on the Insolvency Court to exercise powers conferred by S. 3 of the Act on a Court in the trial of a suit. The Insolvency Court is, therefore, entitled to reduce the interest if it finds sufficient justification for doing so on the merits of the case. AIR (Vol 24) 1937 Lah 629 : 39 P L R 495 : 168 Ind Cas 682.

——S. 6—Applicability and scope.

According to S. 6, the provisions of part 3 of the Act apply only to suits which were pending on or instituted after the commencement of the Act. Where the suit was decided long before the Act came into force, the provisions of the Act do not apply even though an appeal is pending. No provision of this kind affecting substantive rights can be taken to have retrospective effect except in so far as it is expressly laid down in the Act. The Legislature presumably used the word 'suit' advisably in S. 6 and, therefore, the section cannot be held to be applicable to appeals. AIR (Vol 23) 1936 Lah 678 : 38 P L R 885 : 165 Ind Cas 657.

——Ss. 6, 35, 60—S. 6, applicability — Objection to attachment, whether can be raised in appeal but before sale.

The provisions of S. 6 apply only to Part III of the Act and not to part VIII in which S. 35 is to be found. Therefore, the question that the objections by the judgment-debtor that the property attached is not liable to attachment and sale in view of the provisions of S. 35, cannot be raised in appeal, and that the attachment had taken place before the Act came into operation, has no force provided the objections be raised before the sale of the property. Where, therefore, the Court, on such objections being raised refuses to apply the provisions of the Punjab Relief of Indebtedness Act, it fails to exercise jurisdiction vested in it by law and its order is open to revision. A I R (Vol 23) 1936 Lah 574 : 164 Ind Cas 225.

—S. 7.

—— Ss. 7 and 9 — Transferee of mortgaged property —Whether debtor — Order by Board on his application—Effect on mortgagee's claim

The position of a transferee of mortgaged property qua mortgagee's claim cannot be regarded as that of a debtor and he has no locus standi to maintain an application under S. 9 of the Punjab Relief of Indebtedness Act. Any order made by the Board on an application filed by him can obviously not affect the mortgagee's claim. A I R (Vol 36) 1949 Lah 13.

——S. 7—Debtor — Transferee of equity of redemption.

A transferee of the equity of redemption is under no personal liability to the mortgagee for the amount due to him on the footing of the mortgage and cannot be regarded as the debtor of the mortgagee for the purposes of the Relief of Indebtedness Act. A I R (Vol 34) 1947 Lah 240 : 277 Ind Cas 241 : 48 P L R 421 (DB).

——Ss. 7 and 25 — Suit to recover mortgage-money by sale — Suit is for recovery of debt and can be stayed under S. 25—Stay order refused on incorrect grounds—Debt Conciliation Board abolished and not revived within reasonable time — Revision against order of refusal to stay is infructuous as suit even if had been stayed would be required to be ordered to be proceeded with.

The Subordinate Judge at J refused to stay a civil suit brought against the petitioner for recovery of mortgage-money by sale of mortgaged property, on the ground that the suit was not for recovery of debt. The Debt Conciliation Board at J was abolished and in spite of the lapse of one year no other Board had been brought into existence. The petitioner filed revision against order of refusal :

Held that the suit was for recovery of debt within the meaning of S. 7 and could be stayed under S. 25

Held further that even if the decision of the Subordinate Judge were held to be incorrect, yet in view of the abolition of the Debt Conciliation Board itself and of its not having been revived within a reasonable time, the suit even if ordered to have been stayed under S. 25, would have to be ordered to be proceeded with. The revision must, therefore, be dismissed. A I R (Vol 33) 1946 Lah 64 : 222 Ind Cas 13.

——S. 7 (as amended by Act XII of 1940)—"Debtor," meaning of.

A person who admittedly is managing a concern as a managing director is employed elsewhere and is not employed on agriculture and, therefore, is not earning his livelihood by agriculture though undoubtedly he is living on his income as a landlord which really is not the income earned by him but is earned by others for him. He is not, therefore, entitled to the benefit of the provisions of Act VII of 1934 as amended by Act XII of 1940. A I R (Vol 33) 1946 Lah 6 : 47 P L R 259 : 222 Ind Cas 406 (DB).

— Ss. 7, 25 — Debt — Pay order against contributory.

The payment orders made against the contributories under the Companies Act to pay certain sums is no doubt a statutory liability but such a liability is a debt within meaning of S. 7 and therefore, S. 25

would normally operate to stay all proceedings in execution in respect of such debts. A I R (Vol 31) 1944 Lah 414 : 46 P L R 311 : 216 Ind Cas 219 (F B).

——S. 7—Mortgage not usufructuary.

Where the mortgage is not a usufructuary mortgage, a mortgage debt (if subsisting) or a mortgage-decree (if unsatisfied) is a "debt" as defined in the Punjab Relief of Indebtedness Act. A I R (Vol 30) 1943 Lah 97 : 45 P L R 117 : 207 Ind Cas 95.

——S. 7 — Usufructuary mortgage, if creates debt within meaning of S. 7 (1).

The definition of the word 'debt' in S. 7 (1) is not exhaustive. It enlarges the ordinary meaning of 'debt' so as to include certain liabilities of the debtor enumerated therein and at the same time, it excludes from its purview certain other of his liabilities which would otherwise be included in it. A "usufructuary mortgage" does not create a "debt" as defined in S. 7 (1) and a "usufructuary mortgagor" is not a "debtor" within the meaning of S. 7 (2) of the Act. A I R (Vol 27) 1940 Lah 401 : 42 P L R 560 : I L R (1941) Lah 71 : 191 Ind Cas 583 (FB).

——S 7 (1) and (2)—Usufructuary mortgage.

A usufructuary mortgage does not create a debt within S. 7 (1) nor is the usufructuary mortgagor a "debtor" within S. 7 (2). The Board, therefore, has no jurisdiction to bring about conciliation or adjudicate regarding the amount due under a usufructuary mortgage. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——S. 7 (1) — Interest of usufructuary mortgagee, if 'debt'.

The essence of a 'debt', is the liability of the obligor which the obligee is entitled to enforce by action. Where, therefore, a transaction neither imports the personal liability of the obligor to pay, nor confers on the obligee the right to recover the amount by the coercive machinery of the law, it cannot be called a "debt". A usufructuary mortgagor is under no liability to the mortgagee. He is under no legal obligation to pay; it is his option to redeem if and when he chooses. The interest of a "usufructuary mortgagee" is not, therefore, a "debt" within the ordinary meaning of that word. A I R (Vol 27) 1940 Lah 401 : I L R (1941) Lah 71 : 42 P L R 560 : 191 Ind Cas 583 (FB).

——S 7 (2)—Debtor.

Before a person can fall within the ambit of the definition of debtor, he must both earn his livelihood from agriculture and be a landowner. If he is a landowner, but is employed elsewhere, he cannot be held to be earning his livelihood mainly by agriculture. Every person who owns land and is not a member of an agricultural tribe is not within the definition of a debtor unless it is further proved that he earns his livelihood by agriculture. A person who admittedly is managing a concern as a Managing Director is employed elsewhere and is not employed on agriculture and therefore, not earning his livelihood by agriculture though undoubtedly he is living on his income as a landlord which really is not the income earned by him but is earned by others for him. A I R (Vol 33) 1946 Lah 6 : 47 P L R 259 : 222 Ind Cas 406 (DB).

——S. 7 (2) (as amended by Act XII of 1940)—Objection as to judgment debtor being debtor within S. 7 (2) cannot be raised for first time in appeal.

The objection that the judgment-debtor was a debtor within the meaning of S. 7, sub cl. (2), Punjab Relief of Indebtedness Act and hence immune from arrest under S. 34 involves a question of fact, and hence cannot be permitted to be raised in the Appellate Court for the first time. A I R (Vol 30) 1943 Lah 166 : 45 P L R 173 : 209 Ind Cas 609.

——S. 7 (2), Proviso (as amended by Act XII of 1940)—Whether debtor comes within S. 7 (2)—Test.

The proviso appearing in sub-cl. (2) of S. 7 is merely an exception to or a substitute for what is stated in sub-cls. (i), (ii) and (iii). A debtor under sub-cl. (2) is required to prove two things; (a) that he owes a debt and (b) that he is covered by either sub-cl. (2) (i) or sub-cl. (2) (ii) or sub-cl. (2) (iii). Unless he fulfils both these conditions, he cannot be regarded as a debtor within the meaning of S. 7 (2) of the Act. The effect of the proviso is that a member of an agriculturist tribe has yet to prove that he is a debtor although he is not required to prove that sub-cls. (2) (i), (ii) and (iii) are applicable to him. A I R (Vol 30) 1943 Lah 166 : 45 P L R 173 : 209 Ind Cas 609.

——S. 7 (2)—Last para. of S. 7 (2) makes Board final Judge as to whether a debtor possesses qualifications required by the section — It does not refer to adjudications as to nature of transactions entered into by him. A I R (Vol 27) 1940 Lah 401 : 42 P L R 560 : I L R (1941) Lah 71 : 191 Ind Cas 583 (FB).

—S. 9.

——S. 9 — Particulars of debt given in application—Effect.

When particulars of the debt are already given in an application under S. 9, the creditor may not repeat the same in his written statement under S. 13. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

—— Ss. 9, 26 — Decision of Board that application under S. 9 is incompetent or otherwise, does not affect question of extension of limitation under S. 26. A I R (Vol 27) 1940 Lah 417 : 42 P L R 598 : I L R (1941) Lah 647 : 191 Ind Cas 164 (DB).

——S. 9—Application by judgment-debtor under S. 9 —Suit by decree-holder that claims of alleged creditors are fictitious and for injunction restraining them from proving and recovering their claims before Board — Jurisdiction of civil Court is not barred to entertain such suit. A I R (Vol 25) 1938 Lah 14 : 39 P L R 891 : 175 Ind Cas 686 (DB).

——S. 9—Application to Board under S. 9 brought to notice of Insolvency Court — Proceedings pending before it should be suspended. A I R (Vol 24) 1937 Lah 861 : 39 P L R 756 : 170 Ind Cas 33 (DB).

—S 11.

——Ss. 11, 25 — Failure to set out all claims—Jurisdiction of Board—Validity of notice—All claims not set out — Still Board has jurisdiction and notice under S. 25 is valid.

The Board has jurisdiction to deal with an application in which all claims have not been set out though no order of the Board can affect creditors who are not named. A notice under S. 25 staying proceedings would be perfectly valid even if the application presented to the Board was not strictly in accordance with the terms of S. 11. Filing such application merely to obtain stay of execution is no fraud on the Act and the application cannot be said to be mala fide. A I R (Vol 31) 1944 Lah 414 : 46 P L R 311 : 216 Ind Cas 219 (FB).

—S. 12.

—— Ss. 12 (1), 13 (3) — Date of publication of notice, what is — Computation of two months — Penalty of discharge before expiry of date for producing account.

The period of two months for the production of accounts has to be computed from the date of the publication of notice, which is the date of the service of notice and not of its issue. All further proceedings have to be taken after the date on which accounts have to be produced. Penalty by way of discharge before that date, cannot come into operation for failure to appear before the Board. A I R (Vol 32) 1945 Lah 309 : 47 P L R 339 : 222 Ind Cas 295 (FB).

—S. 13.

——S. 13—Scope.

Section 13 only deals with the discharge of liability of the debtor who applies to the Board and not with the liability of other persons who are not parties to the proceedings before the Board. AIR (Vol 24) 1937 Lah 685 : 39 P L R 481 : 173 Ind Cas 488.

——Ss. 13 (1) and 14 (1) — Filing of decree of Civil Court by creditor — Whether sufficient compliance.

A decree of a civil Court has to be regarded as conclusive evidence under S. 14 (1) of the Punjab Relief of Indebtedness Act as to the amount of the debt to to which the decree relates, and the mere filing of the decree is a sufficient compliance by the creditor not only of the provisions contained in S. 14 (1) as to the particulars or the proof of the debt but also those of S. 13 (1) which relate to the statement of the debt owed to him. The decree-holder need not submit a separate statement of account, in as much as a decree must be viewed both as a statement of account under S. 13 (1) as well as a statement of its particulars under S. 13 (2) read with S. 14 (1) of the Act. A I R (Vol 37) 1950 E P 294 : 52 P L R 294.

——S. 13 (1) and (3) and S. 14 — Failure to publish notice under S. 13 (1)—Creditor not complying with provisions of S. 13 (3) — Creditor's debt cannot be deemed to be discharged.

Where a Debt Conciliation Board fails to publish a notice as required by S. 13 (1) the provisions of S. 14 (1) are not attracted and the consequence of discharge of debts mentioned in S. 13 (3) does not follow. Similarly, if the Board fixes no date or dates of hearing after a creditor, has been called upon to submit a statement of debts under S. 13 (1) his failure to appear before the Board cannot be penalised by discharge of his debts as he was under no duty to appear on any particular date. A I R (Vol 33) 1946 Lah 418 : 223 Ind Cas 130.

——Ss. 13 (1) and 12—Date of publication of notice, what is — Computation of two months — Penalty of discharge before expiry of date for producing accounts.

The period of two months for the production of accounts has to be computed from the date of the publication of notice which is the date of the service of notice and of its issue. All further proceedings have to be taken after the date on which accounts have to be produced. Penalty by way of discharge before that date, cannot come into operation for failure to appear before the Board. A I R (Vol 32) 1945 Lah 309 : 47 P L R 339 : 222 Ind Cas 295 (FB).

——S. 13 (1) — Period for submission of statement of account by creditor, if can be extended.

The Debt Conciliation Board has ample power under S. 13 to extend the period for the submission of the statement of account by the creditor. It can fix a date for the production of the account books by the creditor beyond two months from the date of the publication of the notice. A I R (Vol 32) 1945 Lah 223 : 221 Ind Cas 107 (FB).

——Ss. 13 (1), 14 and 9 — Creditor's duty to file decree.

When the decretal amount due to the creditor has been admitted by the debtor in his petition under S. 9, it is not necessary for the creditor to file a copy of the decree in support of his claim. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——Ss. 13 (1) and 9—Written statement—Necessary particulars.

When particulars of the debt are already given in the petition under S. 9 by the debtor, it is hardly necessary for the creditor to repeat the same in his written statement. Reference by the creditor in his written statement to the particulars of his debt given by the debtor in the application under S. 9 is sufficient compliance with S. 13 (1). A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——Ss. 13 (1), 14 (1) — Filing of decree, if sufficient compliance with S. 13 (1).

A decree of a Civil Court has to be regarded as conclusive evidence under S. 14 (1) of the Punjab Relief of Indebtedness Act as to the amount of the debt to which the decree related, and, therefore, the mere filing of the decree is a sufficient compliance by a creditor not only of the provisions contained in S. 14 (1) as to the particulars or the proof of the debt but also those of S. 13 (1) which relate to the statement of the debt owed to him. The decree-holder need not submit a separate statement of account inasmuch as a decree must be viewed both as a statement of account under S. 13 (1), as well as a statement of its particulars, etc., under S. 13 (2) read with S. 14 (1) of the Act. A I R (Vol 30) 1943 Lah 259 : I L R (1944) Lah 418 : 45 P L R 259 : 210 Ind Cas 63 (DB).

——Ss. 13 (1), 14 (1)—Requisite proof of debt—Discharge.

Where the decree has been duly brought to the notice of the Board, no further proof of the debt is necessary. Section 14 (1) made the decree conclusive evidence as to the amount of the debt. The Board's jurisdiction is then confined to dealing with an agreement between the parties or, in the absence of agreement dismissing the application so far as it related to the decree-holder. The Board has no power to discharge the debt. AIR (Vol 30) 1943 Lah 158 : 45 PLR 45 : 209 Ind Cas 7.

——S. 13 (1) — Power of Board to pass order of discharge — Effect—Revival—Further discharge after revival.

There is nothing in the Act which gives the Board power to pass an order of discharge in any circumstances at all. What is actually provided in S. 13 is that if a statement of debts is not submitted in time, the debt shall, for all purposes, be deemed to have been duly discharged. It is thus for the executing Court to decide whether the debt should be deemed to have been discharged by reason of any failure on the part of the decree-holder or not. If there has been any such failure, no order of the Board for discharge of the debt is necessary. On the other hand, if there has, in fact, been no failure, it is not the power of the Board to discharge the debt. Even if the debt has been discharged, there is a further provision that the Board may revive it on good cause being shown, and there is nothing in the Act to provide for any further discharge after revival.

Where no statement is submitted by the decree-holder under S. 13 on the date originally fixed, and the time is extended, and a further statement is submitted within the period of extension, there is sufficient compliance with the provisions of sub-s. (1) of S. 13 and there would be no discharge of the debt. AIR (Vol 29) 1942 Lah 164 : 44 P L R 224 : 201 Ind Cas 118.

——S. 13 (2) and (3) — Order discharging debt — Effect of.

An order discharging a debt under S. 13 of the Punjab Relief of Indebtedness Act on account of default by the creditor, operates only in so far as the liability of the petitioning debtor is concerned. It does not affect at all the liability of any other person for the debt or take away the right of the creditor to proceed againt any such person for the realization of the debt. Accordingly, an order discharging a mortgage debt on account of the mortgagee's default under S 13 of the Act made on an application for settlement of debt made by the mortgagor, does not take away the right of the mortgagee to proceed against the mortgaged property in the hands of a

transferee of that property. A I R (Vol 36) 1949 Lah 13.

——S. 13 (2)—Power of Board to order discharge of debt — Non-submission of statement of debt—Automatic discharge—Power of Civil Court.

It is for the Court to decide whether the debt should be deemed to have been discharged within the meaning of S. 13 by reason of the failure of the creditor to submit statement of debts in time. There is nothing in the Act which empowers the Board to order discharge in any circumstances. AIR (Vol 32) 1945 Lah 309 : 47 P L R 339 : 222 Ind Cas 295 (FB).

——S. 13 (2) — (As amended by Act XII of 1941) — Revision.

Order overruling an objection that the debt must be deemed to have been wiped off on account of plaintiff's failure to comply with Ss. 13 and 14, as amended—Order is revisable. AIR (Vol 31) 1944 Lah 323 : 46 P L R 77 : 218 Ind Cas 375.

——S. 13 (2) and (3)—Discharge of debt is automatic result of S. 13 (2) and (3)—Order declaring debt discharged is not necessary. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——S. 13 (2) and (3)—Construction.

The provisions contained in S. 13 are highly penal in character and must necessarily be construed strictly against those in whose interest they were enacted. AIR (Vol 30) 1943 Lah 259 : I L R (1944) Lah 418 : 45 P L R 259 : 210 Ind Cas 63 (DB).

——S. 13 (2) — Creditor failing to submit account — Debt, if automatically discharged.

A Debt Conciliation Board has no power to discharge a debt under S. 13 (2). If a creditor fails to comply with the provisions of the Act regarding the submission of a statement of account within the prescribed time, his debt will be deemed to be automatically discharged and no order of the Board is required for this purpose. A I R (Vol 29) 1942 Lah 80 : 44 P L R 473 : 199 Ind Cas 562.

——S. 13 (2) — The Board is empowered to pass an order under sub-s. (2) of S. 13 only if a statement of debts is not furnished in compliance with a notice issued under sub-s. (1) and for no other reason. Where that statement had been duly furnished, the order passed by the Board under S. 13 (2) is ultra vires and the jurisdiction of the Civil Court to consider the creditor's claim is not, therefore, barred. A I R (Vol 28) 1941 Lah 8 : 42 P L R 746 : 192 Ind Cas 702.

——Ss. 13 (2), 14, 13—Board, if can, under S. 14, pass order under S. 13 (2) as penalty.

Section 14 does not empower the Board to pass an order under S. 13 (2) as a penalty for failure to produce the documents mentioned in S. 14. It is left to the discretion of the creditor to produce those documents only on which he wishes to rely. If he does not wish to rely on a document, he need not apparently produce it at all. If a creditor does not produce any document that will naturally be excluded from consideration, the Board will have to form its opinion about his debts on such material as he places before it. The Board is a Board of conciliation and not of adjudication and has, therefore no power to adjudicate on the creditor's claim but has only to endeavour to bring about an amicable settlement, if possible, on the basis of the materials placed before it. AIR (Vol 28) 1941 Lah 8 : 42 P L R 746 : 192 Ind Cas 702.

——S. 13 (2)—Jurisdiction of Board — Usufructuary mortgage.

The jurisdiction of the Debt Conciliation Board under the Act is limited to dealing with such 'debts' only as are defined in the Act. They have no authority to deal with transactions of any other kind with which the debtor might be concerned. Hence, an order passed by the Board treating the amount secured on a usufructuary mortgage as a "debt" and declaring that it has been discharged for all purposes and all occasions, is ultra vires of the Board, and Civil Courts are not debarred from entertaining the plea of the mortgagee that his mortgage is not affected by this order. A I R (Vol 27) 1940 Lah 401 : 42 P L R 560 : I L R (1941) Lah 71 : 191 Ind Cas 583 (FB).

——Ss. 13 (2) and 21—Jurisdiction of Board—Order of Board, when operates as bar to a civil suit.

The Debt Conciliation Board is not a Board of adjudication but a mere Board of Conciliation and has no jurisdiction to decide the disputes arising between the creditors inter se. It has no power to reject a claim as unfounded or fictitious nor to dismiss a claim as unproved. It is true that under sub-s. (2) of S. 13, every debt of which a statement is not submitted shall be deemed for all purposes and all occasions to have been duly discharged but when a claim is submitted, all that the Board can do is to use, under S. 15, its best endeavours to induce the parties to arrive at an amicable settlement or to grant the debtor a certificate under S. 20 (1) in case any creditor does not accept a fair offer made by a debtor.

This being so, the jurisdiction of the ordinary Courts to determine such matters cannot be even impliedly barred :

Where a creditor has submitted accounts, the Board cannot discharge the debt on the ground that earlier accounts have not been submitted and a suit in a Civil Court is competent. A I R (Vol 26) 1939 Lah 327 : 41 P L R 242.

——S. 13 (2), Proviso — Application for revival of debt—Civil Court, when has jurisdiction to hear.

Section 13 (2), Proviso really provides for the case of what may be called by analogy an ex parte order where a creditor has not, for some reason or other, been duly served with the notice required under the Act. It is, however, the Board itself that has the power to hear the application for revival of debt. The Civil Court is granted jurisdiction to hear such application in the case where the old Board has been dissolved or has ceased to exist and a new Board has replaced it under the orders of the Local Government as otherwise the creditor would have no remedy. But where the old Board is existing, the Civil Court has no jurisdiction. A I R (Vol 26) 1939 Lah 97 : 182 Ind Cas 604.

——S. 13 (3)—Creditor absent on first date of hearing—Power of Board to discharge his debt on adjourned hearing.

Where the creditor is absent on the first date of hearing but the Board adjourns the hearing, it cannot discharge his debt on the adjourned date for his absence on the first day. By adjourning the hearing, the Board must be deemed by implication to have held in favour of the creditor in regard to his absence on the first day. A I R (Vol 37) 1950 E P 294 : 52 P L R 294.

——S. 13 (3) and (4) — Failure of creditor to be present at hearing before Board—Absence for sufficient cause — Jurisdiction of Civil Court to enquire into such cause — Whether affected by creditor's application to Board for revival of debt.

The Civil Court can enquire into the question whether a creditor has failed to be present at a hearing before a Debt Conciliation Board for sufficient cause as contemplated by S. 13 (3) of the Punjab Relief of Indebtedness Act, and the creditor is entitled to show that he was absent for sufficient cause and that therefore his debt was not discharged.

The jurisdiction of the Civil Court is affected by the fact that the creditor has made an application to

the Board for revival of his debt under S. 13 (4) of the Act. If a finding has been given on the question of sufficiency of cause by the Board in an enquiry under that sub-section that finding is conclusive and the civil Court cannot go behind it. AIR (Vol 36) 1949 E P 1 : 50 P L R 194 (FB).

——S. 13 (3)—Adjournment of proceedings by the Debt Conciliation Board on creditor refusing to accept debtor's offer—If without jurisdiction.

It is competent to the Debt Conciliation Board to adjourn the proceedings when the creditor refuses to accept the offer made by a debtor and it cannot be said that the Board Acts without jurisdiction when it so adjourns proceedings to enable parties to think over the matter. A I R (Vol 35) 1948 E P 33 : 50 P L R 69.

——Ss. 13 (3) and 12 (1) — Notice under S. 12 (1) — Failure of creditor to appear on date fixed in notice —Debt is not discharged.

A notice issued under S. 12 (1) is not a notice for a hearing. The failure to appear, therefore, on a date fixed for hearing under S. 12 (1) does not bring about a discharge of debt under S. 13 (3). Under S. 12 (1), an order can be passed against the applicant debtor only and no order to the detriment of the creditor can be passed. AIR (Vol 32) 1945 Lah 309 : 47 P L R 339 : 222 Ind Cas 295 (FB).

——S. 13 (3) and (1) & S. 14—Notice under S. 13 (1) not published—Creditor not complying with S. 13 (3) —Debt if discharged.

If no notice is published under S. 13 (1) of the Punjab Relief of Indebtedness Act by the Debt Conciliation Board, the provisions of S. 14 (1) of the Act which specifically refers to it cannot be attracted and the consequences mentioned in S. 13 (3) cannot follow. Similarly, if no date or dates of hearing are fixed by the Board after every creditor has been called upon to submit a statement of debts under S. 13 (1) of the Act, his failure to appear cannot be penalised for the obvious reason that he was under no duty to appear on any particular date. A I R (Vol 33) 1946 Lah 418 : 223 Ind Cas 130.

——Ss. 13 (3), 20, 14—Refusal of creditor to agree to settlement—Board cannot continue proceeding—Its duty — Power of Board to discharge debt on creditor's failure to produce account books.

Where the creditor has refused to agree to any amicable settlement, the only course open to the Board is to consider whether the debtor has made a fair offer which the creditor ought reasonably to accept, and, if this is so, a certificate can be granted to the debtor in respect of the debt owed by him to the creditor. This certificate would be of some use to the debtor if, later on the creditor files a civil suit for the recovery of his debt. After the refusal of the creditor to agree to any conclusion, the Board has no right to continue the proceedings and an order passed subsequently under S. 13 (3) discharging the debt for the failure of the creditor to produce certain account books is ultra vires.

If a creditor alleges that he has never kept any bahis and that he has no bahis in his possession, it cannot be said that he has failed to produce documents on which he relies to support his claim. The mere fact that the Board is of the opinion that the creditor has not told the truth in this respect does not give the Board the power to pass an order discharging the debt, as bahis cannot be regarded as documents on which the creditor relies in support of his claim. A I R (Vol 32) 1945 Lah 223 : 221 Ind Cas 107 (FB).

——S. 13 (3)—Discharge of mortgage-debt—Obligation under rent deed executed by mortgagor in favour of mortgagee is also discharged.

Where the mortgagor executes a rent-deed in favour of the mortgagee creditor, the obligation under it is discharged when the mortgage debt is discharged by an order under S. 13 (3). (1945) 47 P L R 280.

——S. 13 (3) — (As amended by Act XII of 1940)— Applicability.

Penalty provided by S. 13 (3) does not apply to proceedings pending at the time of the enactment of the Act in 1940. A I R (Vol 31) 1944 Lah 323 : 46 P L R 77 : 218 Ind Cas 875 (DB).

——S. 13 (3) — Board declaring debt discharged— Effect.

As soon as the Debt Conciliation Board makes an order declaring the debt to have been discharged, it becomes functus officio and has no jurisdiction to issue any directions to the revenue authorities, e. g., to sanction a redemption mutation in favour of the debtor mortgagor. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——S. 13 (3) and (1) and S. 14 — Amount of debt admitted by debtor — Document in support of claim by creditor filed two days late — Order discharging debt.

The provisions contained in S. 13 are highly penal in character and must be construed strictly against those in whose interests they were enacted. Where the debt due to the creditor was admitted by the debtor in his petition under S. 9 and the creditor filed the documents in support of his claim two days after the statutory period, the Board has ample power to condone the delay and the order declaring the debt discharged under S. 13 (3) cannot be justified. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

——S. 13 (4)—Application for revival of debt can be made to any civil Court having jurisdiction.

"Civil Court" in S. 13 (4) means any civil Court and not the principal civil Court of original jurisdiction. An application under S. 13 (4) by a creditor for reviving his debts may be made to any civil Court having jurisdiction and not necessarily to the District Judge who is the principal civil Court of original jurisdiction. A I R (Vol 33) 1946 Lah 418 : 223 Ind Cas 130.

——S. 13 (4)—Order of civil Court granting application for revival of debt — Revision — Objection that Board had not ceased to exist at time of application cannot be entertained for first time — Civil P. C. (1908), S. 115.

Where an application by a creditor under S. 13 (4) for revival of his debts is granted by a civil Court without any objection by the debtor, the debtor cannot, in revision against the order, object for the first time that the civil Court was incompetent to entertain the application as the Debt Conciliation Board which was competent to hear such application had not ceased to exist at the time of the application. A I R (Vol 33) 1946 Lah 418 : 223 Ind Cas 130.

—S. 14.

——Ss. 14 and 13 — Debt supported by hundi — Debtor admitting debt in his application.

Production of hundi is not essential. A I R (Vol 31) 1944 Lah 126 : 215 Ind Cas 46.

——S. 14—Existence of debt.

The determination of the question whether the decree is enforceable or not cannot determine the question of the existence of the debt. The fact that the execution of a decree is barred does not mean that the debt has ceased to exist. It means that the remedy to enforce the decree is barred. A I R (Vol 28 1941 Lah 234 : I L R (1941) Lah 523 : 43 P L R 383 : 198 Ind Cas 125 (FB).

—S. 15.

——S. 15—Duty of Board.

It is the statutory duty of a Board to use its best

endeavours to bring about an amicable settlement between the debtor and the creditor, and it is for this reason that the name "Debt Conciliation Board," rather than Debt Discharging Board has been given to it by the statute. A I R (Vol 31) 1944 Lah 127 : 216 Ind Cas 260 (DB).

—S. 15A.

——S 15A—Scope and applicability.

If the debtor applicant, under S. 9, states definitely that the entire debt due from him has been wiped out by means of repayments made by him, he cannot be regarded as a person who owes a debt within S. 7. If he adds in his application that if the Board comes to the conclusion that any debt is still due from him instalments may be fixed for the payment of such a debt, it does not make any difference at all. The applicant, by asking for instalments, does not admit that a debt is due from him. He merely submits that if the Board finds that some debt (the existence of which he denies) still exists, a certain mode of payment may be prescribed. An allegation that the applicant was at one time a debtor but that the entire debt has been wiped out does not fall within the purview of S. 15-A. A I R (Vol 32) 1945 Lah 223 : 221 Ind Cas 107 (FB).

——S. 15-A—Section 15-A as added in 1940 has no application to proceedings pending at the time the section came into force. A I R (Vol 31) 1944 Lah 323 : 46 P L R 77 : 218 Ind Cas 375 (DB).

——S. 15-A—An allegation that a debt was due and enforceable but was discharged by payment is not a plea within the purview of S. 15-A. A I R (Vol 31) 1944 Lah 323 : 46 P L R 77 : 218 Ind Cas 375 (DB).

—S. 16.

——S. 16—Under S. 16, the Conciliation Board has powers of Civil Court. A I R (Vol 25) 1938 Lah 366 : 40 P L R 218 : 39 Cri L J 658 : 175 Ind Cas 797.

—S. 17.

——S. 17 (2)—M applying for settlement of his debt —His brothers also subsequently becoming parties to proceedings—Settlement arrived at duly signed by M, his brothers and creditor and authenticated by Board under S. 17 (2) — Creditor putting it in Civil Court for execution — Decree to the effect that debt would be liquidated by farm of property for 12 years —Held, that brothers of M could join proceedings— Decree did not require registration—Executing Court was bound to execute decree as its own decree. A I R (Vol 25) 1938 Lah 685 : 178 Ind Cas 760, Reversed ; A I R (Vol 26) 1939 Lah 42 : 41 P L R 238 : 182 Ind Cas 333 (DB).

—S. 19.

——S. 19 — Words "second application" mean "a second application by debtor."

Section 19 is aimed at the debtor and is enacted to prevent abuse of the provisions of the Act by debtors and undue harassment of creditors. Hence the words 'second application' in S. 19 should be construed as meaning a second application by the debtor.

If a debtor makes an application and thereafter a creditor makes an application, it may be regarded as the second application for conciliation but it is certainly the first application made by the creditor. A I R (Vol 32) 1945 Lah 194 : 47 P L R 154 : 222 Ind Cas 271 (DB).

——S 19—Second application.

In order to preclude a second application for conciliation, the first application must have been made by the debtor alone. Once such an application is made and disposed of, no Board can entertain a second application whether by debtor or by creditor within two years from the date of disposal of the first application. A I R (Vol 31) 1944 Lah 368 : 46 P L R 189.

——S. 19—Sub-mortgagee by way of absolute assignment of debt is, but sub-mortgagee by way of further mortgage is not a creditor of mortgagor for purposes of Act. A I R (Vol 29) 1942 Lah 80 : 44 P L R 473 : 199 Ind Cas 562.

—S. 20

——Ss. 20 and 21 (b) — One of judgment-debtors applying for conciliation and obtaining certificate under S. 20 — Other judgment-debtor not party to proceeding — Decree-holder's right to proceed against latter judgment-debtor is not taken away.

A judgment-debtor who is not a party to the proceeding before the Debt Conciliation Board cannot take advantage of an order granting a certificate under S. 20, passed in favour of his joint judgment-debtor. In such a case, the decree becomes inexecutable not as a whole but qua the judgment-debtor in whose favour the order is passed. The decree-holder's right to proceed against the other judgment-debtor is not taken away. A I R (Vol 33) 1946 Lah 267 : 222 Ind Cas 138.

——S. 20 (2) and (4)—Applicability.

Sub-section (4) applies to the case of a decree which though obtained before the certification under S. 21 was sought to be executed for the first time after it. It has no application to the execution application which was pending at the time of certification. Such a case is covered by sub-s. (2) of S. 20. The words "or takes out execution proceedings" in sub-s. (2) are quite distinct from the words "creditor applies for execution" in sub-s. (4) and they both must have been intended to convey different meanings, and the consequences mentioned in sub-s. (2) would alone follow, i. e., no costs of the proceedings or interest after the date of certification would be allowed. AIR (Vol 34) 1947 Lah 182 : 225 Ind Cas 638.

——S. 20 (3) — Execution of decree obtained before certification is not barred by S. 20 (3). AIR (Vol 27) 1940 Lah 163 : 42 P L R 108 (2) : 188 Ind Cas 113.

——S. 20 (4)—Applicability—Application for execution pending before Civil Court.

S. 20 (4) of the Punjab Relief of Indebtedness Act cannot apply to an application for execution which is pending before the Civil Court at the time when the application is made to the Board for conciliation. AIR (Vol 34) 1947 Lah 36 : 228 Ind Cas 607.

—S. 20A

——S. 20A—Scope and effect—Decision of Board—How far final—Jurisdiction of Civil Court.

Before an order passed by a Board can have the effect given to it by S. 20A of the Punjab Relief of Indebtedness Act, it must be shown to be an order passed in proceedings, sanctioned by the Act. If the proceedings during the course of which the order was passed were themselves not warranted by the Act, and if, under the provisions of the Act, the Board had no jurisdiction to take cognizance of those proceedings, the order cannot be said to be one passed in any proceedings under the Act and cannot consequently, attract the application of the section.

It is well settled that whenever the question arises whether the Court of special jurisdiction has or has not jurisdiction to try a particular cause the Court of general jurisdiction is always the final authority as to whether or not the cause is within the special jurisdiction of the special Tribunal. The Court of Special jurisdiction may, no doubt try the question whether a particular cause does or does not fall within its jurisdiction. However, from this it does not follow that a Court can merely by a wrong exercise of discretion or by a wrong construction of law confer jurisdiction upon itself to try a cause.

When the question arises as between the special Court and the Court of general jurisdiction as to whether a cause is within the jurisdiction of the special Court the decision of the Court of general

jurisdiction must override the decision of the Court of special jurisdiction. Accordingly it is open to the Civil Court to enquire into the question whether a decision given by the Board as to the petitioner being a debtor within the meaning of S. 9 of the Act has been given in proceedings which it has jurisdiction to entertain, and if it finds that the Board does not possess such jurisdiction it cannot be bound by such decision despite the provisions of S 20A.

Even in proceedings which may otherwise be regarded as properly constituted proceedings under the Act, the only effect of S. 20A is to make the Board the final judge as to whether an admitted or proved loan or liability falls within the definition of "debt" as contained in S. 7 (1) of the Act and whether a person admitted or proved to be owning a debt possesses the qualifications mentioned in Cls. (i) and (ii) of sub-s. (2) of the aforesaid section. No finality however attaches to the decision of the Board where the dispute is as to whether a person had incurred a loan or liability or otherwise owed a debt as defined in the Act. AIR (Vol 36) 1949 E P 27.

——S. 20A—Decision of Board that person is debtor —Jurisdiction of Court to adjudicate on nature of transaction—If barred.

A decision by a Board that a person is a debtor will not necessarily involve a decision that every debt alleged, during the course of the proceedings, to be owed by him is in fact so owed or that it fulfils the requirements of S. 7 (1) of the Relief of Indebtedness Act, and the Civil Court is not precluded by S. 20A of the Act from adjudicating on such questions. AIR (Vol 34) 1947 Lah 240 : 48 P L R 421 : 227 Ind Cas 241 (DB).

——S. 20A—Decision of Board regarding liability of debtor—If final.

Under S. 20A of the Relief of Indebtedness Act, it is only the decision of the Board regarding the nature of a loan or liability (i. e.) whether the loan or liability is of the nature contemplated by S. 7 (1) of the Act, that has been made final and conclusive. Where the question is whether there is any liability resting on the so-called debtor in respect of a particular transaction the decision of the Board on such question will not attract the application of S. 20A. AIR (Vol 34) 1947 Lah 240 : 48 P L R 421 : 227 Ind Cas 241 (DB).

——S. 20A — Applicability—Matters not decided by Board—Analogy of constructive res judicata.

Section 20A of the Relief of Indebtedness Act gives finality to an actual decision by the Board and its operation cannot be extended, on the analogy of constructive res judicata, to matters not in fact adjudicated upon or decided by the Board, even though the failure to adjudicate or decide may be due to any default on the part of the person against whom the section is invoked. A I R (Vol 34) 1947 Lah 240 : 48 P L R 421 : 227 Ind Cas 241 (DB).

——S. 20A—Applicability.

A decision of the Board that a person is a debtor will not necessarily involve a decision that every debt alleged, during the course of the proceedings, to be owed by him is in fact so owed or that it fulfils the requirements of S. 7 (1). The decision as to the person being a debtor cannot, therefore, by any stretch of imagination be regarded as sufficient to attract the application of S. 20A. AIR (Vol 34) 1947 Lah 240 : 48 P L R 421 (DB).

——S. 20A—Inference that debt was for trade cannot necessarily be drawn because hundi is executed for debt. AIR (Vol 31) 1944 Lah 126 : 215 Ind Cas 46.

——S. 20A—S. 20A is not retrospective. AIR (Vol 30) 1943 Lah 265 ; 45 P L R 284 : 210 Ind Cas 262.

—S. 21

——S. 21 — Order of Board — Interference by Civil Court.

The Debt Conciliation Board is a tribunal of special jurisdiction and its powers are limited by the statute under which it was created. Such tribunal must act within its powers and so long as it does so, its orders—whether right or wrong—cannot be challenged except in the manner and to the extent prescribed by the statute and the Courts of ordinary jurisdiction cannot question them. But where its actions are in excess, or in contravention of the powers conferred on it, they are ultra vires. In a suit challenging any order of the Board, the Civil Court has first to decide whether the Board has acted within, or in exercise of, its statutory powers. If it finds that it acted within its powers, the suit must be dismissed forthwith. If, however, order is ultra vires, the Court must adjudicate on the merits and grant relief accordingly. AIR (Vol 32) 1945 Lah 223 : 221 Ind Cas 107 (FB).

——S. 21—Mortgage-debt discharged under S. 13 (3) —Suit on rent deed executed by mortgagor in favour of mortgagee — Legality and correctness of Board's order, if can be questioned.

In a case based upon a rent deed executed by the mortgagor in favour of the mortgagee, the correctness of the decision of the Debt Conciliation Board discharging the mortgage-debt under S. 13 (3), cannot be questioned, even though its legality may be, though S. 21 does not in terms constitute a bar. The Court is not a Court of appeal against the decision of the Board. (1945) 47 P L R 280.

——S. 21 - Obiter—Section 21 of the Act only debars a Civil Court from taking cognizance of certain classes of suits, and a Civil Court can take cognisance of a plea of lack of inherent jurisdiction in the Board to pass a certain order. A I R (Vol 25) 1938 Lah 685 : 40 P L R 567 : 178 Ind Cas 760.

——S. 21—Applicability.

Application by judgment-debtor under S. 9—Suit by decree-holder that claims of alleged creditors are fictitious and for injunction restraining them from proving and recovering their claims before Board :

Held, that these reliefs did not attack the procedure of the Board or the legality of the agreement arrived at under S. 17 and were, therefore, not covered by the express prohibition contained in S. 21. A I R (Vol 25) 1938 Lah 14 : 39 P L R 891 : 175 fnd Cas 686 (DB).

——S. 21 (b) — Certificate granted to one of judgment-debtors — Decree, if executable against the other.

A judgment-debtor who had not applied for conciliation and who was not a party to the proceedings, cannot take advantage of a certificate granted in favour of his joint judgment-debtor. The obvious interpretation of S. 21 (b) of the Punjab Relief of Indebtedness Act is that the decree would be inexecutable, not as a whole, but qua the person in whose favour the certificate has been granted. The decree-holder's right to proceed against the other judgment-debtor is not taken away. AIR (Vol 33) 1946 Lah 267: 222 Ind Cas 138

——S. 21 (c) — Clause (c) of S. 21 refers to suits to recover a "debt," it has no applicability to suits relating to transactions like a "usufructuary mortage" which does not create a "debt" as defined in the Act. AIR (Vol 27) 1940 Lah 401 : 42 P L R 560 : ILR (1941) Lah 71 : 191 Ind Cas 583 (FB).

—S. 22.

——S. 22 — Order of Board fining party for contempt of Court committed before it — Order, if can be revised.

Section 22 of the Act refers only to orders passed in pursuance of the Act and does not alter the Criminal P. C. If, therefore, a Conciliation Board constituted under the Act takes proceedings against a party under S. 480, Criminal P. C. for contempt of Court and fines such party under S. 228, I. P. C., its order is open to revision. Section 486 of that Code allows an appeal from an order under S. 480 to the Court to which such decrees or orders are ordinarily appealable. As ordinarily there is no appeal, this section, therefore, has no application. But S. 439 of the Code enables the High Court to exercise any of the powers conferred on a Court of Appeal and hence the order can be revised. AIR (Vol 25) 1938 Lah 366: 40 P L R 218 : 39 Cr L J 658 : 175 Ind Cas 797.

—S. 25.

——Ss. 25 and 9 —Application before Board not permitted by S. 9 — Order by executing Court suspending proceedings on notice from Board—If justified.

Where the application made before the Board is not an application permitted or contemplated by S. 9 of the Punjab Relief of Indebtedness Act, S. 25 of the Act is inapplicable and an order made by the executing Court suspending the proceedings for the execution of the decree on notice received from the Board is not justified. AIR (Vol 36) 1949 E P 27.

——S. 25—Scope — Suit by mortgagee for possession of mortgaged property and also for money decree — Enquiry into former relief — If also barred.

S. 25 of the Punjab Relief of Indebtedness Act only bars suits or other proceedings brought for the recovery of any debt if an application in respect of such debt has been made to the Board. It does not deal with other reliefs such as the possession of the property which may be claimed by a plaintiff in a civil suit. If, therefore, a mortgagee sues for the possession of the mortgaged property and also for a money decree by way of alternative relief, the Court can proceed with the suit so far as the claim for possession is concerned. AIR (Vol 35) 1948 Lah 32 : 49 P L R 211.

——S. 25 — Stay of suit — Debt Conciliation Board since abolished and not revived — Suit, if may be proceeded with.

Where after a suit is stayed under S. 25 of the Punjab Relief of Indebtedness Act on receipt of a notice from a Debt Conciliation Board, the Board is abolished and in spite of the lapse of over a year no other Board is brought into existence by the Provincial Government the suit should be allowed to be proceeded with. AIR (Vol 33) 1946 Lah 64 : 222 Ind Cas 13.

——S. 25 — Lahore High Court executing order of Liquidation Judge is Civil Court.

Where the Lahore High Court is executing orders of a Liquidation Judge, it is acting purely as an executing Court. It derives its jurisdiction to execute the orders from the Civil P. C., and as an executing Court, it is clearly a Civil Court, whatever it might be when exercising jurisdiction in winding up and therefore, a notice from the Debt Conciliation Board in a proper case would have the effect of staying such proceedings in that Court. AIR (Vol 31) 1944 Lah 414 : 46 P L R 311 : 216 Ind Cas 219 (FB).

——S. 25—Validity of notice.

A notice under S. 25 is valid even if the application under S. 11, was not strictly in accordance with the terms of S. 11 AIR (Vol 31) 1944 Lah 414: 46 P L R 311 : 216 Ind Cas 219 (FB).

——S. 25—Applicability.

Pay order against contributories under Companies Act is a debt and therefore, S. 25 would apply. AIR (Vol 31) 1944 Lah 414 : 46 P L R 311 : 216 Ind Cas 219 (FB).

——S. 25—Notice for stay.

Board issuing notice for stay of execution — Civil Court can consider whether the Board had jurisdiction to issue notice. AIR (Vol 31) 1944 Lah 325 : 46 P L R 193 : 218 Ind Cas 462 (DB).

——S. 25—Notice for stay after sale.

Board is competent to stay execution after sale but before confirmation of judgment-debtor's property. AIR (Vol 31) 1944 Lah 325 : 46 P L R 193 : 218 Ind Cas 462 (DB).

——S. 25—Mortgage decree — Sale in execution of — Notice under S. 25 after sale but before confirmation —Executing Court has no jurisdiction to stay confirmation of sale. AIR (Vol 30) 1943 Lah 97 : 45 P L R 117 : 207 Ind Cas 95.

——S. 25 — The Civil Court has full power to hold that the order of the Debt Conciliation Board was without jurisdiction and, if it does so hold, should ignore it. AIR (Vol 29) 1942 Lah 87 : 44 P L R 80 : 199 Ind Cas 700 (DB).

——S. 25 — When an intimation under S. 25 to stay proceedings is issued to Civil Court, the Court can consider nature of debts mentioned in application to Debt Conciliation Board and whether their value exceeds Board's pecuniary jurisdiction. When the Civil Court finds debts exceeding or outside Board's jurisdiction, it can ignore intimation. AIR 1938 Lah 702 : 181 Ind Cas 743, Overruled. AIR (Vol 28) 1941 Lah 234 : I L R (1941) Lah 524 : 43 P L R 383 : 198 Ind Cas 125 (FB).

——S. 25—Insolvency Court, if a Civil Court.

An Insolvency Court is a Civil Court for the purpose of S. 25 and consequently, where an application is made by the debtor to a Board, an Insolvency Court is bound to stay proceedings of an insolvency application in respect of the same debt for the settlement of which an application is made to the Board. AIR (Vol 25) 1938 Lah 195 : 40 PLR 490: ILR (1938) Lah 336 : 177 Ind Cas 135 (DB).

——S. 25—Construction.

The words "in respect of any such debt" in S. 25, mean in respect of any debt for the settlement of which application has been made to the Board. The insolvency application comes within the meaning of "other proceeding pending before a Civil Court in respect of any such debt." Consequently, when an application is made to the Board under S. 9 and this is brought to the Insolvency Judge, under S. 25, the proceedings before the Insolvency Court should be suspended. AIR (Vol 24) 1937 Lah 861 : 39 P L R 756 : 170 Ind Cas 33 (DB).

——S. 25—Appeal against adjudication as insolvent.

A proceeding is a matter which proceeds or is going on, and "proceedings" in S. 25, include an appeal against adjudication as an insolvent. AIR (Vol 24) 1937 Lah 680 : 39 P L R 338 : ILR (1938) Lah 120 : 173 Ind Cas 748.

—S. 26

——S. 26—Extension of limitation.

The mere fact that the decision of the Board is that the application is incompetent or otherwise does not affect the question of the extension of the limitation under S. 26. AIR (Vol 27) 1940 Lah 447: 42 PLR 593 : ILR (1941) Lah 647 : 191 Ind Cas 164 (DB).

——S. 26 — Competency of application — Extension of limitation.

In order to decide whether an application is or is not competent, and whether it comes or does not come within the jurisdiction of the Board, as determined by the provisions of the Act, a proceeding before the Board is necessary and the mere fact that the decision of the Board is that the application is incompetent or otherwise, cannot affect the question

of the extension of limitation under S. 26. AIR (Vol 25) 1938 Lah 780 : 179 Ind Cas 468.

—S. 30.

——Ss. 30, 17 and 9 — Parties arriving at an agreement before the Board — Board passing order on August 24, 1939 under S. 17 — Procedure laid down in S. 30 (1) is not applicable — S. 30 (3) as well is inapplicable — Agreement has force of a decree but is neither a decree under S. 30 nor a decree in suit.

The procedure laid down in sub-cl. (3) of S 30 is limited to proceedings concluded on or after October 15, 1939. Similarly, S. 30, sub-cl. (1) is wholly inapplicable to agreements arrived at before a Debt Conciliation Board under the provisions of S. 17. No doubt an agreement arrived at by the Board takes effect as if it were a decree of a Civil Court, but the mere fact that the agreement has been given the force of a decree does not alter its very nature. For purposes of execution, that agreement has been given the force of a decree, but it is obvious that it is not a decree in a suit. Section 30, sub-cl (1) clearly contemplates a decree passed in a suit. The agreement mentioned in S. 17 is not a decree in a suit. The provisions of S. 30 sub-cl. (1) are inapplicable. The proceedings before a Debt Conciliation Board are not in the nature of a suit and the agreement made in those proceedings is not really a decree in the sense in which that word has been used in S. 30. The application presented by the judgment-debtor under the provisions of S. 30 to the executing Court during the pendency of the execution of the order of the Board made on August 24, 1939, is hence, not maintainable. A I R (Vol 32) 1945 Lah 180 : 47 P L R 53: 222 Ind Cas 17.

——S. 30 — (As amended in 1940) — "This Act" in S. 30 (1) means Act of 1934.

The words "this Act" in sub-s. (1) of S. 30 were meant to refer to the original Act of 1934 and not to the Amending Act of 1940. A I R (Vol 32) 1945 Lah 33: 46 P L R 374: 219 Ind Cas 153.

——S. 30 — (As amended in 1940) —Decree—Objection, if can be raised.

The mere omission to raise the objection during the trial stage would not debar a person from raising that objection after the decree had been passed against him. It is, therefore, entirely immaterial whether the decree had been passed after a contest or on the basis of a compromise. A I R (Vol 32) 1945 Lah 33: 46 P L R 374: 219 Ind Cas 153.

——S. 30 —Effect of amendment in 1940.

Sub-section (1) of S. 30 as amended in 1940 is now a part of the Relief of Indebtedness Act and the effect of its incorporation in the Act is that the words "commencement of this Act" mean commencement of the Act of 1934. This interpretation no doubt affects decrees passed in suits instituted between April 8, 1935, (when the original Act came into force) and October 5, 1940; but the Amending Act is professedly retrospective and the Legislature clearly intended a revision of pre-existing decrees which had been passed in respect of debts (as defined in the Act) advanced before April 8, 1935, but which had not been completely executed before the coming into operation of the Amending Act.

Hence, where the debt in respect of which the decree was passed had been advanced in 1923 and the suit had been brought on February 14, 1936, the debt is covered by sub-s. (1) of S. 30 as amended and the judgment-debtor is entitled to file an application under S. 30 (3). AIR (Vol 29) 1942 Lah 254: 44 P L R 399: I L R (1943) Lah 579: 202 Ind Cas 433 (DB).

——S. 30—Capacity or status of applicant—Enquiry.

In an application under S. 30, it is not necessary that proof of the capacity or status of the applicant to make the application be apparent on the application or on the record of the case itself. If his capacity to make the application is challenged by the opposite party, an issue should be framed on the point and the parties given opportunity to produce evidence. A I R (Vol 28) 1941 Lah 380 : 43 P L R 531 : I L R (1942) Lah 149: 198 Ind Cas 267 (FB).

——S. 30 —Essentials to be proved by applicant.

The applicant under S. 30 has to show whether he is a "debtor" and the decree is in respect of a "debt," as defined in S 7. A I R (Vol 28) 1941 Lah 364 : 43 P L R 457 : I L R (1942) Lah 199 : 197 Ind Cas 353 (DB).

——S. 30—Court-fee.

An application under S. 30 of the Act or under S. 3, Usurious Loans Act, is not one for review on which ad valorem court-fee is payable; it is a miscellaneous application on which a fee of Rs. 2 only is required to be paid. A I R (Vol 28) 1941 Lah 364 : 43 P L R 457: I L R (1942) Lah 199: 197 Ind Cas 353 (DB).

——S. 30 (1)—Word "decree" meaning of.

The word "decree" in S. 30 (1) has no reference to future interest. Accordingly, in applying the rule of "damdupat" as laid down in S. 30 (1) the future interest allowed on the decree is not to be taken into consideration at all. A I R (Vol 31) 1944 Lah 422 : 46 P L R 270: 217 Ind Cas 327 (DB).

—S. 34.

——S. 34 — Debtor claiming privilege under S. 34 must prove that he is debtor within S. 7. A I R (Vol 31) 1944 Lah 480: 218 Ind Cas 433.

——S. 34 — Section 34 is intended to have a retrospective effect on existing rights. Further, when the powers of a Court to order arrest are taken away from a particular date, it is really not a question of giving the section any retrospective effect. A I R (Vol 31) 1944 Lah 480: 218 Ind Cas 433.

——S. 34—Applicability.

An objection that the judgment-debtor being a debtor within S. 7 and immune from arrest under S. 34 involves a question of fact and cannot be raised for first time in appeal. A I R (Vol 30) 1943 Lah 166: 45 P L R 173: 209 Ind Cas 609.

——S. 34—Circumstances bringing judgment-debtor under S 34 must be established by decree-holder — Shifting of onus — Warrant of arrest without allowing opportunity to judgment-debtor to give his reasons for non-payment—Legality.

Under S. 34, a duty is, in the first instance, cast upon the decree-holder to bring circumstances on the record from which the Court may be in a position to draw its own inference as to the conditions laid down in the substantive part of the section. This burden may possibly be discharged by the admission of the judgment-debtor that he owns some money or by other unimpeachable evidence that he owns it but this will not be conclusive. It will merely shift the onus on to the judgment-debtor to prove his immunity from arrest. Once it is proved that the judgment-debtor had property available for discharging his debts after being called upon to pay them, the onus falls back upon him to prove some just cause for not having discharged them, and if he offers no explanation, the Court can legally conclude that he has, without just cause, contumaciously refused to pay the amount of the decree in whole or in part. Where, however, the Court issues a warrant of arrest without going into the question of contumacy or just cause and without giving any opportunity to the judgment- debtor to give his reasons for not paying the amount, the warrant of arrest so issued is illegal. A I R (Vol 25) 1938 Lah 211 : I L R (1938) Lah 164 : 40 P L R 486: 181 Ind Cas 109 (DB).

——S. 34—S. 34, whether limited to agriculturists.

Chapter VIII in which S. 34 falls, is headed Miscellaneous Amendments of the Civil Law. The second proviso to the section appears to relate only to agricultural land but its other provisions are not so limited. AIR (Vol 23) 1936 Lah 843: 39 P L R 8: 161 Ind Cas 960.

——S. 34—Scope of—Conditions necessary for operation of S. 34.

There is nothing in S. 34 about the date of issue of the warrant. What the section says is that after April 19, 1935, the date of coming into force of the Act, no judgment-debtor shall be liable to arrest unless the necessary conditions are fulfilled. If the conditions of the section are satisfied, the decree-holders can move the Court for his arrest and a warrant of arrest can issue if the Court comes to the necessary finding.

Where a warrant of arrest was ordered to issue on March 27, 1935, but was not served up to April 19, 1935, the date of coming into force of the Punjab Relief of Indebtedness Act and it was contended that under S. 34 of the Act, the warrant could no longer be executed:

Held, that S. 34 did not mention anything about the date of issue of warrant and arrest could be ordered if the necessary conditions were fulfilled. A I R (Vol 23) 1936 Lah 150: 160 Ind Cas 804.

—S. 35.

——S. 35 — (As amended by Act VI of 1942) — Retrospective effect.

Where in execution of decree, property was attached before but not sold until after S. 35 as amended by Act VI of 1942, exempting it from attachment or sale came into force the property can be sold subsequently because S. 35 as amended is not retrospective and does not apply to such a case. A I R (Vol 31) 1944 Lah 129: 46 P L R 75: 214 Ind Cas 329 (DB).

——S. 35—(As amended by Act XII of 1940)—Section is not retrospective. AIR (Vol 30) 1943 Lah 268: ILR (1944) Lah 379: 45 P L R 432: 211 Ind Cas 291 (FB).

——S. 35—(As amended by Act XII of 1940)—Section is not retrospective and does not apply to execution proceedings pending at the time the Act came into force where attachment had already been effected before the Act. AIR (Vol 24) 1937 Lah 560 : 170 Ind Cas 388, Overruled. AIR (Vol 30) 1943 Lah 170 : ILR (1943) Lah 646 : 45 P L R 265: 208 Ind Cas 345 (FB).

——S. 35—House let out—Onus.

The house of an agriculturist judgment-debtor is exempt under S. 31 unless it has been let out on rent for a period of a year or more. The mere negative form of S. 35 would not shift the onus from the judgment-debtor. Even if it did do so, still once it is proved that the property had been let on rent, the period for which it had been rented being a matter specifically within the knowledge of the judgment-debtor, the onus would lie on him to show the length of the period. A I R (Vol 28) 1941 Lah 28 : 43 P L R 352 : 193 Ind Cas 312 (DB).

—— S. 35—Construction.

The words "for a period of a year or more" in S. 35 only qualify the words "left vacant". A I R (Vol 28) 1941 Lah 28 : 43 P L R 452 : 193 Ind Cas 312 (DB).

——S. 35—The onus to prove the qualification prescribed by S. 35 is on the judgment-debtor when he has special knowledge of the facts. AIR (Vol 26) 1939 Lah 503.

——S. 35 — Judgment-debtor belonging to agricultural tribe but not cultivating land himself.

Where the judgment-debtor, though belonging to an agricultural tribe and owning some land does not cultivate the land himself, he is not an agriculturist within the meaning of S. 60, Civil P. C., and he is not entitled to the benefit of S. 35. A I R (Vol 24) 1937 Lah 287 : 173 Ind Cas 497.

——S. 35—Exemption from attachment.

Kothas in Lahore Cantonment not used for agricultural purposes but owned by an agriculturist having no land in Lahore District are not exempt from attachment under S. 35. AIR (Vol 24) 1937 Lah 113 : 171 Ind Cas 932.

——S. 35—Applicability.

Where there has been a compromise between the parties, S. 35 does not apply. AIR (Vol 24) 1937 Lah 100 : 171 Ind Cas 418.

——S. 35—Objection in appeal.

The question that the objections by the judgment debtor that the property attached is not liable to attachment and sale in view of S. 35 cannot be raised in appeal. A I R (Vol 23) 1936 Lah 574 : 164 Ind Cas 225.

—S. 36.

——S. 36 — Payment or adjustment out of Court—Duty of Court.

Where a judgment-debtor pleads in execution of the decree, a payment or adjustment in whole or in part out of Court, the executing Court must go into the question although the judgment-debtor has not taken advantage of the permission given to him by O. 21, R. 2 (2), Civil P. C., to apply to the Court to issue a notice to the decree-holder for certification.

Consequently, even where the limitation for having the adjustment certified had already expired before coming into force of Relief of Indebtedness Act, the Court can give effect to this adjustment. A I R (Vol 25) 1938 Lah 602:40 P L R 264:181 Ind Cas 243.

——S. 36 — Effect of amendment of O. 21, R. 2, Civil P. C.

Under O. 21, R. 2, Civil P. C., as amended by S. 36 of the Punjab Act VII of 1934 by repealing sub-r. (3), an executing Court must go into the question of payment made by the judgment-debtor out of Court when he raises such objection in execution proceedings. The question relates to the discharge of the decree although he has not taken advantage of the permission given to him by sub-r. (2). A I R (Vol 25) 1938 Lah 126 : 40 P L R 14 : I L R (1938) Lah 264 : 177 Ind Cas 487 (DB).

——S. 36—Retrospective effect.

The question of payment, although raised before the passing of the Act, must be decided by the executing Court if it is pending at the time of the passing of the Act. Section 36 has a retrospective effect. The general principle is, alterations in procedure are always retrospective unless there be some good reason against it. The repealing of sub-r. (3) is merely an alteration in the procedure. A I R (Vol 25) 1938 Lah 126 : 40 P L R 14 : I L R (1938) Lah 264 : 177 Ind Cas 487 (DB).

—S. 51.

——S. 51, Proviso, cl. (a) (ii) — Order for detention of judgment-debtor in civil prison, when can be passed.

Unless a decree-holder establishes what is required to be established under the proviso to S. 51, no order for detention in the civil prison can be made against any judgment-debtor.

Even if the alienations are made by the judgment-debtor after the institution of the suit against him, they do not come within the ambit of sub-cl. (ii) of cl. (a) of the Proviso, when they do not appear to have been effected with the object of obstructing or delaying the execution of the decree. Similarly, where it is found as a fact in certain proceedings against judgment-debtor at the instance of the

decree-holder that the judgment-debtor was possessed of sufficient property otherwise to satisfy the decree, sub-cl. (ii) of cl. (a) will not come into play at all. AIR (Vol 26) 1939 Lah 23.: 41 P L R 164 : 182 Ind Cas 388.

—S. 60.

——S. 60 –Objection to attachment and sale, stage for—Revision.

The question that the objection by the judgment debtor that the property attached is not liable to attachment and sale in view of S. 35 cannot be raised in appeal and that the attachment had taken place before the Act came into operation, has no force provided the objection be raised before the sale of the property. Where therefore, the Court, on such objections being raised refuses to apply the provisions of Act, it fails to exercise jurisdiction vested in it by law and its order is open to revision. A I R (Vol 23) 1936 Lah 574 : 164 Ind Cas 225.

PUNJAB RENT RESTRICTION ACT, 1941

See Punjab Urban Rent Restriction Act (10 of 1941).

PUNJAB RESTITUTION OF MORTGAGED LANDS ACT (4 of 1938).

——If ultra vires the Punjab Legislature—"Pasture" if agricultural land.

The Punjab Restitution of Mortgaged Lands Act, the main purpose of which is to give relief to mortgagors by enabling them to obtain restitution of the mortgaged lands on terms less onerous than the mortgage deeds require, fall within the powers given to the Province by items 2 and 21 of List II without any necessity to invoke any powers from the Concurrent List, List III. Though mortgages are not specifically referred to in the Constitution, mortgages of land would, as a matter of construction, properly fall under item 21 in so far as they are mortgages of land though in certain aspects they include elements of transfer of property and of contract. But they form a type of transaction which may properly be regarded as sui generis, incidental to land and included within item 21 except in so far as they fall within items 8 and 10 of List III which again contain an exception in the case of agricultural land. So far as land at least is concerned, item 21 would include mortgages as an incidental and ancillary subject. The impugned Act is limited to agricultural land and the addition of the word "pasture" in S. 3 of the Act does not extend the scope of the Act beyond agriculture as "pasture" is certainly "land" within item 21 of List II. In any case it is sufficiently allied to agriculture generally to be treated as a species of agricultural land. AIR (Vol 34) 1947 P C 72 : 1947 F L J 28 : 74 I A 12 : 229 Ind Cas 577 : 1947 M W N 251 : 13 B R 405 : 51 Cal W N 523 : 49 Bom L R 516 : 60 L W 416 : 1947 A L J 382 : (1947) 2 M L J 1.

——Act, if ultra vires.

It cannot be said that Punjab Restitution of Mortgaged Lands Act, IV of 1938, prohibited persons of a particular descent (communities classed as non-agricultural) from holding property when under the provisions of the Act, agriculturist mortgagees, though they may be fewer in number, are as much liable to be dispossessed by order of the Collector as non-agriculturist mortgagees. Hence the Punjab Act cannot be impeached on this ground. A I R (Vol 29) 1942 F C 27 : 23 P L T 502 : 1942 M W N 403 : 46 C W N F C 61 : ILR (1942) Kar (FC) 40 Sup : 44 P L R 437 : I L R (1942) Lah 623 : 8 B R 695 : 55 L W 484 : 1942 F C R 53 : 200 Ind Cas 198.

——Scope—Whether takes away rights under Ss. 69, 70, Contract Act—Whether repugnant to Limitation and Transfer of Property Acts.

The Act does not clearly or in terms take away any rights which a mortgagee may have under Ss. 69 and 70 of the Contract Act and no particular provision in the Act can accordingly be said to be repugnant to those provisions of the Contract Act.

There is no provision in the Act which conflicts with the Indian Limitation Act and even if there were any, the saving of special or local laws in S. 29 (2) of the Limitation Act would preclude the argument of repugnancy.

A plea of repugnancy under S. 107 (1) of the Constitution Act can be raised only on the strength of statute law or statutory rules and the T. P. Act is not in force in most of the Punjab. Hence, no argument on the ground of repugnancy to T. P. Act can be urged. A I R (Vol 29) 1942 F C 27 : 23 P L T 502 : 1942 M W N 403 : 46 C W N F C 61 : ILR (1942) Kar (FC) 40 Sup : ILR 1942 Lah 623 : 44 P L R 437 : 8 B R 695 : 55 L W 484 : 1942 F C R 53 : 200 Ind Cas 198.

——Punjab Restitution of Mortgaged Lands Act neither contravenes S. 37, Contract Act, nor is repugnant to S. 9, Civil P. C. A I R (Vol 29) 1942 F C 27 : 23 P L T 502 : 1942 M W N 403 : 46 C W N F C 61 : I L R (1942) Kar (F C) 40 Sup : 44 P L R 437 : I L R (1942) Lah 623 : 8 B R 695: 55 L W 484: 1942 F C R 53 : 200 Ind Cas 193.

——Act, if ultra vires.

The test for determining the scope and validity of legislation is to ascertain the true nature and character of the enactment, that is to say, its "pith and substance." The "pith and substance" of the Punjab Restitution of Mortgaged Lands Act is to empower the Collector to extinguish subsisting mortgages effected before June 8, 1901, subject to the condition of payment of compensation in certain cases. The subject-matter of that Act falls within the expression in item No. 21, "land, that is to say, rights in or over land" and consequently, the restriction on the jurisdiction and powers of Civil Court, provided by S. 12 of that Act is also within the authority of the Provincial Legislature. For the same reasons, the impugned Act cannot be said to conflict with the Contract Act in so far as it deals with the land other than agricultural.

The mere fact that the subject-matter of the impugned Act may also be affected by certain provisions in the Current Legislative List, would not attract the provisions of S. 107, regarding repugnancy. Consequently, the Punjab Restitution of Mortgaged Lands Act is intra vires the Provincial Legislature. AIR (Vol 28) 1941 Lah 177: 43 PLR 226: 194 Ind Cas 413 (FB).

—S. 2.

——S. 2—Applicability — Additional charge created after 8th June, 1901.

Section 2 of the Punjab Restitution of Mortgaged Lands Act does not apply to an additional charge created after 8th June, 1901, although the original mortgage was created before that date. Consequently the Collector has no power to extinguish it along with the original mortgage. (1946) 48 P L R 498.

—S. 4.

——S. 4—Application for restitution—Subsistence of mortgage—Relevant date—Date of application or of Act coming into force.

In each case when the question is raised whether the application to the Collector for restitution of the land has been made in respect of land covered by mortgage which is still subsisting and the right to redeem which has not become extinguished by reason of the expiry of limitation, the material date will be, not the date on which the Punjab Restitution of Mortgaged Lands Act came into force, but the date of the application to the Collector. (1949) 51 P L R 364.

——Ss. 4 and 5 — Mortgagee in possession under mortgage created before 1901 — Second mortgage

created after 1901—Power of Collector to order restitution.

Where a mortgagee has been in possession by virtue of a mortgage created before 1901, and a second mortgage or charge is created after 1901 on the same property with the stipulation that possession will remain with the mortgagee till the second mortgage is redeemed or the charge is paid, the Collector cannot order that the possession be handed over to the mortgagor without payment of the additional charge or mortgage-debt. It may be open to the Collector to declare that mortgages entered into before the 8th June, 1901, have been extinguished. He can, however, go no further and hold that the property should be handed back to the mortgagor without payment of the additional charge created after the 8th June, 1901. AIR (Vol 34) 1947 Lah 278: ILR (1947) Lah 259 : 230 Ind Cas 360 : 49 P L R 85 (FB).

——S. 4 — Application under—Subsistence of mort gage—Relevant date.

Where an application for restitution of possession under S. 4 of the Punjab Restitution of Mortgaged Lands Act is made, the relevant date for determining whether a mortgage subsists is the date on which the Act came into force and not the date on which the application was presented. (1947) 26 L L T 32.

—S. 12.

——S. 12—Orders of Collector ultra vires—Jurisdiction of Civil Court.

Only those orders of the Collector are sacrosanct which are intra vires and those which are ultra vires are subject to the control of a Civil Court despite the provision made in S. 12 of the Punjab Restitution of Mortgaged Lands Act. (1946) 48 P L R 498.

PUNJAB RESTRICTION OF HABITUAL OFFENDERS ACT (5 of 1918)

—S. 3.

—— S. 3—Appeal—Powers of District Magistrate.

The Restriction of Habitual Offenders Act only provides for a higher penalty for offenders who are found to be incorrigible.

A District Magistrate in appeal has jurisdiction to substitute an order under S. 110, Criminal P. C., for that passed by the trial Magistrate restricting a certain person proceeded against under the Restriction of Habitual Offenders Act. A I R (Vol 15) 1923 Lah 851 : 110 Ind Cas 321 : 10 A I Cr R 503 : 29 Cr L J 689.

——S. 3—Procedure — Order of restriction without initiating proceedings under S. 3 and without giving notice to show cause under S. 4—Legality.

A Magistrate trying a case under S. 110, Criminal P. C., has no jurisdiction to pass an order of restriction when no proceedings under Act V of 1918 have been initiated against the petitioner and when the necessary notice required by S. 4 (1) is not served upon him nor is he asked even verbally before the Court to show cause why the order of restriction should not be passed. AIR (Vol 8) 1921 Lah 163 : 59 Ind Cas 656 : 3 L L J 286 : 22 Cr L J 144.

——Ss. 3 and 7—Order of restriction.

A restriction order under S. 7 of the Act following an order for security for good behaviour under S. 118, Criminal P. C., is ultra vires. A I R (Vol 7) 1920 Lah 330 : 1 Lah 100 : 21 Cr L J 385 : 95 P L R 1920 : 55 Ind Cas 993.

—S. 7.

——S. 7 — Grounds for restrictions — Mere isolated suspicions of offences—If sufficient.

The mere fact that a person was suspected of offences on one or two isolated occasions is not sufficient to justify a person being restricted under S. 7. AIR (Vol 16) 1929 Lah 803 : 118 Ind Cas 912 : 1929 Cr C 370 : 30 Cr L J 973.

—— S. 7 — Cr. P. C. (1898), S. 118 — Order of restriction.

An order under S. 7 cannot be made against one, against whom an order under S. 118, Criminal P. C., has been made. AIR (Vol 6) 1919 Lah 87 : 2 P W R 1919 (Cr) : 34 P L R 1919 : 20 Cr L J 352 : 50 Ind Cas 832.

—S. 8.

——S. 8 — Confirmation of order — Restriction exceeding one year—Confirmation of order—If necessary.

An order of restriction for a period exceeding one year passed by a Magistrate under the provisions of the Restriction of Habitual Offenders (Punjab) Act (V of 1918) does not require confirmation by the Sessions Judge. A I R (Vol 8) 1921 Lah 380 : 17 P L R 1921 : 22 Crt L J 108 : 59 Ind Cas 412.

—S. 16.

——S. 16—Scope of restrictions.

The rules under S. 16 do not empower the Magistrate to confine a person to his house between certain specified hours. He can only be restricted to the area of the village or such larger area as the Court may fix. A I R (Vol 14) 1927 Lah 124 : 8 Lah 267 : 28 P L R 440 : 28 Cri L J 176 : 99 Ind Cas 608.

PUNJAB SIKH GURDWARAS ACT (8 of 1925)

——Scope.

The purpose of the Act was to settle, not only pending disputes but all likely disputes in future and to have it determined whether the Gurdwara concerned or some other possible claimant was owner of the right claimed on behalf of the Gurdwara. A I R (Vol 23) 1936 Lah 939 : 39 P L R 439 : 168 Ind Cas 905 (DB).

——Applicability.

The word "Damdama" is not used exclusively by the Sikhs. Hence the mere use of this word in the title place of an institution is not strong evidence that the institution is a Sikh institution. A I R (Vol 22) 1935 Lah 521 (DB).

—S. 2 (4).

——S. 2 (4) — Office-holder and minister, difference —"Office".

While in the case of an 'office-holder', participation in either the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein is sufficient, in the case of a 'minister', the control not only of the management or performance of public worship in a Gurdwara is essential but also of the rituals and ceremonies observed there. Secondly, while a person can be called an 'office-holder' if he participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein, he cannot be called a 'minister' unless he is vested with the control of the management or performance of public worship in a Gurdwara and of the rituals and ceremonies observed therein either solely or along with others. When the Legislature used two different terms in two separate definitions, it did intend to distinguish one from the other and in using the word 'control' as distinguished from management, its intention was to import into the term "control", the idea of domination or command. Unauthorized seizure of jurisdiction would be subject to the control of Courts and an act done which is not within the competence of the Shiromani Gurdwara Parbandhak Committee to do would be liable to be ignored. A I R (Vol 25) 1938 Lah 734 : 180 Ind Cas 103 (DB).

——S. 2 (4)—Hereditary office-holder, meaning of—Sikhs and Udasis, difference.

The definition of the term 'hereditary office-holder' in S. 2 (4) contemplates participation in the manage-

ment or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein. A I R (Vol 21) 1934 Lah 920 : 35 P L R 619 : 155 Ind Cas 396 (DB).

——S. 2 (4)—Office-holders appointed by Panchayat —Locus standi to maintain petition.

Where the office holders of the Gurdwara are appointed by the Panchayat and there is no rule of succession for the institution, the person alleging to be office-holder has no locus standi to maintain his petition when he has not established that he is a hereditary office-holder. A I R (Vol 21) 1934 Lah 344 : 154 Ind Cas 356 (DB).

——S. 2 (4)—Office.

Grant of muafi for performance of music in Gurdwara — Construction of grant — Held, that the ragis were office-holders as defined in Ss. 2 (4) (i) and (iv) and that as their names appeared in the Record of Rights, there was a presumption that the right, title or interest claimed by them really appertained to the Gurdwara under the Sikh Gurdwaras Act. A I R (Vol 20) 1933 Lah 894 : 144 Ind Cas 712 (DB).

——S 2 (4)—Hereditary office — Determination of prevailing rule of descent.

The words "devolved by hereditary right" in S. 2 (4) (iv) have not been assigned any special meaning and must, therefore. be interpreted literally as signifying "descended and capable of descending by inheritance from an ancestor to an heir at-law". The section does not prescribe any particular rule of inheritance and it is a matter for determination in each case as to what the prevailing rule of descent is. A I R (Vol 15) 1928 Lah 337 : 9 Lah 689 : 113 Ind Cas 769 (DB).

——S. 2 (4)—Meaning.

The definition of "hereditary office" in S. 2 (4) (iv) of the Act does not contemplate that the office should have devolved on the applicant himself according to hereditary right or by nomination, but it means that the office should have devolved on the person who was holding it on the first day of January 1920 (whether he be the applicant himself or his ancestor or guru) by hereditary right or by nomination. A I R (Vol 15) 1928 Lah 325 : 9 Lah 649 : 29 P L R 733 : 110 Ind Cas 164 (DB).

——S. 2 (4) (i), (iv) — "Office", if relates to performance of rites and ceremonies in course of private worship.

The use of the words "any rituals or ceremonies" in the latter part of the definition of "office" in S. 2 (4) (i), as opposed to the words "public worship" in the first part is significant and seems to indicate that the rituals or ceremonies referred to in the second part may be in the course of private worship. A I R (Vol 24) 1937 Lah 786 : 40 P L R 82 : 176 Ind Cas 262 (DB).

——Ss. 2 (4) (iv) and 16 (3) — Hereditary office-holder.

Members of committee managing Gurdwara who are either nominated or co opted by committee are hereditary office-holders so as to be entitled to be restored to office under S. 16 (3). A I R (Vol 22) 1935 Lah 277 (DB).

—S. 2 (7).

——S. 2 (7)—Presumptive successor—Meaning.

The expression "presumptive successor" has been given a peculiar meaning in the Act and the mere fact that succession had actually opened out before the application was made by the applicant does not deprive him of his right to apply for compensation under S. 6. A I R (Vol 15) 1928 Lah 337 : 9 Lah 689: 113 Ind Cas 769 (DB).

——S. 2 (7)—Meaning.

Where the succession to office descends from father to son, the son is a "presumptive successor", even though the father had died on the date of application by the son, under S. 6.

In common legal parlance an "heir presumptive" or a "presumptive successor" is a person, who, if the ancestor should die immediately, would be his heir, but whose right to the inheritance may be defeated by the birth of a near relation or by some other contingency, but this is not the sense in which this expression is used in the Act. A I R (Val 15) 1928 Lah 325 : 9 Lah 649 : 29 P L R 733 : 110 Ind Cas 164 (DB).

—S. 2 (9).

——S. 2 (9)—Sikhs—Udasi and Sikhs — Difference—Sub sects.

'Khalsas', "Akalis, Singhs", all mean the same thing viz., Amritdhari Sikhs who have been initiated in the manner prescribed by Guru Gobind Singh and observe and use the five kakas. Sahijdaris are also orthodox Sikhs who, however, do not go through the ceremony of initiation or observe or wear the five kakas. The Udasis are schismatics holding a position somewhere between orthodox Hindus and Sikhs. [Relevant history traced.] A I R (Vol 32) 1945 Sind 177 : I L R (1945) Kar 224.

——S. 2 (9), (10)—Sikh—Udasis — Evidence — Mere fact that Guru Granth Sahib is read there.

The Udasis constitute a separate sect, distinct from the orthodox Sikhs. They occupy an intermediate position between the strictly orthodox Sikhs and Hindus. Though they worship samadis, etc., they do reverence to the Granth Sahib without completely renouncing Hinduism. Owing to their intermediate position, it is possible for Udasis to be in charge of a Sikh Gurdwara properly so called but it does not follow that the institution is a Sikh Gurdwara and not a true Udasi institution merely because the Granth Sahib is read in it. That does not entitle the Sikhs to claim to be associated in the management of the institution. A I R (Vol 26) 1939 Lah 239 : 41 P L R 777 (DB).

——S. 2 (9) — Sikh — Followers of Baba Ram Rai whether Sikhs.

There is an essential difference both in belief and in practice between the Sikhs as defined in the Sikh Gurdwaras Act, and the followers of Baba Ram Rai. Baba Ram Rai never became a follower of the 8th, 9th or 10th Guru ; on the other hand, he was their rival and established an institution of his own at Dehra Dun : neither he nor his followers, therefore, can be styled as the followers of the 10th Guru or believers in the 10 Gurus. A I R (Vol 25) 1938 Lah 76 : 178 Ind Cas 886 (DB).

——Ss. 2 (9), 10—Udasis, whether Sikhs.

Udasis to-day are not to be classed as Sikhs for the purposes of the Sikh Gurdwaras Act. A I R (Vol 23) 1936 P C 93 : 43 L W 443 : 2 B R 383 : 1936 M W N 341 : 17 Lah 146 : 40 C W N 610 : 38 Bom L R 479 : 38 P L R 378 : 63 C L J 390 : 63 I A 180 : 161 Ind Cas 529.

——S. 2 (9)—Dhirmalis and Sikhs.

There is very little difference in practice between the Dhirmalis and ordinary Sikhs. Dhirmalis are Sikhs and have always been Sikhs. A I R (Vol 23) 1936 Lah 936 : 39 P L R 467 : 168 Ind Cas 396 (DB).

——S. 2 (9)—Udasis, whether Sikhs.

Udasis are not Sikhs for the purpose of the Act and the change in the definition of Sikh in the Act, by amending Act III of 1930, does not affect their position.

No general presumption can be drawn that the Udasis are generally recognised as Sikhs from the facts that they not only pay special reverence to the Adi Granth but also respect the Granth of Gobind Singh and attend the same shrines as the Sikhs

generally. A I R (Vol 23) 1936 Lah 924 : 38 P L R 331 : 163 Ind Cas 727 (DB).

——S. 2 (9)—Sikhs and Udasis—Distinction.

The Sikhs are a Hindu sect. The first Guru preached the unity of God but, apart from that, he was in other respects apparently a Hindu. History of Sikhs and Udasis and their practice described.

The Udasis occupy a position between Hindus proper and Sikhs proper, and in some cases where they become heads of Sikh Gurdwaras, it is difficult to distinguish them from Sikhs proper, except that they may privately worship at the samadhs of their predecessors. A I R (Vol 21) 1934 Lah 920: 35 P L R 619 : 155 Ind Cas 396 (DB).

——S. 2 (9)—Udasis, whether Sikhs or Hindus.

Udasi order constitutes a separate sect of schismatics distinct from the orthodox Sikhs. The Udasis are Hindus and in the wider sense of the term, they are also Sikhs. The Udasis are, in fact, a monastic order in their origin and are followers of Bawa Sri Chand, son of the first Guru Nanak, and unlike the orthodox Sikhs, they still worship idols and the samadhs of the heads of the order as well as certain other objects such as the Ball of ashes, etc. At the same time they do reverence to the Granth Sahib and read it without completely renouncing Hinduism. A I R (Vol 21) 1934 Lah 13 : 15 Lah 247 : 37 P L R 458 : 151 Ind Cas 1005 (DB).

——S. 2 (9)—Sikh—Udasis.

The Udasis are not Sikhs within the meaning of the term 'Sikh' as used in the Sikh Gurdwaras Act. A I R (Vol 18) 1931 Lah 296 : 33 P L R 336 : 136 Ind Cas 257 (DB).

——S. 2 (9)—Sikh—Udasis.

Udasis are not Sikhs within the meaning of that term as defined in the Sikh Gurdwaras Act. A I R (Vol 18) 1931 Lah 254 : 33 P L R 498 : 136 Ind Cas 31 (DB).

—S. 3.

——S. 3 — Claim as to muafi rights and rights of tenancy—If amounts to claim of occupancy rights — Punjab Tenancy Act, S. 5 (1) (d).

A claim by the managing committee of a Gurdwara as to muafi rights and rights of tenancy in land under S. 3 of the Sikh Gurdwaras Act, amounts to a claim of occupancy rights having regard to S. 5 (1) (d) of the Punjab Tenancy Act. A I R (Vol 38) 1951 Punj 336.: 52 P L R 379 (DB).

——S. 3—Notice, necessity of.

Under S. 3, the name of the person in possession should be given and he should be served with notice. Service on the person in full physical and lawful possession of the property is proper service within the meaning of S. 3. A I R (Vol 20) 1933 Lah 828 : 36 P L R 438 : 15 Lah 55 : 147 Ind Cas 54 (DB).

——S. 3 — Where the Government has made a declaration that an institution is a Sikh Gurdwara, it is not open to the High Court to consider whether the declaration is justified by the circumstances. A I R (Vol 20) 1933 Lah 334 : 34 P L R 921 : 146 Ind Cas 236 (DB).

——S. 3—Tenant-at-will—Mahant shown as owner—Death of tenant-at-will—Succeeding tenant claiming ownership—Onus of proof.

Where a land was shown in 1911-12 as being in the cultivating possession of A as tenant without occupancy rights the owner being shown as the Mahant of a Gurdwara, and in 1921-22 after A's death, the tenant-at-will was shown as B who set up a claim to ownership of the land :

Held, that the onus lay heavily on B to show that he was the owner of the land in question and that on the evidence the ownership vested in the Mahant. A I R (Vol 20) 1933 Lah 142 : 145 Ind Cas 227 (DB).

——S. 3 — Validity of notice — List forwarded to Local Government — Notice issued to person who was dead — Knowledge imputed to successors-in-interest—Disproof—Onus—Validity of notice.

Where in connection with a list forwarded to the Local Government under S. 3 (1) of the Sikh Gurdwaras Act a notice under S. 3 (3) was addressed by post to a Mahant but it appeared that he was dead at that time and the notice was received by his widow and his son lived all the time along with his mother, held, that the son must have had notice and that the notice was not rendered invalid. In such a case it is for the person impugning the validity of the notice to establish that as a matter of fact he neither had knowledge of the notice nor could by the exercise of reasonable diligence have acquired that knowledge. A I R (Vol 17) 1930 Lah 717 : 123 Ind Cas 543 : 12 Lah L J 65 (DB).

——S. 3 — Petition by muafidar — Personal grant to muafidar—Petition by muafidar against inclusion of muafi in the list—Maintainability.

Where the income of a muafi is used wholly and consistently for the personal benefit of the muafidar (who is also a hereditary office-holder of a gurdwara) showing that the grant is purely a personal one and not for the benefit of Sikh Gurdwara a petition by the muafidar under S. 5 (1), Sikh Gurdwaras Act, lies against the inclusion of the muafi in the list prescribed by S. 3 (2) of the Act. A I R (Vol 17) 1930 Lah 630 (DB).

——S. 3—Transfer of pending suits.

Section 32 of the Gurdwaras Act does not come into operation unless the provisions of S. 3 of that Act have been complied with. A I R (Vol 14) 1927 Lah 394 : 101 Ind Cas 171 : 8 Lah 362 : 28 P L R 698 (DB).

—S. 5.

——S. 5—Dismissal in default—Effect.

The Act interferes with the ordinary civil rights of persons and must be strictly construed. There is no provision in the Act to the effect that even the dismissal of a petition under S. 5 in default is to be taken as equivalent to an adjudication of the right in dispute in favour of the Gurdwara. A I R (Vol 27) 1940 Lah 154 : 42 P L R 180 : 189 Ind Cas 449.

——S. 5—Tribunal, if has power to declare that suit property belongs to Sikh Gurdwara.

(Per Din Mohammad, J.) — On the hearing of a petition under S. 5, the Tribunal has no power to make a declaration that the property in suit belonged to a Sikh Gurdwara, and that all that it can do was to reject the claims as put forward in the petition. A I R (Vol 25) 1938 Lah 369 : 40 P L R 319 : 175 Ind Cas 945 (FB).

——S. 5—Petition under—Applicability of O. 1, R. 8, Civil P. C.

The Act is an enactment of a special nature and is governed by its own procedure. The procedure under O. 1, R. 8, Civil P. C., is not, therefore, applicable to a petition under S. 5, and notification of a claim in the Gazette as required by S. 3 and its publication at the headquarters of the District, etc., is sufficient. A I R (Vol 25) 1938 Lah 369 : 40 P L R 319 : 175 Ind Cas 945 (FB).

——S. 5—Function of Tribunal.

In a petition under S. 5, what the Tribunal has primarily to determine is the right, title or interest of the petitioner in the property in dispute. It may have to determine the objections raised by the opposite party for that purpose, but the section does not seem to justify the determination of the objectors' rights only, without any pronouncement on the rights of the petitioner. A I R (Vol 23) 1936 Lah 643: 38 P L R 865 : 165 Ind Cas 667 (DB).

——S. 5—Powers of the Tribunal—Pahlwanke Bunga —Nature of institution.

If the petitioners are found to have no right, title or interest in the property concerned in a petition under S. 5, the tribunal has no authority to examine and adjudicate upon the claims of the objectors who support the claim made in the list presented and published by the Local Government under S. 3 for the only claim before them for disposal under S. 14 is that made in the petition presented under S. 5. But this does not mean that where a petitioner has succeeded in establishing before the tribunal a lesser right than he claimed in the petition, by showing that he has the right to manage the property, the tribunal cannot, in its decree, define the extent of that right and in so doing, declare that the petitioner is not subject to control by the Gurdwara and there is nothing in the Sikh Gurdwaras Act prohibiting in such case the grant of a declaration to this effect :

Held, that the Pahlwanke Bunga is an institution intended to be reserved as a hostel for pilgrims visiting the Golden Temple, although there is no evidence of the formal dedication of it to religious or charitable purposes. A I R (Vol 23) 1936 Lah 623 : 165 Ind Cas 283 (DB).

——S. 5—Petition by benamidar.

An action can be maintained in the name of the benamidar in respect of property though the beneficial owner was not a party to it, the latter being fully affected by the rule of res judicata. In fact the question whether the property is held benami by any one arises only between the real owner and a benamidar and though consideration moved from the real owner, he can still give a complete title to the benamidar and the benamidar is entitled to possession as against every one except the real owner. (AIR (Vol 21) 1934 Lah 421 : 15 Lah 732 : 35 P L R 423 : 155 Ind Cas 324 (DB).

——S. 5—Jurisdiction of the tribunal.

Tribunal can go into question of vendor's lien vested in the Darbar Sahib. AIR (Vol 21) 1934 Lah 348 : 35 P L R 410 : 150 Ind Cas 725 (DB).

——S. 5 –Right to manage under will.

The petitioner's father A made a will under which half the income of the property was to be spent as dharamarth by setting up a langar. His son S was to receive half the income for the maintenance of his family including the testator's widow. S was to realise the rents, keep half the income and hand over half to H, the son of the petitioner as manager of the langar. He and the petitioner were merely to receive food from the langar. It was also provided that after the death of H and S, whoever was fit out of his family, was to be appointed manager of the dharamarth. After the death to S, his sons K and H handed over his property to the Golden Temple in 1923 before the passing of the Sikh Gurdwaras Act. The property was included in the consolidated list published under S. 3. The petitioner claimed to be entitled to manage the property :

Held, that she was not a member of the testator's family having ceased to be a member of it on her marriage and apart from her right to receive food from the langar, she had no right, title or interest in the property, and hence was not entitled to manage the langar. A I R (Vol 21) 1934 Lah 65 : 154 Ind Cas 418 (DB).

——S. 5—Gift by Mahant to successor—Adverse possession against institution — Possession of donees, whether adverse — Claim of title by adverse possession.

The question of adverse possession is a mixed question of law and fact and if a party claims title by adverse possession, it is his duty to make clear allegations in the plaint and to lead evidence of facts from which he asks the Court to draw the inference that the proved facts amount to adverse possession.

Where the mahant of an institution made a gift of certain properties belonging to the institution to certain persons who afterwards succeeded him as mahants, and the latter continued to be in possession of the properties after the death of the donor :

Held, that the possession of the donees was not adverse to the institution. In the case of a transfer by a mahant, the period of limitation does not run against the institution so long as the donor is alive. A I R (Vol 20) 1933 Lah 25 : 13 Lah 677 : 33 P L R 1035 : 140 Ind Cas 604 (DB).

——S. 5 — Eviction of occupancy tenants — Certain Gurdwara declared to be Sikh Gurdwara and list of properties belonging to it published and interest notified as proprietary interest — No claims made under S. 5 (3) Suit by Managing Committee for immediate possession — Claim contested by defendants on ground that they were occupancy tenants— Procedure.

A Gurdwara was declared a Sigh Gurdwara and a list showing properties claimed as belonging to the institution was published. The interest claimed and notified was proprietary interest in certain lands. No objection having been taken to the claim a notification issued that no claims had been made under S. 5 (3). The Managing Committee of the Gurdwara claimed immediate possession of the land. A and B contested the claim on the ground that they were occupancy tenants.

Held, that so far as A and B were concerned they could not be evicted from the lands attached to the Gurdwara in the summary proceedings. They could be evicted, if occupancy tenants, only by revenue authorities when moved in the proper manner.

Held further that A and B never claimed proprietary interest in the land. They were therefore not bound to make application under the Act and the notification under S. 5 (3) did not operate to prevent their raising the plea that they were occupancy tenants of the land. AIR (Vol 17) 1930 Lah 607 (DB).

——S. 5 — Claim to whole Gurdwara area — Maintainability.

Though under S. 5 nobody can claim any interest, right or title to a Gurdwara yet any one can claim an area alleged to be a Gurdwara. Anybody may put in a claim provided he avoids describing it as a claim to Gurudwara. He may claim in other words, that what the Sikh Gurudwara Prabandhak Committee or any other religious body declares to be a Sikh Gurudwara form part of his private property or a part of the endowment of any institution. 'As a person can claim a portion there is no reason why he cannot claim the whole. A I R (Vol 16) 1929 Lah 603 : 120 Ind Cas 2 (DB).

——Ss. 5 (1), 28— Publication of consolidated list — Person coming forward under S. 5 (1) — Proof to be adduced—Claim not made—Right of Shromani Gurdwara Prabandhak Committee to bring suit for possession—Suit, if to be automatically decreed.

When the consolidated list contemplated by the Act has been published, the person who can come forward under S. 5 (1) is one who claims a right, title or interest in the property included in such consolidated list. If such a person does not come forward, the Local Government must, under the provisions of S. 5 (3), publish a notification specifying the right, title or interest to any properties in respect of which no such claim has been made. If no such claim has been made, the Shromani Gurdwara Prabandhak Committee has a right under S. 28, to bring a suit for possession of that property which, in the ordinary course of events, must be automatically decreed. AIR (Vol 20) 1933 Lah 1041 : 35 P L R 286 : 15 Lah 117 : 147 Ind Cas 1142 (DB).

——S. 5 (3)— Publication of notification — Value in evidence.

The publication of a notification under S. 5 (3) is conclusive proof of the fact that no claim was made with respect to the property in dispute. AIR (Vol 20) 1933 Lah 828 : 36 P L R 438 : 15 Lah 55 : 147 Ind Cas 54 (DB).

—S. 6.

——S. 6 — Office-holder, meaning of — Transfer of control by Sacred Shrines Committee to Shromani Gurdwara Prabandhak Committee — Right to compensation.

Where the petitioners neither separately nor jointly acted as pujaris nor in any other manner either participated in the management or performance of public worship in the Gurdwaras or in the management or performance of rituals or ceremonies observed therein, but as a family shared simply in the offerings and other income of the institutions :

Held, that they could not be regarded as 'office-holders' and were not entitled to make an application under S. 6.

Where the control of a shrine was handed over to the Shromani Gurdwara Prabandhak Committee under a resolution of the Sacred Shrines Committee which had control over the shrine :

Held, that there was no unlawful usurpation of the management of the institution on the part of the Shromani Gurdwara Prabandhak Committee and the petitioners who had a share in the income of the instiiution were not entitled to any compensation under S. 6. AIR (Vol 19) 1932 Lah 41 : 134 Ind Cas 1035 (DB).

—— S. 6—Right to apply.

An application for compensation under S. 6 can only be made on behalf of a "past or present hereditary office-holder" or the "presumptive successor" of such office-holder. AIR (Vol 15) 1928 Lah 395 : 9 Lah 592 : 30 P L R 43 : 112 Ind Cas 183 (DB).

——S. 6 — Enquiry into succession — Dispute as to custom.

There is nothing in the Sikh Gurdwaras Act or in any other Statute to support the view that in determining whether a claimant to compensation under S. 6 is the presumptive successor to a hereditary office-holder, the Tribunal is not "expected by law" to make an enquiry into a special custom under which he claims to succeed. On the other hand if such a custom is set up by one party and denied by the other, it is the duty of the Tribunal to enquire into its existence and validity and record its findings thereon. AIR (Vol 15) 1928 Lah 337 : 9 Lah 689 : 113 Ind Cas 769 (DB).

——S. 6—Office-holder continuing in office till death —Successor prevented from succeeding — Applicability of S. 6.

Section 6 does not and cannot cover the case in which the office holder continued in office till his death, and immediately after his death but before the person next in succession could actually get himself installed, the S. G. P. C., or some other such body intervened and unlawfully prevented him from succeeding. That section is so worded as to make unlawful removal of office holder a condition precedent for the maintainability of an application for compensation. A I R (Vol 15) 1928 Lah 337 : 9 Lah 689 : 113 Ind Cas 769 (DB).

—S. 7.

See also, Punjab Sikh Gurdwaras Act, 1925, S. 8.

——S. 7—Dhirmalis and Sikhs—Sikh Gurdwara.

There is very little difference in practice between the Dhirmalis and ordinary Sikhs; Dhirmalis are Sikhs and have always been Sikhs.

Where the disputed institution commemorated the memory of Guru Arjan Dev and the working by him of miracles and there was evidence to show that Sikhs made offerings there :

Held, that the institution was a Sikh Gurdwara. AIR (Vol 23) 1936 Lah 936 : 39 P L R 467 : 168 Ind Cas 396 (DB).

——S. 7—Proof of institution being Gurdwara.

The mere fact that the Granth Sahib was kept opened or read in an institution will not by itself be proof of the institution being a Sikh Gurdwara.

The dharamsala in dispute was managed by mahants and muafi of the land was granted on condition that the Granth Sahib should be regularly read. There were samadhs and langar but in the plan, there was no place where the Granth Sahib was kept or recited. The dharamsala was referred to as dera by which name Udasi institutions are commonly known:

Held, that the dharamsala was not a Sikh Gurdwara. AIR (Vol 23) 1936 Lah 825 : 167 Ind Cas 590 (DB).

——S. 7—Considerations for Court— Inference warranted by circumstances.

Cases for declaration of religious institution as Sikh Gurdwaras must be decided wholly upon the evidence adduced by the parties for the questions for decision are questions of facts, but, as in such cases the more reliable evidence that of old documents, comes from a time long before the agitation began in favour of the purification of the management of religious and charitable institutions frequented by Sikhs, it is seldom that there is direct and clear proof of the exact nature of the worship for which the institution was founded, and the Court has to base their conclusions upon inferences which appear to be warranted by all the circumstances established in each case. At the same time, for the purpose of deciding such cases, inferences drawn by the Court in other cases from similar circumstances have their importance. AIR (Vol 23) 1936 Lah 825 : 167 Ind Cas 590 (DB).

——Ss. 7, 12—Possession of institution declared to be Sikh Gurdwara can only be obtained by suit under S. 25 (a)—It cannot be given in a petition under Ss. 7 and 12 (10). AIR (Vol 22) 1935 Lah 121.

——S. 7—Presumption.

Holding of dewans and the reading of the Guru Granth Sahib in a Gurdwara show that the Gurdwara was established for use by Sikhs for the purposes of public worship and it is used for such worship by Sikhs, even if there is no property attached to the Gurdwara. AIR (Vol 20) 1933 Lah 1040 : 147 Ind Cas 626 (1) (DB).

——S. 7—Proof of dedication.

Where it is not proved that an institution was established by Sikhs for the purpose of public worship, it cannot be declared a Sikh Gurdwara in a petition under S. 7. A I R (Vol 18) 1931 Lah 254 : 33 P L R 498 : 136 Ind Cas 31 (DB).

——S. 7—Refusal to publish notification— Existence of Gardwara not proved.

It is open to the Local Government to refuse to publish a notification under S. 7, sub-S. (3), if it is not satisfied as to the existence of the alleged Gurdwara, but if they once publish a notification under S. 7 they are bound to publish a notification under S. 9 if no petition under S. 8 has been presented, or to take action under the provisions of Part III of the Act if such a petition had been presented. The same is the case with the powers of the Local Government to issue or not to issue a notification under S. 10. AIR (Vol 14) 1927 Lah 380 : 100 Ind Cas 70.

——S. 7 (3)—Non-existence of Gurdwara — Effect of Notification.

If there is no Gurdwara in fact a notification under S. 7 (3) of the Punjab Sikh Gurdwaras Act is de hors

the Act. Any determination that a place is not a Gurdwara bars not only the jurisdiction of the Courts to reagitate the question but it makes the Act inapplicable. AIR (Vol 37) 1950 East Punj 338 (DB).

——Ss. 7 (4), 3 (ii) — Notice — Person absent from place of residence when notice is served — Presumption.

Per Division Bench. — A person who is absent at the time when the notices under S 7 (4), are served cannot be said to have any knowledge of the fact to which the notices relate and if a peron is absent altogether from the place where the notices are issued, it cannot be expected from him to exercise any reasonable diligence to acquire knowledge of the facts which are not even remotely present to his mind. This is all the more so when the property which was in his possession and was claimed on behalf of the Gurdwara had absolutely no connection whatever with the Gurdwara and the person can never imagine that any claim could be put forward to that property on behalf of the Gurdwara.

The question whether a person on whom a notice was served had knowledge of the same depends on the circumstances of each case and no precedent can serve as a safe guide in the matter. A I R (Vol 29) 1942 Lah 19 : 44 P L R 21 : ILR (1942) Lah 217 : 199 Ind Cas 395 (FB).

——Ss. 7 (5) and 36—Applicability — Jurisdiction of Civil Court—When barred.

Both Ss. 7 (5) and 36 of the Punjab Sikh Gurdwaras Act would be applicable and bar the jurisdiction of the Court if the action complained of is within and under the Act. But if the action complained of is done arbitrarily carelessly or oppressively it would be outside the Act and would not bar the jurisdiction of the Civil Court. AIR (Vol 37) 1950 East Punj 338 (DB).

—S. 8

——S. 8—Power of tribunal.

Under S. 8, the Tribunal has only to determine the nature and character of the institution and not to adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the consolidated list published under S. 7 (3). That is a matter which has to be decided in proceedings on the petition under S. 10. The remarks of the Tribunal in its judgment and decree under S. 8 regarding the right, title and interest of the Gurdwara in the properties mentioned in the consolidated list must be regarded as obiter and have, therefore, no legal effect as against the declaration of rights as embodied in the decree under S. 10. AIR (Vol 28) 1941 Lah 161 : 43 P L R 55 : 194 Ind Cas 883 (DB).

——S. 8 — "Hereditary office-holder" in case of institution of private worship.

There seems to be no good reason why there should not be a private place of worship with a succession of office-holders. The main point of distinction between a public and a private place of worship is that the public can resort to the former as a matter of right, while they cannot do so in the case of a private place of worship. Where, therefore, the widow and daughters of the founder of the institution of worship have been managing the institution after the death of the founder and have appointed Granthis for the performance of religious ceremonies, they are hereditary office-holders, even if the institution is a private one. The widow and daughter can, therefore, apply under S. 8. A I R (Vol 24) 1937 Lah 786 : 40 P L R 82 : 176 Ind Cas 262 (DB).

——Ss. 8, 10, 3—Scope.

Denial by plaintiff that institution was at all a place of worship—Plaintiff should petition under S. 10 and not under S. 8. A I R (Vol 24) 1937 Lah 786 : 40 P L R 82 : 176 Ind Cas 262 (DB).

——S. 8—Sikh Dharamsala or Udasi Dera.

Held, that although Udasis read the Granth Sahib and the scripture is kept in most Udasi Deras the evidence indicated that the institution dharamsala Sree Granth Sahib of Shahabad, though its servitors were Udasi Sadhs was not an Udasi Dera or College but the ordinary Sikh village dharamsala where the travellers were accommodated and the Granth recited by the Udasi Sadh in charge. AIR (Vol 24) 1937 Lah 290 : 174 Ind Cas 712 (DB).

——S. 8 — Succession — Office of Mahant, if hereditary office.

Where there is ample evidence on the record to show that the succession to the institution in dispute has always been from Guru to Chela, the office of the Mahant of the institution is a hereditary office. AIR (Vol 24) 1937 Lah 280 : 174 Ind Cas 317 (DB).

——S. 8 — Conditions for qualifying person to file petition under.

In order to qualify a person to present a petition under S. 8 it is not necessary that he should have been appointed before January 1, 1920. The only requirements laid down in the Act is that the petitioner should be the holder of an office the succession to which before January 1, 1920 devolved according to hereditary right or by nomination by the office-holder for the time being. AIR (Vol 24) 1937 Lah 280 : 174 Ind Cas 347 (DB).

——S. 8—Nirmala Sants whether Sikhs.

Nirmalas can only be described as Sikh priests. They are not a body like the Udasis who broke off from Sikhism before Sikhism had reached its final stage. They were really meant to be the theologians of the 10th and last Guru. For that purpose he sent the first members of the order to Benares to learn the Hindu scriptures so as to be able to meet the Hindu theologians on their own ground. It may be that by means of that training, they have certain learnings towards some of the sacred Hindu books but they are first and foremost Sikh priests. The fact, therefore, that these persons were learning Sanskrit in an institution does not go to show that the institution was not a Sikh Gurdwara :

Held, that the institution in question at Sangatpura, Tahsil Moga, District Ferozepore, is a Sikh Gurdwara. AIR (Vol 24) 1937 Lah 7 : 38 P L R 761 : 163 Ind Cas 515 (DB).

——S. 8—Any hereditary office-holder can present a petition under S. 8. He need not be either a past or present office-holder. A I R (Vol 23) 1936 Lah 675 : 38 P L R 870 : 17 Lah 785 : 16[e] Ind Cas 397 (DB).

——S. 8 — Person claiming property as private property and not claiming to be hereditary office-holder.

A person claiming a property as his private property and investing it with a sectarian character can under no straining of language, be described as an office-holder attached thereto; much less a hereditary office-holder. Moreover, if a person wishes to claim the benefit of S. 8, he must expressly assert that the place is a Gurdwara and that he holds any hereditary office attached to it. Where this is not done, he is not competent to lodge a petition under S 8. A I R (Vol 23) 1936 Lah 213 : 162 Ind Cas 847 (DB).

——S. 8—Udasis whether Sikhs—Institution, when can be held to be Sikh Gurdwara.

Udasis are a sect of schismatics distinct from the orthodox Sikhs. They are a monastic order in origin and are followers of Baba Siri Chand, and unlike the orthodox Sikhs, they still worship idols and samadhs of their Gurus as well as certain other objects such as the ball of ashes, etc. They are really Hindus and can be called Sikhs only in the wider sense of the term. They, however, do reverence to the Granth

Sahib and read it without renouncing Hinduism. It does not follow that an institution is a Sikh Gurdwara merely because an Udasi sadh reads Granth Sahib in the presence of the Sikhs or other persons present. An institution can be held to be a Sikh Gurdwara only if it is proved that it was established for use by Sikhs for the purposes of public worship and was used for such worship by Sikhs. A grant to a holy Udasi sadh or to an institution maintained by him for the purposes of supplying his personal needs and those of other ascetics and needy travellers does not make the institution a Sikh Gurdwara :

Held, that the institution known as Dharamsala Dharmo Chak in village Dharmo Chak in the Amritsar District is not a Sikh Gurdwara. A I R (Vol 22) 1935 Lah 859 : 156 Ind Cas 1017 (DB).

——Ss. 8 and 7—Scope of enquiry.

It is not open to a petitioner under S. 8 to dispute the existence of a Gurdwara which may be interpreted as meaning place of worship. It can only be claimed that it is not a Sikh Gurdwara. A petition under S. 7 can only be presented by 50 or more worshippers and that petition along with a list of all rights, title or interests, etc , is published by the Local Government by notification under S. 7 (3). When such a notification is published, an hereditary office-holder can petition under S. 8 within 90 days that it should be declared not to be a Sikh Gurdwara. Further by virtue of S. 7 (5), the publication of a notification under the provisions of S. 7 (3) shall be conclusive proof that the provisions of sub-ss. (1), (2), (3) and (4) of S. 7 has been duly complied with. The trial of a petition under S. 8 must thus pre-suppose that there are at least more than 50 worshippers and that there is a Gurdwara, or place of religious worship frequented by them. AIR (Vol 21) 1934 Lah 920: 35 P L R 619 : 155 Ind Cas 396 (DB).

——S. 8—Petition under S. 8—Persons competent to file—Locus standi.

A petition under S. 8 is only competent, if made by (1) any hereditary office-holder or (2) twenty or more worshippers of the Gurdwara; and under S. 14(2), the forwarding of the petition to the Tribunal for disposal is conclusive proof that the petition was received by the Government in time and in the case of a petition forwarded by worshippers of a Gurdwara under the provisions of S. 8, that the provisions of S. 8 with respect to such worshippers were duly complied with. Nothing is said about a petition forwarded by a hereditary office-holder under S. 8 except that it must be held to have been presented in time. It follows that the locus standi of such a petitioner can be challenged and would have to be decided before the trial can proceed. This position is not affected by S. 16 (1) which can only apply to a petition, properly before the Tribunal. AIR (Vol 21) 1934 Lah 920 : 35 P L R 619 : 155 Ind Cas 396 (DB).

——S. 8 — Village Gurdwara-dharamsala — Public worship of Granth Sahib and feeding of travellers after British occupation :

Held, that the evidence was sufficient to establish that the dharamsala was a Gurdwara. AIR (Vol 21) 1934 Lah 319 : 147 Ind Cas 834 (DB).

——Ss. 8, 7 — Dharamsala — Whether necessarily a place of public worship.

The word dharamsala is and can be used for a very common type of institution in which there is an almshouse as well as public worship by Sikhs. But it can also be used for a charitable almshouse without there being public worship. Though the Granth was being read since 1880, it cannot be said that the institution was originally established for public worship by Sikhs. The inference that it was a place of public worship might be easier to draw had the institution been set up in a Sikh village abadi. AIR (Vol 21) 1934 Lah 277 : 150 Ind Cas 259 (DB).

——S. 8—Dharamsala, if a Sikh Gurdwara.

Where the dharamsala was established for use by Sikhs for the purpose of worship by the public and was used for such worship by Sikhs and the land attached to it has been given by the ancestors of the present villagers :

Held, that it was a Sikh Gurdwara.

Where the former office-holders were Udasis and that the petitioner is a Sikh and was never the chela of the deceased office-holder, he cannot be an hereditary office-holder. AIR (Vol 21) 1934 Lah 130 : 149 Ind Cas 1087 (DB).

——S. 8—Justification for petition under.

Before a person can put in a petition under S. 8, he has to establish that he was a hereditary office-holder. If he is not such, the petition is not competent, nor his appeal against the decision of the Tribunal maintainable. A I R (Vol 21) 1934 Lah 98 : 148 Ind Cas 1007 (DB).

——S. 8 — Mahant who is hereditary office-holder, whether has locus standi.

Held, on facts and admissions that the mahant had admitted that he was the successor of the previous mahants His assertion that he was the owner must not be read alone. It only meant that he considers that he had full power of disposition in his capacity of mahant. The statement did not affect the question of his locus standi to come in under S. 8. A I R (Vol 21) 1934 Lah 13 : 15 Lah 247 : 36 P L R 458 : 151 Ind Cas 1005 (DB).

——Ss. 8, 7 (3) and 15 — Order declaring an institution as Gurdwara—Review Maintainability.

Where the Sikh Gurdwara Tribunal has passed an order declaring an institution as a gurdwara, the claim of another person not a party to the original proceedings can be entertained only if it is preferred within ninety days of the publication of the notification under S. 7 (3) and it is impossible for the Tribunal to review their order on the application of a person who was not a party to the original proceedings and whose right to object was barred by limitation under S. 8. The case having ended, the provisions of S. 15 cannot be utilised. A I R (Vol 20) 1933 Lah 1038 : 147 Ind Cas 714 (DB).

——S. 8—Application by Government.

It is open to the Secretary of State to present an application under S. 8. AIR (Vol 14) 1927 Lah 380 : 100 Ind Cas 70.

—S. 10.

——S. 10 — Power of Tribunal.

The Tribunal cannot adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the list under S. 7 (3). That is a matter which has to be decided in proceedings on the petition under S. 10. The remarks of the Tribunal in its judgment and decree under S. 8 regarding the right, title and interest of the Gurdwara in the properties mentioned in the list must be regarded as obiter and have no legal effect as against the declaration of rights as embodied in the decree under S. 10. AIR (Vol 28) 1941 Lah 161: 43 P L R 55 : 194 Ind Cas 883 (DB).

——Ss. 10, 14 — Petition by M under S. 10 that property included in Government Notification dated 16th October 1933, was his own — Second petition presented directly to Tribunal misdescribed as better statement of first one but claim made in it really repugnant to and inconsistent with first—Subsequent petition was a new one and Tribunal held, had no jurisdiction to entertain it either under S. 10 or under S. 14. A I R (Vol 24) 1937 Lah 795 : 40 P L R 881 : 175 Ind Cas 382 (DB).

——S. 10—Applicability.

Obiter. — If a petitioner denies that an institution claimed as a Gurdwara under S. 7 is a place of worship at all, whether public or private, no petition under S. 8 is competent and his proper remedy in such a case is a petition under S. 10. A I R (Vol 24) 1937 Lah 786 : 40 P L R 82 : 176 Ind Cas 262 (DB).

——S. 10—Scope.

A claim under S. 10 must be a personal claim and not a claim by trustee. AIR (Vol 24) 1937 Lah 106 : 172 Ind Cas 173 (DB).

——S. 10—Power of Tribunal.

The Tribunal disposing of a petition under S. 10 is empowered to decide by its order not only the petitioner's claim but also the claim made by the Gurdwara. A I R (Vol 23) 1936 Lah 939 : 39 P L R 439 : 168 Ind Cas 905 (DB).

——Ss. 10, 85 (2) — Functions of Tribunal.

When the Tribunal has declared an institution to be a Sikh Gurdwara, it is no function of the Tribunal to decide on an application under S. 10 as to the persons by whom the properties appended to the Gurdwara are to be managed. The question of management arises only between the applicants and the Committee constituted under S. 85 (2). AIR (Vol 23) 1936 Lah 847 : 167 Ind Cas 350 (DB).

——S. 10—Tribunal, if has jurisdiction to determine non-applicant's rights of superintendence.

The power to deal with a petition under S. 10 does not include authority to determine a claim not included in the petition itself. Where the claim that the non-applicant has no right of superintendence and control is made in the petition but this claim is based on the plea that the petitioners were owners of the Bunga, and the evidence adduced by them to prove that the Bunga was not waqf fails entirely, the Tribunal can only dismiss the petitions and has no jurisdiction to adjudicate upon the question what rights were possessed by the non-applicant. AIR (Vol 23) 1936 Lah 645 : 38 P L R 861 : 166 Ind Cas 63 (DB).

——S. 10—Scope.

The Tribunal can proceed to deal with the petitions under S. 10 only on the assumption that the institution was a Sikh Gurdwara. AIR (Vol 22) 1935 Lah 813 : 160 Ind Cas 533 (DB).

——S. 10—Scope.

The petitions under S. 10 can either be wholly accepted, partially accepted or wholly dismissed. There is no provision in the Act for the grant of a declaration disallowing the claim of the objectors. AIR (Vol 22) 1935 Lah 813 : 160 Ind Cas 533 (DB).

——S. 10 — Declaration of Sikh Gurdwara — Office-holders claiming property as personal under S. 10 — Appeal against decision pending — No notification — Held, notification was immaterial and Tribunal could dispose of objection of office-holders. A I R (Vol 22) 1935 Lah 807 : 160 Ind Cas 143 (DB).

——S. 10—Powers of Tribunal.

The Tribunal can proceed to deal with the petition under S. 10 only on the assumption that the institution was a Sikh Gurdwara.

Held, that it was proved that the property was endowed property belonging to Gurdwara and not personal property of the office-bearers. A I R (Vol 22) 1935 Lah 807 : 160 Ind Cas 143 (DB).

——Ss. 10, 8—Stay of petition.

The Act does not contemplate the stay of a petition under S. 10 pending before the Tribunal while the petitioner's appeal is being heard against the decision under S. 8. AIR (Vol 21) 1934 Lah 832 : 150 Ind Cas 671 (1).

——S. 10—Applicability.

Suit for possession of property claimed as a dera of Udasis — Notification with respect to the property during pendency of suit :

Held, that it was necessary for the plaintiff to present a petition under S. 10. A I R (Vol 20) 1933 Lah 268 : 34 P L R 857 : 145 Ind Cas 701 (1).

——Ss. 10 (3), 7 - Scope.

The only thing that the notification under sub-s. (3) of S. 10, can prove is the simple fact that no claim was made in respect of any right, title or interest specified in the notification under S. 7, and no more. It is not conclusive proof of the right, title or interest of the party named therein in the property concerned. A I R (Vol 24) 1937 Lah 285 : 174 Ind Cas 543 (DB).

—S. 12.

——Ss. 12, 7, 10 and 14—Tribunal under — Powers of.

Section 12 is expressly constituted for the purpose of deciding claims made in accordance with the provisions of this Act. It is not constituted merely to decide matters arising in petitions received by it from the Provincial Government under Ss. 5, 6, 8, 10 or 11, in accordance with S. 14 (1). These latter petitions are received by the Government and forwarded by them for decision, but the petition under S. 7 is a claim and is also before the Tribunal when under S. 10 (1) a counter petition is forwarded to it for disposal; because under S. 10 (1), the petition forwarded under this latter section is based upon a right, title or interest in any property included in the list attached to the petition forwarded to Government under S. 7. The Tribunal is set up for the purpose of deciding all claims made, and a claim under S. 7 in connection with the property said to belong to the Gurdwara is a claim in accordance with the provisions of the Sikh Gurdwaras Act. Taking, therefore, the provisions of the Act as a whole, there is no foundation for the argument that the Tribunal has no jurisdiction to decide that the property included in the list attached to the petition under S. 7 belonged to the Gurdwara in question. A I R (Vol 27) 1940 Lah 266 : I L R (1940) Lah 649 : 190 Ind Cas 625 (DB).

——S. 12 — Decree by Sikh Gurdwara Tribunal — Application for execution by assignee.

Even though the Sikh Gurdwaras Tribunal has no power to execute a decree passed by it, an application under O. 21, R. 16, Civil P C., for execution of a decree passed by it by a person in the position of an assignee of the decree must, in the first instance, be made to the Tribunal itself.

Even when a decree is transferred to another Court for execution, the latter Court cannot entertain an application under O. 21, R. 16. A I R (Vol 18) 1931 Lah 499 : 132 Ind Cas 183.

——S. 12 —Procedure—Applicability of C. P. Code.

The provisions of O. 6, R. 17, C. P. Code, apply to the trial of cases before the Sikh Gurdwaras Tribunal. A I R (Vol 15) 1928 Lah 325 : 9 Lah 649 : 29 P L R 733 : 110 Ind Cas 164 (DB).

——S. 13.

——S. 13 — Under the provisions of S. 13, it is legal for two of the members of the Tribunal in the absence of the third to finally decide the case before them.

[Procedure on difference of opinion is laid down.] A I R (Vol 18) 1931 Lah 385 : 12 Lah 467 : 131 Ind Cas 737 (FB).

—S. 14.

——S. 14—Judgment in rem.

A finding by a Sikh Gurdwaras Tribunal that an institution is not a Sikh Gurdwara is a judgment in

rem which establishes that it is not a Sikh place of worship. A I R (Vol 26) 1939 Lah 239 : 41 P L R 777 (DB).

——S. 14—Under S. 14 (ii), the forwarding of the petition is conclusive proof that the provisions of the section with respect to worship have been complied with. AIR (Vol 22) 1935 Lah 666 : 158 Ind Cas 903 (2) (DB).

——**S. 14—Duty of Tribunal—Dismissal of petition—Property, if can be declared to be property of Gurudwara— Practice.**

When a petition under S. 10 is forwarded to the Tribunal, its sole duty is to dispose of the petition in accordance with the provisions of the Act. The inclusion of property in a list prepared under S. 7 (2) implies a claim that that property is the property of the Gurdwara mentioned in the petition with which the list accompanies, but neither this petition nor the implied claim is before the Tribunal for adjudication; the only claim before it is the claim of the petitioner who, under S. 10, claims that certain property belonged to him; and the only way in which the Tribunal can dispose of the petition is by decreeing the claim in whole or in part or by dismissing the petition, leaving the effect of the order to determined afterwards, according to law, either the general law or the specific provisions of the Act. It is not open to the Tribunal on the dismissal of such a petition, to declare that the property belongs to the Gurdwara. A I R (Vol 22) 1935 Lah 279 : 16 Lah 968 : 38 P L R 44 : 156 Ind Cas 1042 (DB).

—S. 15.

——**S. 15—Power of Tribunal.**

The power conferred on the Tribunal under S. 15 is similar to the one conferred upon the civil Courts by O. 1, R. 10 (2), Civil P. C., and does not absolve it from the necessity of following the procedure as laid down in O. 1, R. 8. AIR (Vol 25) 1938 Lah 369 : 40 P L R 319 : 175 Ind Cas 945 (FB).

——**S. 15—Scope—Parties to petition.**

There are no respondents in a petition presented under S. 8 and hence S. 15 has been enacted empowering the Tribunal by advertisement or otherwise, to enquire if any person desires to be made a party and to join any person whom it considers should be made a party. The practice is that the Tribunal ascertains the names of the Sikh worshippers who forwarded the petition under S. 7 of the Act and these persons are notified by beat of drum in the locality to come forward while notice is sometimes sent to some of them. The intention of S. 15 is to allow the Tribunal to consolidate rival or conflicting claims, if convenient, and to furnish a means of getting respondents or objectors to contest petition and thus to permit of petitions being tried as suits because the petitions themselves name no objectors. There is nothing in the section which permits the Tribunal arbitrarily to add or substitute one petitioner for another. A petition can only be put in under S. 8 within 90 days of the notification published under S. 7 (3). AIR (Vol 21) 1934 Lah 920 : 35 P L R 619 : 155 Ind Cas 396 (DB).

—S. 16.

1. Evidence.
2. Interpretation.
3. Restoration of hereditary office-holder.
4. Scope.
5. Tests.
6. What is not Sikh Gurdwara.
7. What is Sikh Gurdwara.

1. Evidence.

——Ss. 16 (2) (iii)—In order to bring an institution within the definition of cl. (iii), sub-s. (2) of S. 16, it is necessary to prove not only that the institution has been used for public Sikh worship but also independently, that it was founded for such worship. A I R (Vol 24) 1937 Lah 577 : I L R (1937) Lah 413 : 39 P L R 817 : 171 Ind Cas 963 (DB).

——**S. 16 (2)—Proof requisite.**

Clause (iii) of S. 16 (2) does not require proof of user of public worship predominantly by Sikhs, but merely that the institution is used for worship by Sikhs. The main stress under the clause has to be taken by the first part thereof. The party has to prove that the institution in suit was established for use by Sikhs for the purpose of public worship. They may prove this by any class of evidence permitted under the Evidence Act but in order to succeed the evidence which they adduce must prove it and the circumstance that an institution is an old one does not absolve them from giving suitable and sufficient proof though it is a fact which has to be taken into account in estimating the evidence :

Held, that the institution in suit was not proved to be a Sikh Gurdwara. A I R (Vol 23) 1936 P C 93 : 43 L W 443 : 2 B R 383 : 1936 M W N 341 : 17 L 146 : 40 C W N 610 : 38 Bom L R 479 : 38 P L R 378 : 63 C L J 390 : 63 I A 180 : 161 Ind Cas 529.

——**S. 16—Report of Government Officials—Value of, in evidence.**

For the purpose of ascertaining whether the old shrine was established for the use of Sikhs, no great stress can be laid upon the language in reports and the like made by the Government Officials. AIR (Vol 23) 1936 P C 93 : 43 L W 443 : 2 B R 383 : 1936 M W N 341 : 17 L 146: 40 C W N 610: 38 Bom L R 479 : 38 P L R 378 : 63 C L J 390 : 63 I A 180 : 161 Ind Cas 529.

——**S. 16 (2) (iii)—Requisite proof.**

In order to succeed in proving that a Dharamsala is a Sikh Gurdwara under the provisions of S. 16 (2) (iii), the petitioners have to prove both that the Dharamsala was being used for public worship by Sikhs before and at the time of the presentation of the petition and that it was established for this purpose :

Held, that Dharamsala Saindaswali at Kamalia, was not a Sikh Gurdwara. A I R (Vol 23) 1936 Lah 924 : 38 P L R 831 : 163 Ind Cas 727 (DB).

——S. 16 (2) (iii) — Burden of proof to establish that institution is Sikh Gurdwara is on petitioner. A I R (Vol 23) 1936 Lah 822 : 169 Ind Cas 89 (DB).

——S. 16 — No proof that institution was established by Sikhs for public worship — Institution, college of Udasi Fakirs—Held, institution could not be declared a Sikh Gurdwara. A I R (Vol 23) 1936 Lah 819 : 167 Ind Cas 662 (DB).

——**S. 16 (2)—Institution founded for public worship—Necessary evidence.**

Where there is no reliable evidence to show that the institution had been established for public worship by the Sikhs and earliest pattas of land given by way of muafi or jagir merely show that these grants were made to the then incumbents of the institution by way of charity and contain no reference to any public worship, it cannot be held that the institution was founded for public worship and the facts that the institution was given grants of land by a Sikh Sardar and that it was named after a Nirmala Sadh cannot make any difference. AIR (Vol 23) 1936 Lah 216 : 162 Ind Cas 858 (DB).

——**S. 16 (2) (iii) — Essentials to establish that institution is Sikh Gurdwara.**

The questions whether the institution was established for use by Sikhs for the purpose of public worship and whether it was used for such worship by Sikhs are two distinct questions. In order to establish that an institution is a Sikh Gurdwara, it is not sufficient to produce satisfactory evidence on the second

question only and ask the Court to infer that the institution was established for the purpose of public worship :

Held, on the evidence that Dera Bawa Dopehr Das, situate at Gurm Tahsil, District Ludiana, was not founded for public worship. (1935) 157 Ind Cas 142 (Lah) (DB).

——S. 16—Onus of proving that institution is Sikh Gurdwara is on those not in possession.

The true issue in cases where the nature of the institution is to be determined is whether it is proved that the institution was established for public worship by Sikhs. Whether the mahant is an Udasi or not is of minor importance.

Where the institution has been in the possession of Udasis for generations and the Udasi mahant resists the declaration, it is for those out of possession desiring a declaration about the character of an institution to prove their allegation.

The institution was a college or small monastery of Udasi sadhus living there together with labourers who worked the land. Travellers were constantly entertained and the Granth Sahib was read and worshipped. Sometime between the death of a certain mahant in 1879, and the settlement of 1913, in his memory a smadh was erected and it had been worshipped since then. The institution was nowhere called a Gurdwara :

Held, that the objectors failed to prove that this institution was established by Sikhs for the purpose of public worship. A I R (Vol 22) 1935 Lah 879 : 160 Ind Cas 744 (DB).

——S. 16—Proof of two separate matters is necessary in order that S. 16 (2) (iii) should be applied, the first being that the institution was established for use by Sikhs for the purpose of public worship, and this is not a necessary inference, when the second proposition concerning user of the institution only has been established. A I R (Vol 22) 1935 Lah 666 : 158 Ind Cas 903 (2) (DB).

——S. 16 (2) (iii)—Dharamsala founded by Sikhs for public worship—User for such worship — Inference.

Where it is alleged that an institution was established by Nirmal Sadhus to serve as a resting place for Sadhus, but the evidence establishes that a dharamsala was founded by Sikhs for the purpose of public worship and there is ample evidence that it has also been used for that purpose, the Granth Sahib being read regularly with due ceremony, the institution is a Sikh Gurdwara and S. 16 (2) (iii), Sikh Gurdwaras Act, applies to the case. A I R (Vol 21) 1934 Lah 215 : 35 P L R 168 : 147 Ind Cas 309 (DB).

——Ss. 16 (2) (iii), 8 — Petition under S. 8—Onus of proof — Evidence to prove that the institution falls under S. 16 (2) (iii).

Where in a petition under S. 8, the petitioner asserts that he is the mahant of a dharamsala and claims that the dharamsala is not a Sikh Gurdwara, and it appears that from its foundation, the mahants have been Udasis, and that there are, at the dharamsala samadhs of the petitioner's ancestors, the onus is on the objectors to establish the character of the institution. When it is proved by documentary evidence that the dharamsala has been a place of public worship since 1853 and that such worship has been connected with the Granth Sahib and it also appears that the village is a Sikh village, and the evidence of the objectors goes to show that the existence of a samadh dates only from recent times, more than probably after the Sikh Gurdwara controversy had become acute and the importance of a samadh had been realised by the Udasi mahant, it should be held that the institution falls within S. 16 (2) (iii). A I R (Vol 21) 1934 Lah 180 : 147 Ind Cas 632 (DB).

——S. 16 (2) (iii)—Nature of institution — Burden of proof—Inference from circumstances.

An institution was founded in the time of Moguls by one Guria, and ever since its foundation all the mahants were Udasis, succession going from guru to chela, subject to confirmation by Udasi Bhek. The principal object of worship was the samadh of Guria, which existed on the date of dispute :

Held, (1) that the onus of proving that Guria was a Sikh and that the institution had been established for use by Sikhs for the purpose of public worship and that it had been used for such worship by Sikhs, and fell within S. 16 (2) (iii), was on those claiming it to be a Sikh Gurdwara ;

(2) that the institution must be regarded as having been founded by Udasis and must be treated as an Udasi Gurudwara ; and

(3) the mere fact that Adi Grantha was also kept in the institution and on occasions, opened with due ceremony and passages from it read was not sufficient proof of the purely Sikh nature of the worship carried on at the Gurdwara or Dera. AIR (Vol 18) 1931 Lah 296 : 33 P L R 336 : 136 Ind Cas 257 (DB).

2. Interpretation.

——S. 16 (2)—"Incident", meaning of.

The word 'incident' in S. 16 (2) (i), must mean some historical event as distinguished from a mere myth or tradition. A I R (Vol 24) 1937 Lah 529 : 39 P L R 802 : 171 Ind Cas 970 (DB).

3. Restoration of hereditary office-holder.

——S. 16—Members of Committee managing Gurdwara who are either nominated or co-opted by Committee are hereditary office-holders so as to be entitled to be restored to office under S. 16 (3). AIR (Vol 22) 1935 Lah 277 (DB).

4. Scope.

——S. 16—Discretion of Court.

Section 16 is mandatory and allows no discretion in its application—Court's sole duty is to apply the criteria laid down in the section and to state the result—A ground in the memorandum of appeal that to hold that the institution is not a Sikh Gurdwara is nothing but a denial of justice is therefore not a proper ground. AIR (Vol 22) 1935 Lah 521 (DB).

5. Tests.

——S. 16—Gurdwara, if could be managed by Udasis —Place, if can be a resting place.

It was very common if not usual, for Sikh Dharamsalas to be managed by Udasis who were regarded by the Sikhs as their priests and employed as such.

The fact that a particular institution was a resting place and a langar as well as one in which the Granth Sahib was recited will not exclude the possibility of that institution having been founded and subsequently used for public Sikh worship. A I R (Vol 24) 1937 Lah 826 : 40 P L R 466 : 169 Ind Cas 947 (DB).

——S. 16—The presence of the Granth Sahib in an institution is not inconsistent with the institution being an Udasi Dera. A I R (Vol 23) 1936 Lah 924 : 38 P L R 831 : 163 Ind Cas 727.

——Ss. 16 (2) (iii), 7 (1) — Institution, when can be declared Sikh Gurdwara—Essentials stated.

To declare a place a Sikh Gurdwara under S. 16 (2) (iii), it is necessary to prove that the institution was (a) established for use by Sikhs for the purpose of public worship and (b) that it was used for such worship by Sikhs before and at the time of the presentation of the petition under sub-s. (1) of S. 7 and the mere recitation of the Granth Sahib does not in itself convert an institution into a Sikh Gurdwara. There is no provision in the Act that raises any presumption that because the present form of worship is Sikh, it

must be held that the Sikh form of worship has been in vogue from the foundation of the institution. AIR (Vol 23) 1936 Lah 819 : 167 Ind Cas 667 (DB).

——S. 16 (2) (iii) — **Conditions necessary under—Mere worship in Sikh mode—Presumption.**

Section 16 (2) (iii) requires the fulfilment of two distinct conditions : the first relating to user, the second to the purpose of the establishment; if satisfaction of one condition were to be accepted as a ground for proving the fulfilment of the second, it would have been unnecessary for the Legislature to specify as necessary the fulfilment of the second condition. Consequently, the existence for a long period of the worship of the Guru Granth Sahib does not raise the presumption that the same mode of worship prevailed at the origin of the shrine. AIR (Vol 22) 1935 Lah 809 : 160 Ind Cas 145 (DB).

——**Ss. 16 (2) (iii), 7 — Evidence sufficient to establish the institution — Whether enough to establish that it is a Sikh Gurdwara.**

Where in an institution there were old smadhs worshipped by none except Udasi sadhs, and persons in sympathy with them and Granth Sahib was not read :

Held, that the institution was not a Sikh Gurdwara.

The facts that Rupa in whose memory the institution was founded was designated as 'Bhai' and that the building was described as 'Dharamsala' in revenue papers would not, by themselve, establish that the institution is a Sikh Gurdwara. AIR (Vol 21) 1934 Lah 60 : 154 Ind Cas 371 (DB).

——S. 16 (2) (iii) — Institution established by Sikhs for public worship and used as such—Granth Sahib read—Office-holders Sikhs—Grants by Sikhs :

Held, that the institution is Sikh Gurdwara; merely because some Hindus went there to worship Granth saheb does not make it Hindu institution. AIR (Vol 21) 1934 Lah 173 (DB).

——S. 16—It does not follow that the institution is a Sikh Gurdwara merely because the Udasi sadh, resident here, read the Granth Sahib in the presence of Sikhs or other persons present. AIR (Vol 21) 1934 Lah 13 : 15 Lah 247 : 36 P L R 458 : 151 Ind Cas 1005 (DB).

——S. 16—In order that a Gurdwara may be a Sikh Gurdwara, it must be proved as given in S. 16 (2) (iii) that the institution or Gurdwara was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. A grant to a holy Udasi sadh for the purpose of supplying his personal needs and those of other ascetics and needy travellers does not make the institution a Sikh Gurdwara. A I R (Vol 21) 1934 Lah 13 : 15 L 247 : 36 P L R 458 : 151 Ind Cas 1005 (DB).

——**S. 16 (2) (iii)—Gurdwara, essentials of — Hindu dharmshala and Sikh Gurdwara—Tests.**

Where it appeared from the evidence that a person worshipped thakurs, gods and goddesses, feasted Brahmans at the opening ceremony of the dharmasala, visited holy places of the Hindu religion, celebrated the marriages of his daughters according to Hindu rites, and finally, on his death, was accorded the Kirya Karm ceremonies :

Held, that in the face of such evidence it is impossible to come to any other conclusion than that he was a Hindu and not a Sikh.

The word 'dharmsala' means primarily a place of rest and has subsidiary meanings which connote both a Hindu place of worship and a Sikh place of worship.

In order to prove that a dharmsala is a Sikh Gurdwara and not a Hindu dharmsala, it must be established that dharmsala (1) was established for use by Sikhs for the purpose of public worship and (2) that it has been so used by Sikhs. It is not enough to show that the dharmsala was used by Sikhs or even that Sikh worship is actually carried on in that place. A I R (Vol 19) 1932 Lah 268 : 13 L 6 : 33 P L R 395 : 142 Ind Cas 600 (DB).

6. What is not Sikh Gurdwara.

——**S. 16 (2) (i), (ii), (iii) — Namdev institution — Baradari Namdev sect — Usages.**

Namdev sect, which is not a Sikh sect, is a very cosmopolitan one and amongst its usages is the reading and worship of the Granth Sahib in which many of the sayings of its founder are incorporated.

Where the baradari formed a small part of Namdev institution and Granth Sahib was kept, read and worshipped both by Sikhs and by followers of Namdev, it was held that the fact that the reading of the Granth Sahib from beginning to end, called akhand path had taken place there from time to time from 1869 onwards did not necessarily bring the baradari within the provisions of S. 16 (2) (i), (ii) or (iii). Unless it had been made out that this baradari was a separate institution and established as such, it could not be held to be a Sikh Gurdwara; for if the baradari was merely a part of the institution of Namdev, it must be held to be a minor or subsidiary part thereof. It may be the case that the Sikhs go there because the Granth Sahib is there; but these must be Sikhs, who are not strict Sikhs but with leanings towards the Namdev sect as in the same institution there are smadhs, which are worshipped, and Hindu temples where worship takes place. Nama Bansi venerate the Grath Sahib and there is no reason to hold that they worship at baradari owing to some tradition connected with one of the ten Sikh Gurus. They do so because the Granth Sahib is one of the books they venerate. If some Sikhs do go there, that would not alter the nature of the institution which is a Nama Bansi institution and a corporate part of one large institution of the followers of Baba Namdevji. AIR (Vol 24) 1937 Lah 753 : 39 PLR 989 : 175 Ind Cas 652 (DB).

——S. 16 (2) — Institution founded as langar by a kamboth who had become Udasi . . . . Held, on evidence that institution was not a Sikh Gurdwara. AIR (Vol 24) 1937 Lah 529 : 39 P L R 802 : 171 Ind Cas 970 (DB).

——**Ss. 16 (2), 7—Institution described as Gurdwara—Presumption that it was founded for Sikh worship, if arises.**

The use of the word Gurdwara is not confined to Sikh institutions and the mere fact that the place has been called a Gurdwara as well as Mandir and Thakardwara does not warrant the presumption that it was founded for Sikh worship.

The institution in question was established by an Udasi Brahmin, the principal endowment being certain land granted by a Muhammadan ruler who hated Sikhs. There was a Hindu temple alongside the building claimed as Gurdwara. The institution was also referred to as a Thakardwara. There were very few Sikhs in the town and the evidence pointed to the place having always been a Hindu place of worship although during and after Sikh times until it included what was recognized to be a Sikh Gurdwara. The principal object of reverence in it was the Gaddinashin Mahant. There were a Lingam and Hindu idols in the Thakardwara and tobacco smoking went on in its precincts :

Held, that the institution was not a Sikh Gurdwara. AIR (Vol 24) 1937 Lah 324: 173 Ind Cas 937 (DB).

——S. 16 — Originator of institution Udasi Fakir — Institution charitable and not religious — Granth Sahib read but rites inconsistent with Sikhism performed :

Held, institution was not Sikh institution within S. 16 (2). AIR (Vol 24) 1937 Lah 280 : 174 Ind Cas 347 (DB).

——S. 16 (2) — Holding the Granth Sahib in reverence and reciting it ceremoniously will not by themselves make the institution in dispute a Sikh Gurdwara as Udasis hold the Guru Granth Sahib in great reverence and the fact that the Granth Sahib is recited in an Udasi institution does not make it a Sikh Gurdwara. This fact does not establish that the institution falls within any of the clauses of S. 16 (2). AIR (Vol 23) 1936 Lah 841 : 165 Ind Cas 507 (DB).

——S. 16 — Isolated statements in Muafi inquiries indicating public worship, whether should be relied on to prove the institution to be a place of public worship.

It is for the incumbents of institutions enjoying Muafis to try to make out that they were serving some religious or charitable purpose, whether they were originally established for such a purpose or not. Mere isolated statements made in muafi enquiries, including that there was public worship cannot be laid much stress on to prove that the institution is a place of public worship.

The Dharmsala in question itself was built by a Hindu Udasi sadh. The Muafi was granted for his maintenance and there was in the grant no mention of public worship or any condition except that the Muafidar should pray for the long life and prosperity of the ruler. The Muafidar and his descendants lived in the Dharmsala with their families and the Granth was kept only in a small portion there. There was a kharas for the convenience of travellers but no langar was kept though fakirs and sadhus who came at the proper time were fed :

Held, that the fact that the Granth Sahib had been kept and recited by itself could not be attached much significance in the case of institutions in charge of Udasi sadhs and that the institution could not be said to be a Sikh Gurdwara. AIR (Vol 23) 1936 Lah 822 : 169 Ind Cas 89 (DB).

——S. 16 (2) (iii) — Hereditary office-holder, who is.

Where the office of mahant devolved before 1st January 1920, according to hereditary right or by nomination by the office-holder for the time being, a person who himself became mahant as the chela of his guru, is the holder of the hereditary office of mahant of the institution :

Held, on facts that the mere fact that lately the worship in the institution has been Sikh alone, will not make the dharmsala a Sikh Gurdwara within the meaning of section 6 where the institution was originally a dharmsala, founded as a private property of the Udasi fraternity. AIR (Vol 23) 1936 Lah 675 : 38 P L R 870 : 17 Lah 785 : 166 Ind Cas 397 (DB).

——S. 16 — Bunga Sohlanwala.

Held, that the very situation of the Bunga on the outskirts of the Gurdwara Harmandir Sahib lends support to the contention that it is intended for the use of pilgrims visiting the Gurdwara and not for the use of people visiting Amritsar on ordinary business. The fact that that place is called "Bunga" is itself significant. Consequently, the Bunga Sohlanwala is an institution partly religious and partly charitable and the proprietors of the village Sohl are the managers of the institution as trustees and not as sole proprietors thereof, and, being a religious and charitable institution, the Bunga would be inalienable and the Golden Temple, Amritsar (Shri Harmandir Sahib) has no right of superintendence or control over the management of the Bunga. AIR (Vol 23) 1936 Lah 641 : 166 Ind Cas 693 (DB).

——S. 16 (2) (iii)—Institution founded by Peshawaris —Marriage parties, smoking and other anti-Sikh ceremonies taking place :

Held, that the institution was not Sikh Gurdwara. Mere fact that mahanths have been Nirmala did not make it Sikh Gurdwara. AIR (Vol 22) 1935 Lah 663 : 160 Ind Cas 538 (DB).

——S. 16 — The fact that the Granth Sahib was brought to the institution and was read on particular occasions does not make the institution Sikh Gurdwara. Nanak Sar at Dinga is not a Sikh Gurdwara. (1935) 157 Ind Cas 844 : 37 PLR 348 (DB).

——S. 16 (2) (iii) — Gurdwara Baghichi Thakram in Gujranwala City is not a Sikh Gurdwara within the meaning of S. 16 (2) (iii). AIR (Vol 21) 1934 Lah 920: 35 PLR 619 : 155 Ind Cas 396 (DB).

——S. 16—Dera Bhai Pirthi Sahib, whether Sikh Gurdwara.

Dera Bhai Pirthi Sahib at Manak in the Lahore District is not a Sikh Gurdwara. It was not established for use by Sikhs for the purpose of public worship nor in memory of any Sikh saint.

Udasis are not Sikhs but schismatics who separated in the earliest days of Sikhism and never merged with the followers of the Guru. AIR (Vol 18) 1931 Lah 161 : 32 PLR 910 : 12 Lah 497 : 135 Ind Cas 657 (DB).

7. What is Sikh Gurdwara.

——S. 16—Granth Sahib being read, whether conclusive to establish institution is Gurdwara—Gurdwara, if can contain samadh.

There is no authority that an institution containing a samadh cannot be a Sikh Gurdwara, although no doubt the worship of a Samadh is opposed to orthodox Sikhism.

The evidence that the Granth Sahib has, from earliest times, been read in a Dharmsala will not, by itself be a conclusive evidence that the Dharmsala is a Sikh Gurdwara. It might, indeed, be the determining factor in arriving at a conclusion regarding the purpose for which a particular institution was founded. AIR (Vol 24) 1937 Lah 826 : 40 P L R 466 : 169 Ind Cas 947 (DB).

——S. 16—Gurdwara Baba Narain Singh.

Held, that the Gurdwara Baba Narain Singh had been used for public worship of the Granth Sahib by the Sikhs ever since the time of the founder, that there was enough evidence to justify the inference that the institution was established for public worship. AIR (Vol 24) 1937 Lah 786 : 40 P L R 82 : 176 Ind Cas 262 (DB).

——S. 16 (2) (iv)—Worshipper of Sikh Guru blessed by him—His name mentioned in Sikh historical works :

Held, he was a Sikh saint and institution founded in his memory was a Sikh Gurdwara. AIR (Vol 24) 1937 Lah 273 : 174 Ind Cas 682 (DB).

——S. 16 (1) — Institution founded in 1850 and lands granted by Sikhs — Mahants always Udasis — No evidence to show nature of worship originally practised—Institution is not a Sikh Gurdwara. AIR (Vol 21) 1934 Lah 969 : 150 Ind Cas 925 (1) (DB).

——S. 16—Institution founded by Sikhs for their benefit—Worship of the Granth Sahib :

Held, that the institution is a Sikh Gurdwara though Udasis had been always the incumbents. AIR (Vol 21) 1934 Lah 398 : 36 P L R 280 : 151 Ind Cas 32 (DB).

——S. 16—When a Gurdwara was established for the worship of Sikhs and has been used throughout its existence for the same purpose and all the office-holders during the whole period of the existence of the institution have been Sikhs, the Gurdwara must

be deemed to be established to be a Sikh Gurdwara. AIR (Vol 21) 1934 Lah 344 : 154 Ind Cas 356 (D B).

——S. 16 (2) (iii) — Where the village where the dharamsala in question was situated was a Sikh village and the dharamsala was the only place of worship there and the Granth Sahib was read there but the mahant was an Udasi :

Held, that the fact that the mahants had been all Udasis was a feature common to many Gurdwaras admittedly Sikh and that the dharamsala in question was a Sikh Gurdwara. AIR (Vol 21) 1934 Lah 63: 148 Ind Cas 45 (DB).

——S. 16—Institution built for reading Granth Sahib —Udasis, office-holders :

Held, that the only possible conclusion was that it was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. The mahants themselves may have worshipped the Samadhs as they were Udasis,but this was merely subsidiary to the main object of the Gurdwara. AIR (Vol 21) 1934 Lah 39 : 15 Lah 270 : 36 P L R 442 : 151 Ind Cas 738 (DB).

——S. 16 (2) (iii)—Where it is found that in an institution, any Sikh can worship, he cannot be stopped from doing so and if any one wants to distribute 'karah parshad' and have a recitation of Guru Granth Sahib, he can do so, the institution can be said to be a Sikh Gurdwara coming within the purview of the Sikh Gurdwaras Act. A I R (Vol 21) 1934 Lah 28 : 35 P L R 346 : 148 Ind Cas 162 (DB).

——S. 16 (2) (iii)—An institution was a dharamsala founded by the villagers and used for the worship of the Granth Sahib and also the entertainment of wayfarers. It was not established that its primary object was simply the entertainment of wayfarers :

Held, that the institution came within the provisions of S. 16 (2) (iii) and that it was Sikh Gurdwara. AIR (Vol 21) 1934 Lah 25 : 35 P L R 343 : 148 Ind Cas 185 (DB).

——S. 16—Mahants erecting buildings on land belonging to Gurdwara — Presumption.

Where the mahants of a Gurdwara in possession of the lands of the Gurdwara as custodians for the benefit of the Gurdwara erect buildings on the lands,the presumption is that the buildings are meant to pertain to and attach to the Gurdwara.

Where it was proved that from the very beginning certain land was muafi granted for the purposes of the expenses of the langar of a Gurdwara, the land should be considered to be muafi, belonging to the Gurdwara.

The word 'dehra' is generally used to describe a cremation place and a birth place is never described as a 'dehara.' A I R (Vol 20) 1933 Lah 475 : 145 Ind Cas 727 (DB).

——S. 16 (1) (2)—'Tank,' whether Gurdwara.

A tank adjoining building used for public worship by the Sikhs can be regarded as a 'Gurdwara' within the purview of S. 16 (1) (2). AIR (Vol 19) 1932 Lah 451 : 33 P L R 806 : 142 Ind Cas 698 (DB).

—S. 18.

——S. 18 (1) — Construetion.

The words "his name" in S. 18 connote the idea of the land being held in the capacity of an office-holder and not in any other capacity. A I R (Vol 24) 1937 Lah 180 : 39 P L R 301 : I L R (1937) Lah 136 : 172 Ind Cas 266 (D B).

——S. 18 (1) — Presumption.

Presumptions under S. 18 come into play only if the other requirements laid down in S. 18 are fulfilled. These presumptions can be availed of only if the denial is made by any past or present office-holder, and that the denial is of a right, title or interest recorded in his name. A I R (Vol 24) 1937 Lah 180 : I L R (1937) Lah 136 : 39 P L R 301 : 172 Ind Cas 266 (D B).

——S. 18 (1) (a) — Mahant acquiring occupancy rights — Whether belong to institution.

A grant to a person by way of reward in recognition of services rendered to the Gurdwara always remains a personal one. If a person, while occupying the office of mahant, acquires occupancy land and occupancy rights in it and the acquisition is shown as personal in the revenue records, the occupancy rights so acquired are personal to him and he holds the land personally and not on behalf of the institution. A I R (Vol 24) 1937 Lah 488 : 39 P L R 400 : 170 Ind Cas 456 (D B).

——S. 18 (1) (a) (g) — Grant of muafi for performance of music in Gurdwara, whether belongs to Gurdwara or musicians — Construction of grant — Grantees appearing as office-holders — Presumption under S. 18.

A Sikh proprietor made a grant of the muafi in suit for the benefit of one B in his capacity as a ragi. The terms of the grant were that B was to sing and play upon musical instruments at the time when the religious service was held in the Gurdwara in the morning and the evening. The musicians were to participate in the profits accruing from the land in suit, as their fees and wages. On his death, B was succeeded by his widow, with whom the surviving ragis, who called themselves chelas of B, continued to work at the Gurdwara. On the death of the widow, the ragis, for the time being, succeeded to the land. The muafi was proclaimed as a Gurdwara and the ragis claimed the property as their own :

Held, that the muafi was given to the ragis attached to the Gurdwara and not in their personal and private capacity. A I R (Vol 20) 1933 Lah 894 : 144 Ind Cas 712 (D B).

——S. 18 (1) (a) — Succession from chela to chela — Presumption — 'Chela', meaning of.

Where the succession to the lands in suit has been from chela to chela as such on more than two consecutive occasions, there is a clear presumption that the mahants are office-holders and not owners and the provisions of S. 18 (a) become applicable.

The word 'chela' denotes a spiritual relationship and not natural relationship and is not synonymous with adopted son. A I R (Vol 19) 1932 Lah 147 : 32 P L R 589 : 134 Ind Cas 484 (D B).

——S. 18 (1) (b) — Assignment of land revenue — Presumption.

The land revenue was assigned in the name of various members of the family and what remained was assigned in the name of the Gurdwara :

Held, that the presumption would only be that the muafi pertained to the Gurdwara and not the land. A I R (Vol 21) 1934 Lah 1 : 154 Ind Cas 375 (D B).

——Ss. 18 (1) (b) and (d), 5 — Grant to Udasi sadh for establishing langar.

Where a grant was made to an Udasi sadh so that he might found a village in a desolate place and establish a langer for feeding sadhus :

Held, that the land or muafi was not granted to a Gurdwara. A I R (Vol 21) 1934 Lah 1 : 154 Ind Cas 375 (D B).

——S. 18 (1) (b)—Gift for maintenance of Gurdwara — Presumption — Descent not from office-holder to office-holder but from father to son—Presumption.

In the case of an assignment of the proprietary rights in the land for the service and maintenance of a Gurdwara to which admittedly a langar was attached, the provisions of S. 18 (1) (b), are applicable and the presumption therein contained displaces the presumption which otherwise would arise under S. 44 of the Punjab Land Revenue Act, 1887.

Where the descent has not been from office-holder to another office-holder as such but has evidently been from father to son and the assignment was an assignment without any direct reference to any religious purpose, the reference to the religious purpose being confined to the muafi or remission of land revenue :

Held, that no presumption under S. 18 (1) (b) arose. A I R (Vol 20) 1933 Lah 137 : 142 Ind Cas 530 (D B).

——S. 18 (1) (b) — Personal grant — Jaghir prior to British administration devolving from father to son — British Government confirming it personally in name of one who was then enjoying it though he was also pujari of Akal Takht naming his male issue as successor — Nature of jaghir.

A jaghir prior to British administration devolved from father to son and not from one office-holder to his successor in office. It was confirmed by the British Government personally in the name of the man who was then enjoying its benefit, though he was also the pujari of Akal Takht, and his male issue was named to be his successor.

Held, that the jaghir was a personal grant, no presumption arising under S. 18, cl. (b) or (g). A I R (Vol 17) 1930 Lah 757 (D B).

——S. 18 (1) (d) — Institution notified as Gurdwara— Original grant of land made for upkeep of institution — Produce applied for that purpose :

Held, that the institution is the owner of this property and that the office-holders never before claimed it as their property; they administered in their capacity as office-holders. A I R (Vol 21) 1934 Lah 602 : 149 Ind Cas 267 (D B).

——S. 18 (1) (d) — Income of land not applied to services of Gurdwara — Presumption.

Where it has not been established that the income of the land has been applied ordinarily on the service and maintenance of the Gurdwara, the presumption under S. 18 (1) (d) does not arise. A I R (Vol 21) 1934 Lah 1 : 154 Ind Cas 375 (D B).

——S. 18 (1) (e), (5) — Presumption under, when arises.

Where the oral evidence on the question as to whether the money came from the Gurdwara is unconvincing and unreliable and there is evidence that the family of the mahant has ancestral land, a share of which was given to the mahant and the mahant could have been given gifts of money and these would certainly not be the property of the Gurdwara of which he was the mahant, it is clear that he had other sources of income and there is no evidence worth considering that the money was supplied from Gurdwara income; there is no presumption under S. 18 (1) (e).

In order to bring themselves within the presumption arising from S. 18 (1) (e), the Gurdwara have to prove that the acquisition of the right, title or interest in question was made with funds proved to have belonged to the Gurdwara. A I R (Vol 21) 1934 Lah 421 : 35 P L R 423 : 15 Lah 732 : 155 Ind Cas 324 (D B).

——S. 18 (1) (g) — Assignment — Devolution—Presumption.

Where an assignment of land is made in the name of the office-holder of a dharamsala and the devolution has been, on two successive occasions, from guru to chela, presumption referred to in S. 18 (g) arises. A I R (Vol 22) 1935 Lah 813 : 160 Ind Cas 533 (D B).

——Ss. 18 (1) (g), 2 (4) — Muafidars abandoning secular life — Services at institution — Reciting Granth Sahib — Muafidars, if office-holders within S. 18 (g).

Where it was found that the muafidars who had abandoned secular pursuits were constantly performing service at the institution and were found to take out the Granth Sahib and recite it :

Held, that technically speaking, they fell within the definition of office-holders as given in S. 2 (4) as they participated in the management of public worship in a Gurdwara or in the management of performance of rituals or ceremonies observed therein and a presumption arose in favour of the Gurdwara under S. 18 (g). A I R (Vol 21) 1934 Lah 68 : 154 Ind Cas 357 (D B).

——S. 18 (1) (g) — Presumption under — When arises.

Where it is admitted that a property descended from a mahant to his chela and from him as mahant to the successor-in-office, S. 18 (1) (g) applies and a rebuttable presumption that the land belongs to the Gurdwara arises. A I R (Vol 20) 1933 Lah 334 : 34 P L R 921 : 146 Ind Cas 236 (D B).

——S. 18 (1) (g) — Person in possession of property proved to be office-holder — Presumption.

Where it is proved that a person is an office-holder, the burden of proof is on him or on those who claim through him to show that the property in dispute was his personal property and did not belong to the Gurdwara. A I R (Vol 19) 1932 Lah 150 : 32 P L R 858 : 136 Ind Cas 718 (D B).

——Ss. 18 (2), 5 — Muafi — Ownership of land — Test.

The primary title on authority is the jamabandi and its value is very much greater than that of any entry in any muafi register. Where the entries in the jamabandis made from 1851 onwards consistently showed the mahant for the time being as the owner of the land but, in the muafi register of 1856, it was shown that the land was attached to the institution :

Held, that the entry in the muafi register can, in no way, be taken as cancelling or reversing the entries in the jamabandis.

A muafidar is not necessarily, though, in fact, he often is, the owner of the land exempted from the payment of revenue.

The second portion of S. 18 makes it clear that the preceding portion does not apply to a claim to a right, title or interest made by a person deriving title previous to the first day of January 1920, from a past or present officeholder. A I R (Vol 19) 1932 Lah 513 : 33 P L R 730 : 14 Lah 156 : 138 Ind Cas 387 (D B).

——Ss. 18 (2), 5 — Entry in revenue papers — Presumption — Claim under S. 5.

A Sikh Jat mortgaged his ancestral and self-acquired properties to his brother and his nephews with possession, in 1899. In 1903, he made a gift of the same to a Gurdwara. The Gurdwara was entered in the revenue papers as owner of the parties but the mortgagees remained in possession. The donor died in 1921. The properties were mutated in favour of the mortgagees and the Gurdwara's name disappeared from the revenue papers. In 1926, the Gurdwara was notified as a Sikh Gurdwara. The mortgagees preferred a claim to these properties under S. 5.

Held (i) that there was no presumption under S. 18 (2), that the properties entered in the revenue papers till 1921, belonged in reality to the Gurdwara, as the petitioners did not derive title from the donor but from a common ancestor and the presumption arising from the later entries must, therefore, be given effect to ;

(ii) that no question of limitation arose as the petitioners were in possession all along;

(iii) that under S. 5, petitioners had a statutory right to put forward their right even though they had not filed a suit within 6 years to set aside the gift. A I R (Vol 18) 1931 Lah 668 : 32 P L R 479 : 132 Ind Cas 661 (D B).

—S. 22.

——S. 22 (2)—Compensation to mahant—Matters to be considered.

Under the Act, the outgoing mahant is not given a mere subsistence allowance which would enable him to supply himself with bare necessaries of life and residence but an allowance which would enable him to maintain himself in a position of comparative ease, comfort and dignity.

Where the total receipts of a Gurdwara amounted to about Rs. 4,000 a year :

Held, that the Gurdwara Tribunal was justified, having regard to the antecedents of the mahant and the services which he had rendered to the institution, in fixing a sum of Rs. 2,400 a year as compensatory allowance for the loss of his rights and privileges relating to residence, subsistence, service and other recognised allowances, enjoyed by him while he was the mahant. A I R (Vol 19) 1932 Lah 599 : 34 P L R 580 : 140 Ind Cas 395 (DB).

—S. 25.

——Ss. 25, 7, 12 (10)—Delivery of possession.

Possession of an institution declared to be a Sikh Gurdwara can only be obtained by a suit brought under S. 25 (a), and no hereditary office-holder can be deprived of his right to occupy the Gurdwara in his official capacity except in accordance with the provisions of Part 3, Sikh Gurdwaras Act (see Chap. 11). Hence the Court cannot give possession on a petition filed under Ss. 7 and 12 (10). A I R (Vol 22) 1935 Lah 121.

——Ss. 25, 12 (10)—Proper remedy.

Where the Sikh Gurdwara Tribunal has passed a decree for compensation under S. 11 in favour of a mahant, the proper course for the mahant is to apply to the Collector under S. 25 and not to ask the District Court to execute the decree or order under the provisions of S. 12 (10). A I R (Vol 20) 1933 Lah 630 : 34 P L R 633 : 14 L 672 : 144 Ind Cas 192.

—S. 25-A.

——S. 25 A—When the property of a ward is subject to certain right in favour of the public and suit under S. 25-A is brought against the ward in respect of that right and the entire property of the ward is under the superintendence of the Court of Wards, a notice under S. 19, Punjab Court of Wards Act (1903) is necessary. A I R (Vol 28) 1941 Lah 161 : 43 P L R 55 : 194 Ind Cas 883.

——S. 25A — Applicability — Suit for possession of "right of way"—S. 25-A does not apply.

The only relief which can be given in a suit under S. 25-A is one of possession. The "right of way" is an incorporeal right of which possession cannot be given. The provisions of S. 25-A, therefore, do not apply and the Tribunal errs in entertaining and decreeing the claim for a right of way. Remedy may be by way of injunction, or other relief, which might be obtained in the ordinary Civil Court. AIR (Vol 27) 1940 Lah 250 : I L R (1940) Lah 587 : 190 Ind Cas 434 (DB).

——Ss. 25-A, 10, 7—Compromise decree under S. 10 — Decree with regard to property included in compromise petition but not in notification under S. 7 — Suit in respect of that property if maintainable under S. 25-A.

Where, in proceedings under S. 10, the Tribunal passed a compromise decree, the decree, with regard to property not mentioned in the notification under S. 7 but included in the petition of compromise, must be deemed to be invalid under O. 23, R. 3, Civil P. C. The proper remedy, therefore, in respect of that property is by way of a regular suit in the ordinary Civil Court based on the registered compromise deed and not by proceedings under S. 25-A before a Tribunal. A I R (Vol 27) 1940 Lah 250 : I L R (1940) Lah 587 : 190 Ind Cas 434 (DB).

——S. 25-A.

In introducing S. 25-A by the amending Act of 1930, the obvious intention of the Legislature was that a successful party as soon as the decision was reached by the Tribunal would be at liberty to sue for possession. The whole section was introduced owing to the difficulty that had been experienced owing to the lack of any provision in the original Act for implementing the decisions reached by the Tribunal in cases under Ss. 5 and 10. Section 25-A was introduced to provide a cheap and speedy method of giving effect to the decisions of the Tribunal. It is obvious that the proper course for the successful party would be to lodge his suit and if the opposite party had preferred an appeal in the High Court for that party to obtain an order staying the proceedings, if necessary.

The only possible interpretation of S. 11 of the amending Act is that it makes S. 4 (now S. 25-A of the original Act) only applicable to those claims, petitions and suits in which the recording of evidence has not been concluded before the Tribunal at the commencement of the Act. A I R (Vol 23) 1936 Lah 298 : 165 Ind Cas 846 (DB).

——S. 27.

——S. 27—Trust in favour of dharamsala—Notification—Rights of trustees.

In case where a trust is entirely in favour of a dharamsala, the property belongs to the dharamsala and once there is a notification declaring a Gurdwara to be a Sikh Gurdwara, the trustees come in under S. 27 and can claim an order as to who should administer the trust. A I R (Vol 24) 1937 Lah 106 : 172 Ind Cas 173 (DB).

——S. 27—Applicability — Claim of title by Mahant —Onus—Trust deed by Mahant — What amounts to allotment to persons other than Gurdwara.

Where certain property was notified as Gurdwara property but the Mahant claimed ownership on the basis of a trust deed executed by his predecessor-in-office from which it appeared that the Mahant was not in possession as owner :

Held, that the burden of proving his title was on the Mahant and his possession did not shift the burden on the opposite party.

Where a sapurdnama executed by the Mahant of a Gurdwara recited that certain properties belonged to the Gurdwara on the date on which the document was executed, that the income had not been sufficient, that certain gentlemen (named in the deed) had raised subscriptions which had enabled him to put the institution on a proper footing, that the income of this property was used by him for his own use and for the purposes of the Gurdwara and that he and his chela would be entitled to deal with the property under the terms of the deed and after his death, his chela would carry on the work under the control of the gentlemen (or their nominees) who had raised the subscription subject to his good conduct :

Held, that there was no allotment of any property, or income of any property, to any person other than the Gurdwara. A I R (Vol 18) 1931 Lah 256 : 32 P L R 768 : 135 Ind Cas 503 (DB).

—S. 28.

——Ss. 28, 30 (2), Proviso, 32 — Scope — Duty and power of Court.

In order to come within the proviso to sub-s. (2) of S. 30, the defendants have to prove want of knowledge of the fact that their right, title or interest had been included in the list published under the provisions of sub-s. (2) of S. 30, that their failure to make the claim under S. 5, was due to want of this knowledge and that they could not, by the exercise of reasonable diligence, have come to know of the fact that their right, title or interest was so included. The burden of proving all these matters is on them and the benefit of the proviso can only be extended to such of the defendants as were able to establish these matters. A I R (Vol 22) 1935 Lah 843 : 160 Ind Cas 133 (DB).

——Ss. 28, 5 (1) (3) — Notification under S. 5 (3) — Whether conclusive proof that no claim was made— Right of Gurdwara Committee to file suit.

A notification under S. 5 (3) is conclusive proof of the fact that no claim under S. 5 (1) has been made and under S. 28, the Committee of the Gurdwara has the right to bring a suit for possession. Such a suit should, therefore, be decreed. A I R (Vol 21) 1934 Lah 54 : 149 Ind Cas 955 (DB).

——S. 28—Applicability.

When publication of consolidated list was made but the claim was not made by any person, the Committee had a right under S. 28 to bring a suit for possession of that property. A I R (Vol 20) 1933 Lah 1041 : 15 L 117 : 35 P L R 286 : 147 Ind Cas 1142 (DB).

——Ss. 28, 30 (1) — Proceedings under S. 28 for possession of area—Resistance by occupancy tenant —Eviction—If can be granted—Procedure for eviction.

An institution was declared a Sikh Gurdwara under the Act and within the period prescribed, certain Sikhs filed the list referred to in S. 3 of the Act. The list contained an item regarding an area of land situated in A of which the right claimed was shown as 'milkiyat' or ownership and S was named as in possession. None made any claim to any of the properties entered in the list and a notification was issued under S. 5. The Managing Committee of the Gurdwara took proceedings under S. 28 for possession of the Gurdwara properties and the area in A. B contested the Committee's claim regarding this property on the ground that he was not proprietor thereof but the occupancy tenant :

Held, that S. 30, sub-s. (1), applied and inasmuch as no claim was made to the occupancy tenancy, possession of the occupancy-tenancy could not be granted to the Gurdwara Committee :

Held also, that the Gurdwara if it sought to evict an occupancy tenant, must do so in accordance with the provisions of the Punjab Tenancy Act. A I R (Vol 19) 1932 Lah 303 : 13 L 36 : 137 Ind Cas 877 (DB).

——S. 28 — Proceeding under S. 28 — Valuation — Pleader's fee.

Though a proceeding under S. 28 is to be treated as a suit, it was not the intention of the Legislature to enable the plaintiffs to fix more or less their own value on such proceedings in order to enhance the costs incurred. AIR (Vol 18) 1931 Lah 71 : 11 L 621 : 31 P L R 958 : 129 Ind Cas 495 (DB).

——S. 28—Limitation — Applicability of S. 4, Limitation Act.

Section 29 (2) (a), Lim. Act as amended in 1922, excludes the applicability of S. 4 only when a special or local law expressly excludes it. Sikh Gurdwaras Act, however, does not expressly exclude S. 4 and so its applicability cannot be barred in the case where the Managing Committee of a Gurdwara takes proceedings under S. 28, Gurdwaras Act, and brings a suit for possession. AIR (Vol 17) 1930 Lah 800 (DB).

—S. 29

——S. 29—Interpretation—'Suit or proceeding.'

The words "suit" or "proceeding" in Ss. 29 and 32 must be construed in a narrow sense as signifying an action in the trial Court or proceedings ejusdem generis and cannot be held to include appeals. A I R (Vol 15) 1928 Lah 627 : 10 Lah 165 : 113 Ind Cas 529 (FB).

——Ss. 29 (2) and 31 (2) — Applicability — Non-existence of Gurdwara—Jurisdiction of Civil Court.

Ss. 29 (2) and 31 (2), Punjab Sikh Gurdwaras Act contemplate the existence of a Gurdwara with regard to which a notification has issued under S. 7 (3) of the Act. If there is in fact no Gurdwara, neither of the sections is a bar to the jurisdiction of the Civil Court. AIR (Vol 37) 1950 E P 338.

—S. 30

——S. 30 — Claim to property by Gurdwara—Claim petition not filed by defendant under S. 10—Suit for possession of property by Gurdwara.

Per Full Bench.—Where certain property is claimed on behalf of a notified Gurdwara under S. 7 and no claim petition under S. 10 is filed by the person against whom the property was claimed, a suit on behalf of the Gurdwara instituted after coming into force of the Act for possession of the property falls under S. 30. A I R (Vol 29) 1942 Lah 19 : 44 P L R 21 : ILR (1942) Lah 217 : 199 Ind Cas 395 (FB).

——Ss. 30, 36, 37, 3 and 5—Bank obtaining decree on equitable mortgage against S—Shromani Parbandhak Committee claiming mortgaged property under S. 3(1) — Counter-claim by S under S. 5 (1) — No reference made by either to mortgage in favour of Bank — Tribunal declaring property as belonging to Darbar Sahib, Amritsar, and decree passed accordingly — Bank taking out execution — Committee of Management, Darbar Sahib, applying for stay of execution relying on S. 37 — Execution stayed — Suit by Bank against S. Shromani Parbandhak Committee and Committee of Management for setting aside decree of Tribunal decreed — Bank again starting execution — Suit by Committee for declaration that decree in favour of Bank was without jurisdiction — Suit held, maintainable—Court decreeing Bank's suit held had no jurisdiction and its decree was ultra vires. A I R (Vol 25) 1938 Lah 129 : 182 Ind Cas 785 (DB).

——S. 30—Consolidated list under S. 30 (1) — Claim to village shamlat — Notice not sent to proprietors— Proprietors not making claim under S. 5 within period fixed :

Held, that claim cannot be decided against proprietors. (AIR 1942 Lah 19 (FB), Overruled.) A I R (Vol 21) 1934 Lah 390 : 36 P L R 426 : 15 Lah 66 : 151 Ind Cas 890 (DB).

——S. 30—Burden of Proof—Publication of list with name of dead person — Right of successor—Proof of absence of knowledge.

The publication of the "list" and notification under S. 5 (3) is intended to give notice to the general public. Where, therefore, the person shown to be in possession in the "lists', of the property was dead before the "lists" and notification were published, his successor in order to avail himself of the proviso to S. 30 (2) must prove that he neither had knowledge of the fact that his right, title and interest was included in the "lists" nor could he by the exercise of reasonable diligence have acquired that know-

ledge. AIR (Vol 17) 1930 Lah 717 : 12 L L J 65 : 123 Ind Cas 543 (DB).

——S. 30—Proviso—Receipt of notice.

Where a person has a fairly clear knowledge of the Government Notification and notice sent to him and the working of the Gurdwaras Act, it does not matter whether he has received notice in original or not. AIR (Vol 22) 1935 Lah 165 (DB).

——S. 30 (ii) — Representative suit by Anjuman — Finding by Tribunal that Muhammadans in general had no right in mosque—S. 30 (ii), if applies.

Where the claim of the Anjuman before the Tribunal was a representative one and it was decided that the Muhammadans in general had no rights left in the mosque, that finding must be held to be binding on all. In this aspect of the case, no question of assertion of a claim on behalf of any individual on the ground of want of knowledge, etc., within the purview of S. 30 (ii), Sikh Gurdwaras Act, arises. A I R (Vol 25) 1938 Lah 369 : 40 P L R 319 : 175 Ind Cas 945 (FB).

——S. 30 (2), Proviso — Errors made in the preparation of claims.

The proviso to Cl. (2), S. 30, does not cover cases where errors are made in the preparation of claims. It provides only for two classes of cases: (1) those in which the claimant had no knowledge of the existence of his own rights, (2) those in which he had no knowledge of the fact that the right, title and interest had been included in the list published under the provisions of sub-s. (2) of S. 3 in either case subject to the further proviso that he could not have obtained this knowledge by the exercise of reasonable diligence. A I R (Vol 21) 1934 Lah 30 : 15 Lah 113 : 36 P L R 425 : 148 Ind Cas 250 (DB).

——Ss. 30, Proviso (ii), 3 (2), 5 (3), 32 (1) (2)—Person in possession, having no knowledge that property was included in list published under S. 3 (2) — Applicability of proviso (ii) to S. 30 — Claim, if can be decided merely on the ground of inclusion of property in notification under S. 5 (3).

Where it is established that the person in possession of certain property had no knowledge of the fact that the property was included in the list published under the provisions of sub-s. (2) of S. 3, and he could not, by the exercise of reasonable diligence, have come to know of it, proviso (ii) to S. 30 applies and the Court should not decide the claim put forward in respect of the property merely on the ground that the property had been included in the notification published under the provisions of sub-s. (3) of S. 5.

[Proper procedure for deciding the question of title between the parties explained.] A I R (Vol 21) 1934 Lah 203 : 147 Ind Cas 378 (DB).

—S. 31

——Ss. 31, 10—Applicability — Jurisdiction of Civil Court—Stay of proceedings—Construction.

Secton 31 does not bar the jurisdiction of Civil Court, but only requires that proceedings to which that section is applicable, be stayed till the decision of the Tribunal on the question whether the institution is or is not a Sikh Gurdwara. Sub-section (2) of S. 31 must be strictly construed. The sub-section only applies in the case of a claim which could have been made in a petition forwarded to the Local Government under the provisions of S. 10 and was not so made. Where a claim in respect of the property relating to an institution has been made to the Local Government in a petition under S. 10, S. 31 has no application. A I R (Vol 23) 1936 Lah 443 : 38 P L R 1139 : 168 Ind Cas 285 (DB).

——S. 31—Suit for possession of property claimed as a Dera of Udasis — Notification with respect to the property during pendency of suit — Suit, if to be stayed.

Where a suit was instituted for possession of property which was claimed as a dera of Udasis and it appeared that a notification was published under S. 7 (3) with respect to this property during the pendency of the suit :

Held, that it was necessary for the plaintiff to present a petition under S. 10 if he wanted to claim possession thereof, and that the proceedings in the suit had to be stayed in view of the provisions of subs. (2) of S. 31. AIR (Vol 20) 1933 Lah 268 : 34 P L R 857 : 145 Ind Cas 701 (1).

——S. 31 — Applicability — Claim untenable under S. 5.

Where no claim can be made under S. 5, inasmuch as the property is shown as part of the Gurdwara and not attached to it, S. 31 or S. 32 has no application. AIR (Vol 16) 1929 Lah 167 : 171 Ind Cas 815.

—S. 32

——Ss. 32, 30 (ii) — Applicability — Jurisdiction of Court.

Per Full Bench. — The words "might be made" in S. 32 cannot be read as "might have been made." Section 32 was intended to apply only to those cases which were instituted either before the commencement of the Act or which were instituted after the commencement of the Act, but before the expiry of prescribed period of limitation for making a claim under the various sections referred to therein. Section 30 applies, on the other hand, to cases where a claim might have been made but was not made within the prescribed period. Under S. 30, it is only in the exceptional circumstances mentioned in provisos to S. 30 (i) or (ii) that the claim will be tried on merits in a suit falling under S. 30. Section 32 on the other hand, makes no reference at all to any such circumstances.

Section 32 does not, therefere, apply to cases covered by proviso to S. 30 (i) or by the proviso to S. 30 (ii) and the Court has jurisdiction to decide the same. A I R 1934 Lah 390 : 151 Ind Cas 890 and AIR 1935 Lah 843 : 160 Ind Cas 133, Overruled. AIR (Vol 29) 1942 Lah 19 : 44 P L R 21 : I L R (1942) Lah 217 : 199 Ind Cas 395 (FB).

——S. 32 — Applicability.

Section 32 is intended to apply only to claims, which could be made under certain sections of the Act and for which the prescribed period of limitation has not yet expired. The words 'within the time prescribed therein occurring in the section are very significant in this connection. It could not be intended that the Civil Courts should entertain such claims at any time even after the lapse of the prescribed periods. AIR (Vol 27) 1940 Lah 154 : 42 P L R 180 : 189 Ind Cas 449.

——S. 32—Scope.

The language of S. 32 is unambiguous. It is intended to apply only to those suits which were pending at the commencement of the Act or in which, though instituted after its commencement, the claim could be made under the sections mentioned therein within the time prescribed. It does not obviously cover such suits as are instituted long after the time during which the petitions could be made has expired. A I R (Vol 25) 1938 Lah 369 : 40 P L R 319 : 175 Ind Cas 945 (FB).

——S. 32 — Applicability — Duty of Court to remit issue for trial to Tribunal.

Where the provisions of S. 3 (2), have been complied with and the claim advanced in the suit is one capable of being made under S. 5 (1), S. 32 becomes applicable and the civil Courts should settle the issue referred to in that section and remit that issue to the Tribunal for decision. A I R (Vol 18) 1931 Lah 85 : 12 Lah 204 : 131 Ind Cas 89 (FB).

—S. 33.

——Ss. 33, 31, 34 — "Hereditary office-holder," meaning of— Jurisdiction of civil Courts —Whether deprives him of his right to establish his claim in civil Court on the score of his being an office-holder.

The term "hereditary office-holder" is a technical term under the Act, and merely because a person is not found to come within the definition of that term, he does not lose all the rights of which he is possessed otherwise. A person who is not found to be such, merely disentitles him to any further relief at the hands of the Tribunal but it does not deprive him of his right to establish his claim in the ordinary civil Courts on the score of his being an office-holder of the institution even though not hereditary. A I R (Vol 24) 1937 Lah 88 : 171 Ind Cas 590 (DB).

—S. 34.

——S. 34—Suit, held barred under S. 34.

A claim under Act was made by the Anjuman Islamia of the Punjab "on behalf of the Muhammadans" claiming that the land and property were dedicated for a mosque and did not belong to the Gurdwara. Claimants failed before the Tribunal, by reason of adverse possession and previous decisions. No appeal was brought by the Anjuman from the decision. Later on, another suit was instituted by the Muhammadans. It contained no claim for possession of the property or ejectment of the defendants or that the property be handed over to the hereditary mutawalli but for a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and interference with the plaintiffs' right of worship; and a mandatory injunction to reconstruct the building:

Held, that the suit was barred by res judicata and also under S. 34, since if the later suit were to succeed, the effect of the decree would necessarily be inconsistent with the decision of the Tribunal rejecting the petition of the Anjuman Islamia. A I R (Vol 27) 1940 P C 116 : 6 B R 777 : 1940 A L J 522 : 52 L W 266 : 1940 O W N 671 : 44 C W N 957 : 1940 M W N 818 : I L R (1940) Lah 493 : 42 Bom L R 1100 : 22 P L T 140 : (1940) 2 M L J 903 : 1940 O W N 1280 : 67 I A 251 : ILR (1940) Kar (PC) 251 : 1940 A W R 90 : 73 C L J 199 : 189 Ind Cas 1.

——S. 34—High Court's decree under S. 34 — Further right of appeal to Privy Council.

The provisions in the Act, that appeals from the Tribunal are to be heard by Division Court and not by a Single Judge does not indicate that the High Court in dealing with the matter would be exercising a special jurisdiction, nor should any such inference be drawn from the provisions of S. 37 which is consistent with the view that the jurisdiction conferred upon the High Court by S. 34 is intended to include the new subject-matter as part of the ordinary appellate jurisdiction of the High Court. The provisions of the Civil P. C., with reference to appeals to His Majesty apply to decrees of the High Court made under S. 34 and consequently, a right of appeal to the Privy Council from such decrees exists. A I R (Vol 23) 1936 P C 93 : 43 L W 443 : 2 B R 383 : 1936 M W N 341 : 17 Lah 146 : 40 C W N 610 : 38 Bom L R 479 : 38 P L R 378 : 63 C L J 390 : 63 I A 180 : 161 Ind Cas 529.

——S. 34—Appeal — Order by Tribunal under Civil Procedure Code—If appealable.

Sub-section (1), S. 34, has taken away from an aggrieved party the right to appeal against orders passed by the tribunal under the provisions of the Civil Procedure Code, even though such orders, if passed by an ordinary Court, would have been appealable under S. 104 or O. 43, Civil P. C., unless they come within the purview of Sub-s. (1), S. 34. A I R (Vol 15) 1928 Lah 651 : 10 Lah 435 : 30 P L R 712 : 116 Ind Cas 460 (DB).

——S. 34—Interpretation — Final order — Order of interim injunction—If final.

The expression "final" is not defined in the Sikh Gurudwaras Act. But there is no doubt that in S. 34 (1) it is used to signify orders which are not of an interlocutory nature. An order of interim injunction to a party is merely provisional in its nature. It is in no sense of the term a "final order" determining a matter decided by the Tribunal under the provisions of the Act. AIR (Vol 15) 1928 Lah 651 : 10 Lah 435: 30 P L R 712 : 116 Ind Cas 460 (DB).

—S. 36.

——S. 36—Applicability—Jurisdiction of civil Court —When barred.

Both Ss. 7 (5) and 36 would be applicable and bar the jurisdiction of the Court if the action complained of is within and under the Act. But if the action complained of is done arbitrarily, carelessly or oppressively it would be outside the Act and would not bar the jurisdiction of the civil Court. A I R (Vol 37) 1950 E P 338.

——S. 36—Res judicata.

Bank obtaining decree on equitable mortgage against S — Shromani Parbandhak Committee claiming mortgage property under S. 3 (1) — Counter-claim by S under S. 5 (1) — No reference made by either to mortgage in favour of Bank — Tribunal declaring property as belonging to Darbar Sahib Amritsar and decree passed accordingly—Bank taking out execution — Committee of Management, Darbar Sahib applying for stay of execution relying on S. 37 — Execution stayed — Suit by Bank against S, Shromani Parbandhak Committee and Committee of Management for setting aside decree of Tribunal, decreed — Bank again starting execution — Suit by Committee for declaration that decree in favour of Bank was without jurisdiction—Suit held, maintainable — Court decreeing Bank's suit held, had no jurisdiction and its decree was ultra vires. A I R (Vol 25) 1938 Lah 129 : 182 Ind Cas 785 (DB).

—S. 37.

——S. 37—Restitution.

Where no declaration has been made by the Tribunal, its decision does not debar the executing Court from carrying out the provisions of the ordinary law in making restitution of properties which had been improperly seized by it in execution of its decree which has since been reversed. A I R (Vol 20) 1933 Lah 798 : 148 Ind Cas 335.

——S. 37 — Decree for sale of property — Property declared to belong to Gurdwara by Tribunal — Decree-holder not party to proceedings before Tribunal — Decree-holder, whether entitled to execute decree.

A person raised a loan from a Bank on the security of certain property and the Bank obtained a decree for recovery of money by sale of the said property. The Local Government issued a Notification under S. 3 (2), Sikh Gurdwaras Act, declaring the property in dispute as belonging to the Darbar Sahib, Amritsar. The judgment-debtor filed a petition under S. 5 of the Act. The matter was compromised in the Tribunal and the property was declared to belong to the Darbar Sahib. The Bank was not party to the said compromise. On the basis of this compromise decree, the Committee of Management and the Darbar Sahib applied to the executing Court to stay execution of the decree obtained by the Bank, under S. 37 of the Act. This application was accepted and the execution proceedings consigned to the record room :

Held, that although the Bank was not a party to the proceedings before the Tribunal and was not

bound by the compromise, yet S. 37 barred the execution of the decree. A I R (Vol 19) 1932 Lah 125 : 134 Ind Cas 481.

——S. 37 — Jurisdiction of civil Court — Whether alienation by limited owner in favour of Gurdwara is valid—Right to determine.

The question whether a person having a limited interest in the property is competent to alienate it by gift is obviously not one for the Tribunal to determine. That question must be enquired into and decided by the civil Courts whether the gift is to a Gurdwara or anybody else. A I R (Vol 14) 1927 Lah 394: 8 Lah 362: 28 P L R 698 : 101 Ind Cas 171 (DB).

—S. 39.

——S. 39 — Appeal filed before Act — Suit under S. 92, Civil P. C. — Appeal against decree — Effect of passing of Sikh Gurudwaras Act—Procedure.

The enactment of the Sikh Gurudwaras Act and the issue of a notification made under the provisions of the said Act declaring the Gurudwara to be a Sikh Gurudwara do not bar the jurisdiction of the High Court to deal with an appeal against the decree of the Subordinate Courts passed in a suit under S. 92, Civil P. C., in respect of Gurudwara, which appeal was pending when the Act came into force or the notification was issued. The High Court must hear and decide the appeal, though in view of the imperative provisions of S. 3 it may not be possible for it to grant all the reliefs claimed. Under that section it is not open to the Court to go into the question whether or not the Gurudwara is a Sikh Gurudwara, nor can it settle a scheme of management in respect of such a Gurudwara. The procedure laid down in S. 32 is applicable to "suits" or "proceedings" ejusdem generis pending in a Court of first instance and does not govern a pending appeal even if all or some of the matters mentioned in that section arise for decision in the appeal. A I R (Vol 15) 1928 Lah 627 : 10 Lah 165 : 113 Ind Cas 529 (FB).

——S. 39 — Revision — Order holding that suit is triable only by tribunal under Act.

Order of Court holding that a suit is not triable by itself but by the tribunal under the Sikh Gurdwaras Act (VIII of 1925) goes to the root of the case and practically terminates the proceedings so far as that Court is concerned, and therefore the order is revisable. A I R (Vol 14) 1927 Lah 394 : 8 Lah 362 : 28 P L R 698 : 101 Ind Cas 171 (DB).

—S. 86.

——Ss. 86 and 40—Committee under the Act is not a successor of the old committee.

The right of a trustee to nominate his successor is a right which must be derived from some special provision either in the deed of settlement or in the rules of the foundation or in the custom of the society or otherwise. Where the old S. G. P. C., sued to recover a certain amount from an ex-trustee, and subsequently after the Act came into effect the Committee which was placed in charge sued as successors to the original committee.

Held, that the suit was not properly framed.

Held also that the Court cannot order the substitution of the new body on an application which is really an attempt to evade S. 92, C. P. C. A I R (Vol 18) 1931 Cal 281 : 52 C L J 78 (DB).

—S. 99.

——S. 99—Scope.

The purpose of S. 99 is to ensure that all members of the Committee had notice of any meeting. Section 99 is directory and not imperative. The fact that all the members of the Committee were present when the resolution appointing the president to conduct the suit was passed, makes the resolution in accordance with law and renders the issue of notice unnecessary. AIR (Vol 27) 1940 Lah 266 : 1LR (1940) Lah 649 : 190 Ind Cas 625 (DB).

——S. 99—Notice of meeting—Whether should be in writing—Proof.

The fact that the members of the Committee met shows that there was reasonable notice and that the members themselves combined together to meet. Such notice of meeting need not be in writing. AIR (Vol 24) 1937 Lah 116 : 174 Ind Cas 328 (DB).

—S. 103.

——S. 103—Students' exercise book can form minute book. AIR (Vol 24) 1937 Lah 116 : 174 Ind Cas 328 (DB).

——S. 103—Minute book — Chairman must sign it.

According to S. 103, only the Chairman is compelled to sign the minute book. The fact that three other members sign it does not make the resolution illegal as it is also singed by the Chairman. A I R (Vol 24) 1937 Lah 116 : 174 Ind Cas 328 (DB).

—S. 133.

——Ss. 133 and 108—Investment of General Board Fund—Custodians advancing loans to Parchar Fund by way of investment — Custodians not committing breach of trust but not keeping reasonable possibility of its repayment in mind, cannot be said to have acted as prudent men of business.

If Parchar Fund fails to repay loan to General Board Fund, persons responsible for having made advances would be jointly and severally liable to make good loss caused to general Board Fund. AIR (Vol 26) 1939 Lah 202 : 41 P L R 517 (DB).

——S. 133—Dismissal of mahanth's claim petition—Absence of declaration that lands belong to Gurdwara.

A Gurdwara Committee has no statutory power to hold possession of properties which do not belong to the particular Gurdwara but which have been found to belong to a local Nirmala Dharmsala with which the Gurdwara has no concern whatever.

Mere fact of dismissal of the mahant's petition of claim under S. 5 (1) does not entitle the Gurdwara Committee to retain possession. A declaration by the Tribunal that they belonged to the Gurdwara is necessary. Where no declaration has been made by the Tribunal, its decision does not debar the executing Court from carrying out the provisions of the ordinary law in making restitution of properties which had been improperly seized by it in execution of its decree which has since been reversed. A I R (Vol 20) 1933 Lah 798 : 148 Ind Cas 335.

—S. 142.

——S. 142—Member of Gurdwara acquitted of charges of negligence, etc.—Costs—Warning to such person by the Judicial Commission.

Where a member of the Committee of Management of a Gurdwara is acquitted of charges of negligence, etc., the Judicial Commission should award him costs.

Where such a member does act in due course of the management of a Gurdwara and it is found that the persons on whom he had to rely were negligent in the duties, such member cannot be warned by the Judicial Commission. A I R (Vol 25) 1938 Lah 272 : 177 Ind Cas 320 (DB).

—S. 145.

——S. 145—Irregularity in convening meeting — Effect of S. 145.

Per Division Bench.—Any irregularity or defect in convening a meeting of the Committee of a Gurdwara to authorise a person to institute and prosecute a suit on behalf of the Gurdwara is condoned by S. 145, and the suit instituted by such a person cannot be dismissed by reason of that irregularity or defect in the absence of proof that it has occasioned a failure of justice. A I R (Vol 29) 1942 Lah 19 : 44 P L R 21 : I L R (1942) Lah 217 : 199 Ind Cas 395 (FB).

——S. 145—No meeting held—S. 145, whether applies.

Section 145 would apply only if a meeting has actually been held, if no meeting was held, the section cannot apply. AIR (Vol 18) 1931 Lah 226 : 32 P L R 48 : 12 L 314 : 131 Ind Cas 287 (DB).

—Sch. 2.

——Sch. 2—Effect of inclusion in schedule — Conclusive proof.

Inclusion of a particular place in Sch. II is not regarded as a conclusive proof of its being so except when the claim is for Gurudwar as such. AIR (Vol 16) 1929 Lah 603 : 120 Ind Cas 2 (DB).

PUNJAB SMALL TOWNS ACT (2 of 1922)

——Village does not become a town by mere application of the Act—Growth of village into town does not depend upon will of Government — Burden of proof in case of towns shifts on proprietors.

The provisions of the Act could be extended, not only to a village but to what was already a town. Moreover, a village would not become a town merely because the Act has been extended to it as well, and although the village may become a small town for the purposes of the Act, it would still remain a village if it is not otherwise found to have grown into a town. The growth of a village into a town cannot be made to depend upon the sweet will of the Government but upon number of other factors which must be taken into consideration and in spite of the wishes of the Government one way or the other. While the custom cannot be held to have been wholly abrogated on account of the development of a village into a town and the rights of the proprietors do not cease to exist by that fact only, the burden of proof in case of a town shifts on those (i. e. the proprietors) who allege that a non-proprietor cannot dispose of the site without their consent. AIR (Vol 32) 1945 Lah 256 : 47 PLR 212 (DB).

—S. 3.

——S. 3 (3-a)—Applicability and scope.

Section 3 (3-a), merely lays down that in respect of all rules, bye-laws, etc. made by the Notified Area Committee, the Small Town Committee is the perpetual successor of the Notified Area Committee. Where the notification making certain provisions of the T. P. Act applicable to the Municipalities and notified areas was issued in the year 1935, when a certain place was already a small town, the provisions of S. 3 (3-a) are applicable and the notification does not apply to the small town. AIR (Vol 26) 1939 Lah 234 : 41 PLR 29 : 182 Ind Cas 952.

—S. 4.

——S. 4—Committee, when comes into existence.

Under the Act where the Local Government has declared a particular area to be a Small Town and the Commissioner has issued the notification mentioned in S. 4, a committee is constituted. The fact that one of the members appointed to the committee was either not in India at the time of the Notification or he left the country very soon after, without taking the oath of allegiance or entering upon his duties as a member of the Committee is no ground for holding that the Committee had not come into existence. AIR (Vol 20) 1933 Lah 435: 34 Cr L J 776: 14 L 461: 34 PLR 758 : 144 Ind Cas 475.

—S. 16.

——S. 16—Cost of maintenance of lunatics, if comes within the objects of S. 16.

The detention ot the lunatics in a Mental Hospital and the cost of their maintenance is covered by the objects mentioned in S. 16. Even if, under S. 16, the Small Town Committee is entitled to spend the funds on the costs of maintenance of lunatics, it is not bound to do so. A Small Town Committee is not liable to pay the cost of the maintenance of the lunatics already incurred. AIR (Vol 21) 1934 Lah 148 : 15 L 480 : 36 PLR 360 : 151 Ind Cas 403.

——S. 16—Powers of Committee.

The scope of the power of the Committee under S. 16 is not in any way affected by S. 35 which merely regulates the powers of the Committee for issuing orders for sanitary or other purposes. AIR (Vol 21) 1934 Lah 148 : 15 L 480 : 36 PLR 350 : 151 Ind Cas 403.

—S. 21.

——S. 21 (a)— Imposition of haisiyat tax — Legality.

The imposition of a *haisiyat* tax is within the power of the committee under S. 21 of the Small Towns Act and the tax is, therefore not *ultra vires*. 49 PLR 133: AIR (Vol 35) 1948 Lah 66.

——S. 21 (a) (ii)—Phrase "according to their circumstances"—Interpretation.

The phrase "according to their circumstances" in S. 21 (*a*) (*ii*) of the Small Towns Act does not necessarily mean income. In any case it would certainly include agricultural income. AIR (Vol 35) 1948 Lah 66 : 49 PLR 133

——S. 21 (a) (ii)— Tax-paying capacity depends on means and material welfare. AIR (Vol 22) 1935 Lah 636 : 16 L 1073: 38 PLR 118: 159 Ind Cas 1064 (DB).

—S. 24.

——S. 24—Imposition of tax—Decision, if must be express—Fresh resolution after every five years — Whether necessary.

The decision of the Small Town Committee, whatever it is, must be reduced to writing and entered in the minutes book. The mere fact that the imposition of a tax might be indirectly inferred from its inclusion in the budget is not a "decision" contemplated by S. 24 of the Small Towns Act. But if a decision is taken and a tax is validly imposed, it does not, for its continued validity, require any fresh resolution after every five years. A resolution to impose a tax does not exhaust itself after five years. AIR (Vol 35) 1948 Lah 66 : 49 PLR 133.

—S. 25.

——S. 25— Jurisdiction of Civil Courts.

Where the tax has been properly assessed as to amount, it cannot come before the Courts. It is for the assessee to object under S. 25 to the amount of the assessment unit at which he was assessed. If he is dissatisfied with the order passed on his objection, he can appeal to the Deputy Commissioner setting forth any circumstance in his favour and ask for the unit to be reduced. The order passed by the Deputy Commissioner is final and cannot be challenged in the Courts. AIR (Vol 22) 1935 Lah 636 : 16 L 1073 : 38 PLR 118 : 159 Ind Cas 1064 (DB).

—S. 35.

——S. 35—Rules under.

Date when rules come in force cannot affect right of Committee to collect fees under them. AIR (Vol 22) 1935 Lah 980.

——Ss. 35 and 16 — Whether affects the scope of S. 16.

Section 35 merely regulates the powers of the committee for issuing orders for sanitary or other purposes and does not, in any way, affect the scope of the power of the Committee under S. 16. AIR (Vol 21) 1934 Lah 148 : 15 L 480 : 36 PLR 350 : 151 Ind Cas 403.

——S. 35 (ll)—Order for removal of sun-shades projecting over public street —Whether intra vires the committee.

The words "encroachment over any street" in S. 34 (ll) are wide enongh to include "overhanging structures" such as sun-shades or cornices projecting over street. The mere fact that overhanging structures are

not specifically mentioned in S.35 (ll), is not sufficient to hold that they are not included in the expression "encroachment over a street." Consequently, an order by a Small Town Committee for removal of sun-shades and cornices of a house projecting over a public street is intra vires the Committee. AIR (Vol 24) 1937 Lah 543 : 39 PLR 746 : 171 Ind Cas 961.

—S. 41.

——Ss. 41, 34 (q) —Resolution fixing fees for occupation of portion of public street for motor lorries—Whether ultra vires.

A resolution passed by the Small Town Committee fixing fees for the occupation of a portion of a public street, where motor lorries were allowed to stand, falls within S. 41 and not under S. 34 cl. (q), as cl. (q) of S. 34 deals with licensing of motor vehicles and setting apart of places for public vehicles while the levying of fees comes under cls. (c) and (e) of S. 41 and the resolution is not ultra vires. AIR (Vol 24) 1937 Lah 389 : 173 Ind Cas 914.

——S. 41 (1) (e) —Object and scope—Power to lease.

Looking generally at the scheme of the Act, it does not appear that the Legislature wished to confer more extensive power on a Small Town Committee than on a Municipal Committee. The real object of S. 41 (1) (e) is to give the Small Town Committee power to charge fees from persons who were allowed to temporarily or premanently occupy any portion of a public street but not to give any power of giving leases thereof. AIR (Vol 22) 1935 Lah 958 : 16 L 608 : 37 PLR 719 : 159 Ind Cas 983 (DB).

——S. 41 (1) (e) —Vesting of public street, whether gives ownership of soil.

The mere vesting of a public street in a corporate body would not necessarily give the corporate body either ownership of the soil under the public street or necessarily give it a power to grant leases thereof. AIR (Vol 22) 1935 Lah 958 : 16 L 608 : 37 PLR 719 : 159 Ind Cas 983 (DB).

PUNJAB TENANCY ACT (16 of 1887)

——"Land" — Agricultural land included in village abadi.

Agricultural land included within the area of the abadi does not cease to be "land" as defined in S. 4, Punjab Tenancy Act. A I R (Vol 37) 1950 East. Punj 90 : 51 P L R 401 (DB).

——Joint tenancy according to settlement record — Partition for convenience — Landlords not parties to partition proceedings — Tenancy, held as joint tenancy — Death of joint tenant — Passing of rights by survivorship.

A tenancy was shown as dawami (permanent) in the settlement record and further it was shown as held by Buta Shah and Bullah Shah sons of Mulk Shah, Jhande Shah son of Ghulam Farid and Ilam Din, Chiragh Shah and Karam Shah sons of Fazal Shah, caste Fakir in the following shares : Sons of Mulk Shah and Jhande Shah one share each; Sons of Fazal Shah one share. In the year 1918, the tenancy was partitioned but the partition was entered into merely as a matter of convenience and for the purpose of cultivation. The partition took place through the Revenue Court. The tenants went to the Court merely to obtain a confirmation of a division of the property which had already taken place. Landlords were not even pro forma parties to these proceedings :

Held, that the nature of tenancy was not changed by the partition and the tenancy remained a joint tenancy. On the death of a joint tenant without descendants who could inherit, his rights passed to others by survivorship. AIR (Vol 32) 1945 Lah 235 : 47 P L R 220 (DB).

——Scope.

The Punjab Tenancy Act is intended merely to control the relationship between landlord and tenants and has nothing to do with the powers of alienation possessed by a widow or the control of such alienation by reversioners. AIR (Vol 17) 1930 Lah 942.

——S. 3.

——S. 3 — Suit for rent against occupant of water mill.

A suit for rent due from the occupant of a water mill is not governed by the Act as the site of the mill cannot be held to be agricultural land and the occupant cannot be said to "hold" land within the meaning of the Act. Such a suit is cognisable by the civil Court. 39 P L R 1912 : 47 P W R 1912 : 13 Ind Cas 348.

——S. 4.

——S. 4 (1) — "Land."

Trees standing on agricultural land are not land for the purposes of the Act. A I R (Vol 29) 1942 Lah 152 : 44 P L R 157 : 200 Ind Cas 697.

——S. 4 (1)—"Land"—Water-mill.

The site of a water-mill is not governed by the Punjab Ten. Act. Hence a person who is the heir of the last owner of a water-mill is entitled to succeed to the rights of the last holder in it. A I R (Vol 23) 1936 Lah 780 : 161 Ind Cas 975 (DB).

——S. 4 (1) — "Land" — Option to build on land leased—Building not erected.

Where option is given to a person to build on land leased but as a matter of fact, no building has yet been erected thereon, it is not sufficient to take the land out of the definition of that term in the Act. AIR (Vol 23) 1936 Lah 244 : 37 P L R 735 : 161 Ind Cas 349.

——S. 4 (1)—"Land"

The purpose contemplated in the definition of "land" in the Act is the direct purpose for which the land is occupied by or has been let to the occupier by the owner. It is the purpose of the occupier and not the object of the owner which supplies the test. AIR (Vol) 18) 1931 Lah 726 : 132 Ind Cas 847.

——S. 4 (1)—"Land"—Meaning.

The manufacture of saltpetre is not an agricultural purpose or a purpose subservient to agriculture and property let out for that purpose is not land within the meaning of Section 4 (1). What has to be considered is the character and use of the property at the time immediately before the cause of action arose and the nature of the suit will not be affected by the act of one party which gives the other his cause of action. AIR (Vol 10) 1923 Lah 462 : 83 Ind Cas 171.

——S. 4 (5)—"Holds."

Per Full Bench—The word "holds" in S. 4 (5) does not mean or include merely the "right to hold" but means "actually or constructively holds." A I R (Vol 29) 1942 Lah 217 : 44 P L R 488 : I L R (1943) Lah 191 : 202 Ind Cas 497 (FB).

——S. 4 (6)—"Landlord"—Meaning of.

Where a tenant holds under more persons than one, any one of them or some of them are not landlords but all of them collectively except where it is expressly provided so. A I R (Vol 32) 1945 Lah 249 : 47 P L R 329 : I L R (1945) Lah 475 : 221 Ind Cas 293 (FB).

——S. 4 (6) — "Landlord" — Transfer of right to recover rent—Transferee landlord.

The transfer of a right to recover rent only could not make the transferees "landlords" within the definition given in the Act. AIR (Vol 22) 1935 Lah 976.

——S. 4 (6), (7) —"Landlord."

Every successor-in-interest of a landlord and every person who is entitled to receive rent from the tenant is a landlord for the purposes of the Act. AIR (Vol 22) 1935 Pesh 20 : 154 Ind Cas 898.

——S. 4 (6) — 'Landlord' — Mortgagee with possession.

The term 'landlord' as defined in S. 4 of the Act includes mortgagee in possession. A suit for possession by pre-emption of certain land sold by an occupancy tenant to the mortgagees with possession of the proprietary rights does not lie inasmuch as the sale must be held to have been made in favour of the landlord. A I R (Vol 6) 1919 Lah 276 : 149 P W R 1918 : 47 Ind Cas 3.

——S. 4 (7) (1) — "Tenant" —Person paying rent, if tenant though mukarridar.

The question whether a mukarridar comes within the definition of a "tenant" will have to be decided on the conditions on which the land is held by him. Where the land has been taken on payment of a sum as rent, it is sufficient to bring him within the definition of the term "tenant." A I R (Vol 23) 1936 Lah 244 : 37 P L R 735 : 161 Ind Cas 349.

——S. 4 (7) -Tenant—Meaning.

Whatever be the meaning of "tenant" elsewhere in the Act the word "tenant" in S 50 means a person who having been a tenant has been dispossessed. AIR (Vol 14) 1927 Lah 35 : 98 Ind Cas 875.

——Ss. 4 (7), 5 (1) (d) and 84—'Tenant'—Meaning of —Occupancy rights—Jagirdar's descendants— Right of—Revision.

If the other conditions of Cl. (d) of S. 5 (1) of the Act are satisfied, a successor or descendant of a jagirdar or ex-Jagirdar is entitled to claim under the clause for occupancy rights. The new provision in S. 4 (7) of the Act includes in the definition of 'tenant' predecessors and successors-in-interest of a tenant.

Where the lower Court dismissed a claim on the ground that the claimant is a descendant, held there was a failure to exercise jurisdiction and that the case was one for interference in revision under S. 84 of the Act. 7 P R 1912 Rev : 178 P L R 1913 : 18 Ind Cas 56.

——Ss. 4 (15) and 5 (1) (d) — "Village servants"— —Khangah Service.

The Muafi granted by the Zamindars of the village for the service of Khangah brings the persons responsible for such service, within the category of "village servants" and includes them from being "Jagirdars" for the purpose of S. 5 (1) (d) of the Tenancy Act. 4 P R 1915 Rev : 5 P W R 1915 Rev : 31 Ind Cas 238.

——S. 5.

——Ss. 5 and 53 — Occupancy tenancy held by several persons — Relationship inter se of landlord and tenants-in-common — Surrender of his share by tenant in landlord's favour—If results in partial extinction of tenancy — Landlord's right to possession of such share.

An occupancy tenancy under the Punjab Tenancy Act held by more persons than one as tenants-in-common must be regarded, in relations inter se of the landlord and the tenants-in-common, as one single tenancy and the entire body of tenants as one tenant, while the unity of possession lasts. The necessary result of this is that so long as there is in existence any one of such tenants, who has a subsisting title to his interest in the tenancy, the landlord as such can have no claim to the possession of any part of the subject-matter of the tenancy.

However, one or more of the tenants may validly transfer his or their undivided share or shares in the occupancy holding to any person, whether an outsider or the landlord himself, and thus effectively clothe such transferee, as against his or their co-tenants, with all the rights possessed by himself or themselves in the subject-matter of the tenancy.

This right of the tenant-in-common to transfer his undivided interest cannot, of course, prejudice any right that some or all of his co-tenants may, as his reversioners possess, under any custom governing them, to object to the transfer on the ground of the land transferred being ancestral qua them and the transfer being without legal necessity or being otherwise opposed to custom. Nor has it application to the case of a widow succeeding to an undivided share in an occupancy holding under S. 59 of the Act.

In the light of the above principles, a surrender in favour of the landlord by one of the tenants-in-common of his right in land can properly and legitimately be held to take effect as a transfer by him of such interest in favour of the landlord, but it does not and cannot result in a partial extinction of the tenancy.

Further, although in consequence of the said transfer the landlord may rightly be regarded as having become clothed with all the rights possessed by his transferor at the time of the transfer, he cannot be deemed to have, in any manner, improved his position as a landlord in respect of the subject-matter of the tenancy, in as much as till physical separation of the land comprised in the tenancy, and till the actual and physical separation of the share of the other co-tenants in such land, the other co-tenants are entitled to remain in possession of the whole and every part of that land.

The landlord has therefore, till such division takes place no right to dispossess them of any portion of the land. AIR 1936 Lah 70, Overruled. AIR (Vol 37) 1950 East Punj 53 (FB).

——S. 5 (1) — Applicability of presumption – Debtor and creditor.

Presumption in S. 5 applies not only to the tenant who is in possession at the commencement of Act; it is not restricted to landlord and tenant but applies between creditor and judgment-debtor as between landlord and tenant. AIR (Vol 16) 1929 Lah 473 : 118 Ind Cas 904.

——Ss. 5 (1) (a) and 59—Presumption, if available to collateral of last holder.

When dispute is between the landlord and the tenant, the Court is entitled to draw the presumption under S. 5 (1) (a) of the Punjab Tenancy Act. There is no reason why this presumption should not be available when the question to be decided is between the landlords and the collaterals of the last holder who was the occupancy tenant. (1950) 52 P L R 132.

——S. 5 (1) (a) — Facts raising presumption can be proved by any one.

Whenever it is proved that a tenant has continuously occupied land for thirty years with such other conditions as are found in the section, a presumption may be raised that he (the tenant) held rights of occupancy under S. 5 (1) (a). The facts raising presumption need not be proved by a tenant alone. If the facts mentioned in cl. (2) are established on the record, the Court will be entitled to raise presumption in favour of the tenant. A I R (Vol 31) 1944 Lah 276 : 46 P L R 88 : 219 Ind Cas 11 (DB).

——S. 5 (1) (a)—Daughter or sister of last male-holder cannot acquire occupancy rights. It is only a widow who can acquire occupancy rights under cl. (b) of S. 59 (1). A I R (Vol 25) 1938 Lah 575 : 40 P L R 411 : 177 Ind Cas 784.

——S. 5 (1) (a) and (2) — Ejectment—Suit to contest —Presumption.

Where the presumption given in Cl. 5 (2) has not been rebutted the plaintiff (a tenant who sued to contest a notice for ejectment) is entitled to occupancy rights under S. 5 (1) (a). 2 P W R (Rev.) 1915 : 30 Ind Cas 845.

——Ss. 5 (1) (a) and 5 (2)—Conditions as to continuous occupation by more than two generations in male line.

The provisions of S. 5 (1) (a) as to continuous occupation of land by more than two generations in the male line, apply only to the tenant in occupation at the commencement of the Act, and if in respect of his occupation such conditions are satisfied, his subesquent successors-in-interest are entitled to the benefits of the same and they need not themselves be in the male lineal descent. 7 P R 1913 (Rev.): 76 P L R 1914 : 22 Ind Cas 552.

——Ss. 5 (1) (a) (d) and 59 (3)—Right of inferior proprietorship.

Even if a tenure is something below proprietorship still it certainly comes under S. 5 (1) (a) and (d) and the widow's husband's reversioners descended from the common ancestor who "occupied the land can impeach the sale by the widow." 86 P W R 1909 : 4 Ind Cas 626 (DB).

——S. 5 (1) (b)—Muafi—Status of muafidar.

Muafidars are not village servants but jagirdars and therefore they are occupancy tenants not liable to ejectment. (1920) 2 Lah L J 714.

——S. 5 (1) (b)—Owner losing ownership—Inability to pay revenue—Occupancy tenant.

An owner who through inability to pay the revenue loses his ownership, ceases to be a landowner by an involuntary act within S. 5 (1) (b) of the Act. 3 PWR (Rev) 1912 : 15 Ind Cas 927.

——Ss. 5 (1) (c), 111 and 112—Erroneous statement —Entry in Record of Rights — Effect of.

An erroneous statement by the tenants that they are non-occupancy tenants, even though recorded in the Record of Rights will not operate to deprive them of their rights. 3 P R (Rev) 1919 : 54 Ind Cas 969.

——S. 5 (1)(c)—"Settlement along with the founder" explained.

Under S. 5 (1) (c) of the Act, the meaning of "settlement with the founder" is settlement contemporaneously with or in association with the original founder in the initial stages of the foundation and development of the village.

But "settlement by the founder" might be after these initial stages. There is a fair rebuttable presumption in favour of a cultivator being settled in a village by the founder as cultivator thereof when there is evidence of his commencing to reside in and cultivate Shamilat land in a village during the lifetime of founder who was at the time a lambarder or had direct concern otherwise with the Shamilat management, the requirements of S. 5 (1) (c) being so far fulfilled. 3 P R 1916 (Rev) : 37 Ind Cas 1066.

——S. 5 (1) (d)—Muafidar — Possession for over 20 years—Effect.

Where a person continuously has occupied the land in suit for more than 20 years as muafidar without condition of service he cannot be ejected at the mere pleasure of the proprietors or because he is a minor. AIR (Vol 11) 1924 Lah 606 : 76 Ind Cas 134.

——S. 5 (2)—Thirty years, how to be counted.

The thirty years referred in S. 5 must be counted prior to the institution of the suit and not prior to the commencement of the Act. The period should be found to have expired not on the date of the attachment of the occupancy-rights held by the tenant before a presumption could be raised in favour of his owning those rights under S. 5. It would be sufficient if thirty years are found to have expired on the date on which evidence was being led to prove and rebut the issue framed. AIR (Vol 31) 1944 Lah 276 : 46 P L R 88 219 Ind Cas 11 (DB).

——S. 5(2)—Thirty years—How reckoned.

The term thirty years means thirty years from the commencement of the suit and not from the Act. 3 P R (Rev) 1911 : 258 P L R 1911 : 5 P W R (Rev) 1911 : 12 Ind Cas 442.

——Ss. 5 (2) and 59 — Occupancy holding—Revenue Record—Presumption.

It was found that the father of an occupancy tenant who was recorded in the revenue papers as hereditary cultivator had been in possession of the holding for 50 years.

Held, that the Court may presume that the grandfather of the tenant was an occupant of the land, so that in case of the death of the tenant, his collaterals, descended from the same grandfather would succeed to the occupancy holding. 166 P W R 1908 : 101 P R 1908 : 11 P L R 1909 : 4 Ind Cas 691 (DB).

——S. 6.

——S. 6—Transfer of occupancy rights—Legality.

Occupancy tenant under S. 6 mortgaging occupancy holding — Landlord challenging the alienation :

Held, that the transfer was void not only qua the landlord and the transferee but even qua the transferor and transferee. Such a transaction cannot become valid even if the parties act on it. AIR (Vol 24) 1937 Lah 664 : 39 P L R 261 : 172 Ind Cas 246 (DB).

——S. 6—Purchase of occupacy rights by landlord—Right of collaterals of vendor to pre-emption.

Plaintiffs, as collaterals of the vendor, have no right of pre-emption against the landlord vendees, who have purchased occupancy rights from their tenant, the vendor, and that this is so even though the said rights come under S. 6 and S. 8, Punjab Tenancy Act, and not under S. 5. Section 2 (2), Punjab Pre-emption Act, enacts that nothing in that Act should affect Ss. 53 and 54, Punjab Tenancy Act, while Ss. 53 and 54 refer only to rights of occupancy under S. 5, Punjab Tenancy Act.

In spite of that the same principle is applied to holdings under S. 6 which are of a more limited nature and a sale to the landlords by a tenant holding under S. 6 could not be pre-empted by a collateral or a co-sharer in the occupancy khata. (1928) 108 Ind Cas 598 (Lah).

——Ss. 6 and 8 — Sale of occupacy rights — Collaterals, right of.

Where occupancy rights are sold to the landlord the collaterals of the vendor cannot pre-empt against the landlord though the said rights are not covered by S. 5. AIR (Vol 4) 1917 Lah 284 : 116 P R 1916:38 Ind Cas 712 (DB).

——S. 8.

——S. 8 — Occupancy right—Acquisition of—Basiku Opathus of the Kangra District.

Basikhu Opathus or tenants who had settled upon land and have built themselves a bhasti or homestead on or near it are entitled to occupancy rights under S. 8 of the Act, if there is an express or implied contract that they shall hold so long as they farm well and pay their rent or in other words, 'ta quasur' i.e., till commission of fault against their tenure.

A contract to that effect may be implied where the tenants and their predecessors have occupied the lands as basiku opathus for 100 years and have built houses on the land occupied by them paying half produce as rent. AIR (Vol 6) 1919 Lah 277 : 50 P R 1919 : 51 Ind Cas 484.

——S. 8 — Acquisition of occupancy rights—Agreement not to eject.

Occupancy rights may be decreed under S. 8 where there has been a promise not to eject the tenant, which promise may be implied from the conduct of the parties. A promise not to eject does not, however, mean a promise not to eject under all circums-

tances but 'ta quasur' i.e., till commission of a fault against the tenure. 5 P R 1918 (Rev) : 4 P W R 1918 (Rev) : 46 Ind Cas 571.

——S. 8 — Occupancy rights—Tenants of the Morni hill tract — Tahsil Naraingarh.

Looking to the Morni tract tenures as detailed in the settlement report and to the fact of occupation for 28 years, through two generations, without payment of any rent over and above land revenue and cesses a tenant of Mauza Mauli Bhoj Rajpura, was held entitled to occupancy rights under S. 8 of the Act. 3 P R (Rev) 1917 : 8 P W R (Rev) 1917 : 41 Ind Cas 34.

——S. 8 — Occupancy right — Butamari.

Butamari per se connotes no occupancy right. As to whether it does or does not must turn on the question whether at the time when the land was first broken up and occupied, the competition for land was such that the tenant could dictate his own terms or such that the landlord could do so. 6 P R 1914 Rev : 230 P L R 1915 : 27 Ind Cas 791.

——S. 8 — Wajib-ul-arz—Butamari.

The Wajib-ul-arz of Mouza Rambura, Sirsa Tahsil prepared in 1862 and revised in 1882 does not imply that Butamari per se confers an occupancy right. But as the village was Barani and the demand for tenants great, up to 1882, land personally broken up in 1882 and cultivated by tenants is held by them as occupancy tenants. 6 P R 1914 Rev Note:231 P L R 1915: 27 Ind Cas 745.

——Ss. 8, 111 and 112—Occupancy rights — Wajib-ul-arz—Entry in.

An entry in a Wajib-ul-arz signed by the landlords and tenants to the effect that the tenants shall be entitled to occupancy rights under certain conditions is binding upon the signatories and their representatives for ever, and its non-repetition in a subsequent settlement does not amount to its cancellation.

The question whether an agreement in an administration paper would operate only for the term of the settlement or beyond it is one of intention. 2 P W R 1913 Rev. : 148 P L R 1913 : 18 Ind Cas 598.

——S. 12.

——Ss. 12 and 77 (3) (j) — Civil and Revenue Court — Claim by water carrier against proprietary body based on Wajib-ul-arz.

A suit by a village "water carrier" against some of the proprietary body to recover from them his dues on basis of the Wajib-ul-arz in return for his doing the work of a water carrier at marriages and at the camps of officers on tour, is cognizable by a Civil and not a Revenue Court. Hag Buhf or Pooch Baki etc., are cesses recoverable independent of any service. AIR (Vol 4) 1917 Lah 231:74 P R 1917 : 44 P W R 1917 : 40 Ind Cas 487.

——Ss. 12 (4) and 17—Possession of produce before division — Right of tenant—Appointment of referee — Effect of—Tenant, if can commit theft of produce before division — Penal Code, S. 378.

Under S. 12 (4), Punjab Tenancy Act, the tenant is entitled to the exclusive possession of the whole produce until it is divided, and it is only after the division that the landlord becomes entitled to the possession of his share. The tenant's right to possession is not affected even in the event of the appointment of a referee under S. 17 of the Act. The tenant cannot, therefore, commit the offence of theft in respect of the produce before its division. AIR (Vol 37) 1950 Lah 42 : 51 Cr L J 454.

——S. 13

——S. 13—Commutation of rent—Mortgagee with possession.

A mortgagee with possession cannot under S. 13 of the Act commute produce rent into cash rent so as to bind the mortgagor landlord after the redemption of the mortgage. 3 P R 1918 Rev : 132 P L R 1918 : 46 Ind Cas 5.

——S. 14

——Ss. 14, 50 and 77 (3), (g)—Tenant—Suit for compensation—Suit after dispossession—Forum.

A suit by a tenant who is dispossessed for compensation, more than a year after dispossession is cognizable only by a Revenue Court and not by Civil Court. AIR (Vol 6) 1919 Lah 475 : 90 P R 1918 : 48 Ind Cas 8 (FB).

——Ss. 14 and 77 (3) (n)—Civil and Revenue Court —Plaintiff entitled to possession, if landlord.

A person entitled to possession of land is a landlord within S. 14 of the Act, and a suit for mesne profits in respect thereof is cognizable by a Revenue Court under S. 77 (3) of the Act. 145 P R 1893 not Foll. AIR (Vol 5) 1918 Lah 185 : 53 P R 1918 : 46 Ind Cas 437 (DB).

——S. 14—Holding land in contravention of agreement—Plaintiff's right.

When defts. cultivate in contravention of the agreement and without the consent of the plaintiffs the latter can claim that defendants should pay them for the use and occupation of the land. Under S. 14 aforesaid the Revenue Court is precluded from decreeing a larger amount than the rent payable in respect of the land in one agricultural year. AIR (Vol 4) 1917 Lah 188 : 30 P R 1917 : 41 P W R 1917: 38 Ind Cas 580 (DB).

——Ss. 14, 84 (5) — Ejectment — Person in adverse possession of land made over to another in partition proceedings.

A person in adverse possession of land which was made over to another in partition proceedings to which the former was not a party would not be liable to ejectment as a tenant under the Act. 1 P R 1914 Rev. : 199 P L R 1915 : 25 Ind Cas 867.

—S. 17

——S. 17—Appraisement—Record of Rights—Entries —Punjab Land Revenue Act, S. 144.

Under the joint force of S. 17 of Act, XVI of 1887 and S. 144 of Act XVII of 1887, a co-sharer in a joint holding is competent to make an application for appraisement ; it is not necessary for all the co-sharers to join it. In disposing of applications under S. 144 of the Act of 1887 and S. 17 of the Act of 1887, the Revenue Officer should not go behind the entries in the Revenue Records. He should act as if the co-sharers recorded therein were in fact the co-sharers in the holding.

A procedure is provided for those who dispute the correctness of the Record of Rights entries to have them altered and pending alterations, the Revenue Officer should, in a proceeding under S. 17, Tenancy Act treat the entries as correct. 4 P W R Rev 1912 : 15 Ind Cas 914.

—S. 19

——S. 19 — Appraisement — Confirmation — Objections.

The refusal by a tenant to accept the result of an appraisement is no reason for declining to confirm it.

The failure by a Revenue Officer to give effect to the direction contained in S. 19 (2) of the Act, does not affect the admissibility or the value of the evidence contained in the appraisement record.

In suits for the value of produce rents there is no conclusive presumption that produce calculated according to the Financial Commissioner's instructions in paragraph 12 in Standing Order No. 2 is the actual produce of the particular land in the particular harvest in suit. 4 P R 1918 Rev : 1 P W R 1918 Rev : 45 Ind Cas 980 (DB).

—S. 29

—S. 29—Acquisition of rights.

Occupancy rights cannot be acquired by mere passage of time. AIR (Vol 31) 1944 Lah 276 : 46 PLR 88 : 219 Ind Cas 11 (DB).

—S. 36

—S. 36—Occupancy tenancy held by several persons—Relationship inter se of landlord and tenants-in-common—Surrender of his share by tenant in landlord's favour—If results in partial extinction of tenancy—Landlord's right to possession of such share. See AIR (Vol 36) 1949 East Punj 53 (FB).

—Ss. 36 and 38—Merger—Whether reversioners can challenge.

If an alienation operates as a merger of the tenancy right with the proprietary right, it is not subject to challenge by the reversioners, as there is no property left, a declaration regarding which can be granted by the Court. AIR (Vol 4) 1917 Lah 208 : 41 Ind Cas 301, overruled. AIR (Vol 32) 1945 Lah 249 : 47 PLR 329 : ILR (1945) Lah 475 : 221 Ind Cas 293 (FB).

—S. 38

—S. 38—"Abandonment" under the Punjab Tenancy Act is not limited to the provisions of S. 38.

The question of abandonment is generally one of fact. AIR (Vol 21) 1934 Lah 163 : 34 PLR 1065 : 146 Ind Cas 1022.

—S. 38—Jurisdiction of Civil Court — Question whether occupancy tenant lost his right—Power to decide.

It is not open to the Civil Courts to decide whether the occupancy tenants had lost the occupancy right which they originally had in the land having regard to the proviso to S. 77 (3). 65 Ind Cas 520 : 4 Lah L J 196 : 3 Lah 84 : AIR (Vol 9) 1922 Lah 33 (DB).

—S. 38 — Abandonment of holding — Proof of—Possession of proprietor.

Where occupancy tenants did not for a long time cultivate the land without sufficient cause, and did not arrange for payment of rent when due.

Held, that abandonment is established and adverse possession by the proprietors may be presumed from the fact that they gave the land to their own tenants-at-will. AIR (Vol 7) 1920 Lah 293 : 170 P R 1919 : 54 Ind Cas 873.

—Ss. 38, 59 and 60—Abandonment—Relinquishment—Test of—Sub-lease for more than a year.

To constitute abandonment of the occupancy holding within S. 59, there must be relinquishment of possession and also the absence of intention to retain. A gift unaccompanied by any other act or omission cannot be regarded either as relinquishment under S. 38 or abandonment under S. 59 of the Act. AIR (Vol 4) 1917 Lah 408: 44 PR 1917: 51 PLR 1917: 1 PWR 1917: 39 Ind Cas 163 (DB).

—Ss. 38 and 59 (1) (b)—Abandonment by widow—Effect.

Abandonment terminates the rights of the widow and the occupancy right at once devolves upon the next claimant. Under S. 38 the tenant who is alleged to have abandoned, must have been at some time, in possession of the tenancy in question.

The moment the period required to bring S. 38 into operation is completed, the widow ceases to be the 'tenant having the right of occupancy' by operation of S. 59 (1) (b). 200 PLR 1915: 2 PR 1914 Rev: 25 Ind Cas 854.

—S. 38—Minor—Non-cultivation.

Rights of minor occupancy tenants are not extinguished by non-cultivation of land. 3 PR 1910: 9 PWR 1910: 157 PLR 1910: 5 Ind Cas 235 (DB).

—S. 39.

—S. 39 — Denial of landlord's title — Whether effects forfeiture of rights.

An occupancy-tenant can only be ejected from his tenancy on the grounds enumerated in S. 39. The mere repudiation by him of his landlord's title does not involve forfeiture of his rights and render him liable to ejectment. AIR (Vol 20) 1933 Lah 488 : 34 PLR 319 : 142 Ind Cas 232.

—Ss. 39 and 77 (3)—Landlord and tenant—Failure to cultivate — Damages, suit for—Civil and Revenue Courts.

A suit for damages against occupancy tenants for non-cultivation of a part of the land does not fall within S. 77 (3) of the Act, and is not excluded from the cognizance of a civil Court. AIR (Vol 4) 1917 Lah 252 : 99 PLR 1917 : 90 PWR 1917 : 42 Ind Cas 279.

—S. 41.

—S. 41 — A definite procedure is prescribed for the ejectment of tenants under Ss. 41, 42 and 43. If a decree is passed in favour of a plaintiff without observing the provisions regarding the ejectment of a tenant, it must be held that the tenant was prejudiced by the mistake as to jurisdiction and it would be inequitable in these circumstances to register the decree of the Civil Court, as a decree of the Revenue Court. AIR (Vol 21) 1934 Lah 353 : 35 PLR 411 : 155 Ind Cas 242.

—S. 50.

—S. 50 — Suit between dispossessed tenant and his landlord—Forum.

All the remedies of a tenant who has been dispossessed are provided in the Tenancy Act, and, therefore, all suits between dispossessed tenant and his landlord should be disposed of by the Revenue Court. No suit lies in a Civil Court after the expiry of the period of one year provided by S. 50, Punjab Tenancy Act. AIR (Vol 29) 1942 Pesh 65 : 202 Ind Cas 577 (DB).

—S. 50—Person claiming occupancy rights as collateral of the last holder — Jurisdiction.

Certain persons, claiming to be collaterals of the last holder F, brought a suit for declaration after the death of F, that they were entitled to the occupancy-rights of land in suit. The defendants denied that they were the reversioners of F, and pleaded that by virtue of an agreement during the lifetime of F they had relinquished their rights to the holding :

Held, that the dispute was not between a landlord and a tenant but between a person who claimed to succeed to the occupancy rights of the deceased F and the owners of the land and such a suit was cognizable by the Civil Courts. AIR (Vol 21) 1934 Lah 271 : 149 Ind Cas 1107.

—S. 50 — Alienation by tenant—Transfer of occupancy holding — Landlord recovering same from alienee—Suit by tenants to recover holding — Jurisdiction of Civil Court.

Where the tenant gave over the land to the alienee and the landlord having recovered the same from the alienee, the tenant sued for possession of the occupancy holding :

Held, that the Civil Court had jurisdiction to try the suit. AIR (Vol 17) 1930 Lah 934 : 31 P L R 615 (DB).

—S. 50 — Fraudulent representation — Dispossession of tenant on representation of abandonment to Revenue Officer — Suit for possession in Civil Court —Maintainability.

Where the plaintiffs allege that they were dispossessed from their tenancy by the landlords who fraudulently represented to the Revenue Officer that the occupancy tenancy had been abandoned, their dispossession is such a dispossession as would be covered by S. 50 (a), Punjab Tenancy Act, and by the combined operation of that section and S. 77 (3) (g) the plaintiffs are debarred from suing for re-

covery of possession in the Civil Courts. (1928) 110 Ind Cas 419 : 10 L L J 274 : 29 P L R 713 (DB).

——S. 50 — Suit in Revenue Court — Dispossession more than 1 year before suit.

A suit for possession by a tenant who is dispossessed by landlord more than a year prior to suit lies only in revenue Court and not in civil Court. AIR (Vol 13) 1926 Lah 613.: 8 L L J 501 : 27 P L R 537 : 96 Ind Cas 479.

——S. 50 — Dispossession more than 1 year before suit.

A suit for possession by an occupancy tenant who has been wrongfully dispossessed from his holding by the landlord lies in a revenue Court only, even though one year from the date of possession has expired. AIR (Vol 13) 1926 Lah 128 : 7 L L J 600 : 27 P L R 24 : 92 Ind Cas 597.

——S. 50—Suit for possession by heirs of tenant.

A suit for possession of occupancy holding against landlord by the heirs of the occupancy tenant is cognizable by a Revenue Court and a Civil Court has no jurisdiction to entertain it. AIR (Vol 13) 1926 Lah 6 : 89 Ind Cas 884.

——S. 50—Dispossession by execution against landlord — Suit for possession if barred.

The Civil Courts have jurisdiction to try a case between landlord and tenant, where the plaintiffs are tenants dispossessed in execution of a decree suing their landlord to recover possession as tenants. S. 50 cannot help the landlord as it applies to a tenant dispossessed "otherwise than in execution of a decree." AIR (Vol 9) 1922 Lah 44 : 4 L L J 400 : 67 Ind Cas 485 (DB).

——S. 50—Tenant — Wrongful dispossession—Limitation.

A person wrongly dispossessed of his tenancy is bound to sue for recovery of possession in a Revenue Court within one year from dispossession. AIR (Vol 7) 1920 Lah 344 : 54 Ind Cas 832.

——Ss. 50 and 51 — Applicability — Suit by under tenant-at-will.

These sections do not apply to a suit by an under tenant-at-will of an occupancy tenant for recovery of possession of land from the occupancy tenant as it is not between landlord and tenant. 102 P W R 1913 : 198 P L R 1913 : 84 P R 1913:19 Ind Cas 346 (DB).

——Ss. 50, 77 (3) (i) — Suit for share of produce removed.

A suit by a tenant for recovery of his share of produce forcibly removed by the landlord is a suit cognizable by the Revenue Court. 49 P W R 1912 : 101 P L R 1912 : 13 Ind Cas 447.

——S. 50-A.

——S. 50-A—Scope.

A suit by a person claiming possession of the land under title of ownership or any title other than a title as tenants (as a mortgagee with possession) is not barred under the provisions of S. 50A, even if previously the said person has been ejected by a Revenue Court under S. 45, sub-s. (6) or his suit has been dismissed under S. 50 and the Civil Court has jurisdiction to entertain such a suit. AIR (Vol 28) 1941 Lah 189 : 43 PLR 233 : ILR (1941) Lah 499 : 194 Ind Cas 852 (FB).

[Overruling AIR (Vol 25) 1938 Lah 82 : 177 Ind Cas 703.]

[Reversing AIR (Vol 27) 1940 Lah 183 : 188 Ind Cas 682.]

——S. 50-A—Scope.

Section 50-A must be read along with Ss. 45 (6) and 50, which are expressly mentioned in it, and the only reasonable interpretation which can be put on it is that a second trial between the parties is barred in the Civil Courts on the grounds on which they had fought it in the Revenue Court under S. 45 (6) or S. 50. The mere fact that a suit by tenants has been previously brought in a Revenue Court under S. 50 to contest their liability to ejectment on the ground that they were occupancy tenants, does not bar the jurisdiction of Civil Courts to entertain the suit based on adverse possession. AIR (Vol 24) 1937 Lah 849 : 39 PLR 485 : 175 Ind Cas 808.

——S. 50-A—Scope.

The whole intention of S. 50-A, is to render final the decision of the Revenue Courts in cases under S. 45 by expressly barring recourse to Civil Courts for the purpose of attacking the decision of the Revenue Courts in such cases. Where a suit is, on the face of it, merely one for declaration that the plaintiffs are owners by virtue of adverse possession but is, in substance, one to contest their liability to ejectment which has already been decided by the Revenue Courts, the suit is barred by virtue of the provisions of S. 50-A, Punjab Tenancy Act. AIR (Vol 22) 1935 Lah 719 : 37 PLR 507 : 16 Lah 1086 : 156 Ind Cas 592.

——S. 53.

——S. 53 — Occupancy tenancy held by several persons — Relationship inter se of landlord and tenants-in-common — Surrender of his share by tenant in landlord's favour — If results in partial extinction of tenancy — Landlord's right to possession of such share. See AIR (Vol 36) 1949 East Punj 53 (FB).

——Ss. 53, 56—Joint occupancy-holding—Alienation by one of joint tenants — Reversioner, whether can challenge.

A reversioner of a tenant is entitled to challenge an alienation made by him of an ancestral occupancy-holding if such challenge is allowed by custom, and if the alienation is not in accordance with the provisions of Ss. 53 and 56. Such an alienation can be contested by the landlord as well as by the reversioners.

Further, if an alienation operates as a merger of the occupancy right with the proprietary right, it is not subject to challenge by the reversioners, as there is no property left subsisting, a declaration regarding which can be granted by a Court A private transfer by a tenant in favour of one of his landlords is outside the provisions of Ss. 53 and 56 of the Act and can be challenged by the reversioners of the tenant.

In the case of a joint occupancy holding under S. 6, if one of the joint tenants alienates (mortgages) his occupancy rights in favour of one of several landlords without consent in writing of all the landlords, the alienation is invalid and can be challenged by his reversioners if permitted by custom on the ground of want of consideration and legal necessity if the occupancy-holding is ancestral qua the reversioners: AIR (Vol 4) 1917 Lah 208 : 41 Ind Cas 301, Overruled. AIR (Vol 32) 1945 Lah 249 : 47 PLR 329 : ILR (1945) Lah 475 : 221 Ind Cas 293 (FB).

——S. 53—"Landlord" meaning of, in S. 53 (10) and S. 56.

Where a tenant holds under more persons than one, any one or some of them are not landlords but all of them collectively, except where it is expressly provided so. Section 53, cl. (10) has expressly provided that for the purpose of S. 53 and that section alone, any one may be deemed to be the landlord. In S. 56, a provision similar to the one contained in S. 53, cl (10) has not been made. It is obvious, therefore, that the "landlords" in S. 56, means all the landlords collectively as a unit. AIR (Vol 32) 1945 Lah 249 : 47 PLR 329 : I L R (1945) Lah 475 : 221 Ind Cas 293 (FB).

——Ss. 53 to 59—Object of

A close study of provisions of Ss. 53 to 59 displays an anxiety on the part of the Legislature to safeguard

the interests of the landlord as far as possible and to protect him against all intruders.

The mortgagee who acquires the status of an occupancy tenant on the expiry of the period of limitation for redemption of the mortgage of an occupancy right under Art. 148, Limitation Act, cannot continue to retain it even on the death of the mortgagor without leaving any heirs as mentioned in S. 59 : AIR (Vol 25) 1938 Lah 488 : 179 Ind Cas 561, Reversed. AIR (Vol 25) 1938 Lah 675 : 40 PLR 948 : 179 Ind Cas 357 (DB).

——S. 53—Applicability — Sale to landlord, whether pre-emptible.

Section 53 only applies to landlords under whom the occupancy tenancy is held and not to an ordinary tenant holding under a contract between the landlord and himself.

Where an occupancy tenant held land under a contract with the landlord and the landlord had no right to purchase the occupancy tenancy under S. 53, which the tenant sold to him :

Held, that the sale could not be said to be not subject to a right of pre-emption. AIR (Vol 23) 1936 Pesh 10 : 160 Ind Cas 427.

—— S. 53 — Suit by purchaser — Agreement to sell occupancy holding to a stranger — Notice of sale served on the landlord — Period fixed by Revenue Officer to pay price—Landlord not paying price but privately purchasing the holding after that period — Sale if voidable.

A tenant who had agreed to sell his occupancy holding to a stranger served a notice on his landlord as required under Cl. 2 of S. 53. But instead of taking this opportunity to purchase the holding, the landlord privately purchased the holding from the tenant after the expiry of the period fixed by the Revenue Officer for paying the price. The purchaser used to enforce the specific performance of the contract of sale.

Held, that he was so entitled as the sale to the landlord was voidable at his instance. AIR (Vol 15) 1928 Lah 860 : 110 Ind Cas 247 (DB).

——S. 53—Intention and scope—Application for sale by tenant—Right to withdraw.

It was not the intention of the Legislature to render the action of a tenant irrevocable once he had made an application under Cl. (2) of S. 53, and a tenant has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer.

A proper construction of the section enables the tenant to withdraw his offer up to such time as the landlord makes the payment contemplated by the sub-cl. (5). AIR (Vol 10) 1923 Lah 521 : 4 Lah 173 : 5 L L J 338 : 73 Ind Cas 209 (DB).

——Ss. 53 and 56 — Effect of — Discharge of mortgage.

If plaintiff, an occupancy tenant, had alone paid off an old standing mortgage by himself, he would be entitled to retain possession of the share of the mortgaged area until his mortgage rights had been satisfied. AIR (Vol 6) 1919 Lah 2 : 95 P R 1919 : 52 Ind Cas 525 (DB).

——Ss. 53 and 56 — Sale of occupancy holding by joint tenant to co-sharer landlord — Right of reversioner of tenant.

A sale by one of several co-tenants to one of several co-landlords of a specific share of the holding, which had fallen to his share in a private partition is valid and cannot be challenged by the reversioner of the tenant. The vendee landlord will occupy the same position as the vendor, co-tenant in a general partition of the holding. A I R (Vol 4) 1917 Lah 208 : 66 P W R 1917 : 137 P L R 1917 : 41 Ind Cas 301.

——Ss. 53, 56 and 59 — Alienatien by an occupancy tenant.

Reversioners have no right to control alienations by occupancy tenants under these provisions. **A I R** (Vol 4) 1917 Lah 147 : 6 P R 1917 : 39 Ind Cas 96.

——Ss. 53, 59 — Nature of tenancy — Limitation to avoid gift.

The nature of status of occupancy tenant is not affected by presence or absence of statutory heirs. To avoid a gift by an occupancy tenant of his holding to an adopted son, time runs against the landlord from the date of gift and not from the date of the donor's death since he can oust the donee during the donor's life-time, otherwise, the gift ceases to be voidable and if it is not voidable by the reversioner the donee becomes a tenant. 5 P W R 1913 Rev : 5 P R 1913 Rev : 200 P L R 1913 : 19 Ind Cas 344.

——Ss. 53, 56—Mortgage of occupancy — Rights by tenant, if can be questioned by reversioner.

A reversioner of an occupany tenant cannot impugn a mortgage of occupancy rights by the tenant in favour of the landlord. Ss. 53 and 56 of the Act apply to every kind of alienation—Sale, gift or mortgage—and a tenant complying with the provisions of the sections has an absolute right of alienation. 73 P R 1911 : 113 P W R 1911 : 208 P L R 1911 : 11 Ind Cas 427 (DB).

——Ss. 53 (3) and (5)—Locus Paenitentiae.

Section 53 (3) does not deprive the occupancy tenant of a Locus Paenitentiae. He may withdraw from the proceedings at any time prior to the completion of the purchase by the landlord as determined by S. 53 (5). 1 P R (Rev.) 1917 : 38 Ind Cas 944.

——S. 53 (6)—Applicability to voluntary sales — Applicability of English rule— Extinction of occupancy rights under S. 53 (6) in case of mortgage.

The English doctrine that merger depends on the intention of the person making the acquisition does not come into play in the Punjab especially in the face of S. 53, sub-s. (6), Punjab Tenancy Act, which enacts in clear terms that on the value being paid by the landlord to the occupancy-tenant, the right of occupancy shall be extinguished. This principle of law found in S. 53 (6) applies not only to involuntary acquisitions but also to voluntary acquisitions.

But S. 53 (6) does not contemplate the extinction of occupancy right in the case of a mortgage. **A I R** (Vol 28) 1941 Lah 433 : 43 P L R 581 : I L R (1942) Lah 155 : 197 Ind Cas 227 (FB).

——S. 53 (6)—Scope of.

The scope of the Act is to legislate between landlord and tenant and S. 53 (6) means only that on the landlord purchasing occupancy rights under the provisions of the section, the rights of the occupancy tenant or any one who would have a right to succeed to him under S. 59 after his death, are finally extiuguished. (AIR (Vol 4) 1917 Lah 430 : 163 P W R 1917 : 42 Ind Cas 468.

——S. 56.

——S. 56—Joint tenancy holding— Alienation not in accordance with Ss. 56 and 53—Right of reversioner.

A reversioner of a tenant is entitled to challenge an alienation made by him of an ancestral occupancy holding if such challage is allowed by custom and if the alienation is not in accordance with the provisions of Ss. 56 and 53. AIR (Vol 4) 1917 Lah 208 : 41 Ind Cas 301, Overruled. AIR (Vol 32) 1945 Lah 249 : 47 P L R 329 : I L R (1945) Lah 475 : 221 Ind Cas 293 (FB).

——S. 56—Sale to mukarridar—Pre-emption.

A sale of occupancy right to a mukarridar by a tenant holding land under him is a sale to a landlord. AIR (Vol 30) 1943 Pesh 66 : 209 Ind Cas 179 (DB).

——S. 56— Intention and scope — Contract between tenant and his alienee—Effect of section.

Section 56 was enacted for the protection of the interests of the landlord. It does not affect the validity of the contract as between the tenant and his

alienees if the landlord does not choose to attack it or if after having attacked it he waives his rights under the decree obtained by him. AIR (Vol 17) 1930 Lah 241 : 118 Ind Cas 911.

——S. 56 (8) — Sale to landlord, whether pre-emptible.

The provisions of the Punjab Pre-emption Act do not override the provisions of S. 56, Punjab Tenancy Act. Hence a sale of the occupancy-rights under S. 8, Ten. Act, to the landlord cannot be pre-empted. AIR (Vol 30) 1943 Pesh 66 : 209 Ind Cas 179 (DB).

——S. 57.

——S. 57—Attachment of mortgagee rights.

Where occupancy rights falling under S. 6 or S. 8 are subjected to a usufructuary mortgage, the rights of the mortgagee in the occupancy tenancy are not liable to attachment and sale in execution. A I R (Vol 23) 1936 Lah 370 : 38 P L R 625 : 162 Ind Cas 526 (DB).

——Ss. 57, 54—Mortgage of occupancy rights—Subsequent sale—Landlord avoiding sale and recovering possession from vendee — Mortgage, whether subsists—Mortgage without possession—Validity.

A mortgage without possession of occupancy rights is not void. Where a landlord has succeeded in recovering possession from the transferee of the occupancy rights, the occupancy tenant can claim reentry, not on the ground that he has got any option to revive the tenancy but because the tenancy exists and as he is the tenant and his transfer had been declared void, he is entitled to the possession of his rights.

Therefore, where an occupancy tenant mortgages his rights and subsequently sells his tenancy and the land-lord recovers possession from the vendee after avoiding the sale, the mortgage is not extinguished but may be enforced against the occupancy rights in the property. A I R (Vol 20) 1933 Pesh 49 : 142 Ind Cas 518 (DB).

——S. 57— Succession to joint tenancy — Succession to occupancy holding as against landlord — Joint tenancy—One line dying out — Other line surviving — Rights of landlord.

The principle to be followed in cases of succession to an occupancy holding, as against the landlord, is that joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant and as long as any of them or the descendants of any of them survive, the landlord cannot claim in the share of any tenant whose line has died out. (1926) 98 Ind Cas 871 (Lah).

——S. 57 — Division of holding for cultivation— No final partition—Right of landlord to line dying out.

The principle to be followed as regards the landlord is that the joint tenants of an occupancy holding even though it was not held by their common ancestor are to be regarded as single tenant, and that as long as any of them, or the descendants of any of them, survive, the landlord cannot claim the share of any tenant whose line has died out. Where the joint tenants divided the holding for purposes of cultivation or in order to raise money :

Held, this does not indicate that the holding had, as a matter of fact, been finally partitioned. A I R (Vol 11) 1924 Lah 127: 5 L L J 381 : 73 Ind Cas 370 (DB).

——S. 58.

——Ss. 58, 74, 77 (3) (b), 60 — Improvement— Compensation—Sub-letting by tenant.

The planting of trees by a tenant is an improvement within the definition of that term in the Act.

A sub-letting by an occupancy tenant operates to create privity of contract as landlord and tenant between the land-holder and the sub-tenant.

An award of compensation for improvements to a tenant on ejection can be made by the executing Court when it is omitted in the decree. The Court ordering the sub-tenant's ejectments is bound to award him compensation for improvements effected by him. 1 P W R 1916 Rev : 34 Ind Cas 248.

—S. 59.

1. Applicability, scope and object.
2. Alienation by widow.
3. Customary succession.
4. Extinction of line.
5. Joint tenancy.
6. Mode of succession.
7. Religious institutions.
8. Succession by agreement.
9. "Will".

1. Applicability, scope and object.

——S. 59—(As amended by N.-W. F. P. Act 20 of 1939)—Applicability.

A Muhammadan oucupancy tenant died in 1911 leaving a widow who obtained the occupancy rights as the tenant's widow. She was enceinte at the time of her husband's death and gave birth to a son subsequently. The land was mutated in favour of the son who died in 1923, while he was a minor. The occupancy rights were again mutated in favour of the widow as a life-tenant. The widow died in 1942:

Held, that the widow had a life-tenancy and no more and as the amended S. 59 was in force when she died, the property would go to the Muhammadan Law heirs of her husband on her death and the nephew of the widow's husband was, therefore, entitled to succeed to his occupancy right. AIR (Vol 31) 1944 Pesh 12 : 212 Ind Cas 193.

——S. 59—(As amended by N. W. F. P. Act (20 of 1939)—Applicability.

Where a Muhammadan widow, on her husband's death, succeeded to his occupancy rights before the amendment of S. 59, Punjab Ten. Act, by N.-W. F. P. Act XX of 1939, and died after the aforesaid amendment, succession to the occupancy rights must be governed by S. 59 as amended and, therefore, the widow's husband's brother's sons are entitled to claim their share as heirs of her husband under the Muhammadan Law. AIR (Vol 30) 1943 Pesh 23: 206 Ind Cas 420.

——S. 59—Widow of predeceased son of occupancy tenant has no right to succeed along with son. AIR (Vol 26) 1939 Lah 428 : I L R (1940) Lah 180 : 42 P L R 702 : 184 Ind Cas 703.

——S. 59—Tenant recorded as maurusi holding land —Presumption — Applicability of S. 59.

In the case of occupancy rights, there is a strong presumption that the land held by a tenant at the time of regular settlement and of which he is recorded a maurusi is inherited by him from his father who must be presumed to have occupied the land for the purposes of S. 59.

Section 59 will, therefore, apply to such a case irrespective of the fact whether the father also occupied the land as a maurasi or in any other character. AIR (Vol 26) 1939 Lah 171 : 41 P L R 329.

——Ss. 59, 53 to 58—Object of.

A close study of provisions of Ss. 53 to 59 displays an anxiety on the part of the Legislature to safeguard the interests of the landlord as far as possible and to protect him against all intruders.

The mortgagee who acquires the status of an occupancy-tenant on the expiry of the period of limitation for redemption of the mortgage of an occupancy right under Art. 148, Lim. Act cannot continue to retain it even on the death of the mortgagor without leaving any heirs as mentioned in S. 59. AIR (Vol 25) 1938 Lah 488 : 40 P L R 240 Reversed; AIR (Vol 25) 1938 Lah 675 : 40 P L R 948 : 179 Ind Cas 357.

——S. 59 (c) — "Occupied" meaning of.

The word "occupied" in the Act implies some control over the land by whatever name it may be expressed in law. It may not necessarily be actual possession. A co-sharer whose name is merely mentioned along with other co-sharers as a co-owner in the shamilat-deh may neither have physical control over the property nor be in constructive possession thereof.

His contact with the land by virtue of such entry alone is too remote to be dignified by the name of possession even in the literal sense of the term. AIR (Vol 25) 1938 Lah 435 : 40 P L R 269 : I L R (1938) Lah 411 : 177 Ind Cas 445 (DB).

——S. 59 — One of two brothers having identical rights, in possession as occupancy tenant, in 1842 and in 1882—Presumption.

Where one of the two brothers whose rights were identical has been shown to have been in possession as an occupancy tenant in 1842 and then in 1882, a presumption arises that the land was acquired by the brothers from their father. AIR (Vol 24) 1937 Lah 141 : 38 P L R 433 : 169 Ind Cas 410.

——S. 59—Effect of section — Right of reversioners under customary law.

Section 59 does not create an absolute and indefeasible right of succession in the persons named therein. The right of the reversioners which they might otherwise have, to contest an alienation under customary law is not taken away. AIR (Vol 15) 1928 Lah 371 : 110 Ind Cas 725.

——S. 59—Succession—Occupancy rights—Entry in settlement record—Presumption of correctness.

Held, that as it was not proved that the land entered in the name of S, whose heir plaintiff claimed to be, was the same as that entered in the name of K, father of the plaintiff it could not be presumed to be the same. A presumption of correctness attached to the entry in the Regular Settlement of 1860 and S having at that time been declared as having personally acquired occupancy rights in the land in suit, K having had no part or share in bringing the land under cultivation, the plaintiff's suit was not maintainable. Presumption could not take the place of positive proof. AIR (Vol 5) 1918 Lah 342 : 107 PWR 1918 : 45 Ind Cas 938.

——Ss. 59 (b) and 112 — Succession — Occupancy Rights—Wajib-ul-arz—Attested after 1871.

For purposes of S. 112 of the Act a Wajib-ul-arz of the revised settlement alone is to be considered. Where a Wajib-ul-arz is part of the settlement record taken up in 1872 and not attested by the Settlement Tahsildar till 1873 it does not fulfil the conditions laid down in S. 112 of the Act. AIR (Vol 1) 1914 Lah 220 : 212 P W R 1913 ; 339 P L R 1913 : 12 P L R 1914 : 22 P R 1914 : 21 Ind Cas 843 (DB).

——S. 59 — Occupancy rights — Succession — Long possession—Presumption.

Where the lands are proved to have descended from a common ancestor who had himself occupancy rights in the property and the settlement of 1862 also showed the same about a portion of the holding, the Courts were justified in presuming from this fact of long possession that the holding came from the ancestor. 192 P W R 1913 : 331 P L R 1913 : 21 Ind Cas 561.

——S. 59—Wajib-ul-arz—Meaning of words.

The phrase "if he abandons possession of the land of his own accord, his nazdaki bhai will be entitled to possession if he so desires" in the Wajib-ul-arz does not touch the matter of inheritance of occupancy rights at all. 39 P W R 1913 : 70 P L R 1913 : 19 Ind Cas 243.

— S. 59—Alienation of occupancy right.

The tenant has a right to recover possession from the landlord on the alienation being declared void. 31 P L R 1911 : 1 P R 1911 Rev : 2 P W R 1911 Rev: 8 Ind Cas 733.

——S. 59—Succession—Quarishis of Ferozpore.

Among, the quarishis of Ferozpore city succession to occupancy holding is governed by S. 59 of the Act and not by the custom or personal law. 74 P W R 1910 : 50 P R 1910 : 131 P L R 1910 : 6 Ind Cas 946 (DB).

——S, 59—Wajib-ul-arz—Entries—Value.

Statements of custom in a Wajib-ul-arz cannot override S. 59 of the Punjab Tenancy Act. 10 P L R 1910 : 97 P R 1909 : 166 P W R 1909 : 4 Ind Cas 851.

2. Alienation by widow.

——S. 59—Widow in possession of husband's holding under S. 59 — Alienation by her beyond life-estate—Reversioners or heirs of husband can challenge alienation.

Where the widow of the last male-owner is in possession of his holding under S. 59, the reversioners or heirs of the last male owner can challenge an alienation made by the widow beyond her life-estate after the widow's death. AIR (Vol 32) 1945 Pesh 26: 1945 Pesh L J 26 : 220 Ind Cas 112 (DB).

——Ss. 59 (3) and 60—Right of reversioners to get alienation declared void independently of question of valid necessity.

The position of the widow who has succeeded to her husband's occupancy-tenancy under S. 59 is not the same as that of a widow who succeeds, under the personal law, to a life interest to his proprietary estate and whose alienations hold good for her lifetime whether they have been effected for necessity or not. An alienation by sale or mortgage of an occupancy tenancy by a widow is absolutely forbidden and hence such an alienation is void whether it is made in favour of the landlord or a stranger.

The mere fact that according to the provisions of S. 60 a transfer of occupancy rights by a widow falling within the ambit of S. 59 (3) would be 'voidable' at the instance of the landlord, would not show that the transaction would remain valid until it is so avoided. (1) AIR (Vol 17) 1930 Lah 942 : 130 Ind Cas 517 ; (2) AIR (Vol 4) 1917 Lah 408 : 39 Ind Cas 163 : 1917 P R No. 44 ; (3) AIR (Vol 23) 1936 Lah 70 : 155 Ind Cas 836 Overruled. AIR (Vol 27 1940 Lah 364 : 42 P L R 538 : ILR (1941) Lah 212 : 190 Ind Cas 769 (FB).

——S. 59 (3)—Widow's power of alienation.

The restrictions on the powers of alienation of a widow are an incident of her tenure as an occupancy-tenant and are placed in the interests of the reversioners and not in the interests of the landlord. AIR (Vol 27) 1940 Lah 364 : 42 P L R 538 : ILR (1941) Lah 212 : 190 Ind Cas 769 (FB).

——S. 59—Rights of reversioners and landlord—Suit by reversioner for declaration of invalidity of alienation—Maintainability.

Though a mortgage of occupancy rights by widow is in contravention of S. 59 (3), it is not void during the lifetime of the widow but only voidable at the instance of the landlord under the provisions of S. 60. The Punjab Tenancy Act is intended merely to control the relationship between landlord and tenants and has nothing to do with powers of alienation possessed by a widow or the control of such alienation by reversioners.

Where, therefore, a Mahomedan widow alienated some portion of her occupancy rights, in certain land and her collaterals brought a suit for declaration, that the alienation should not affect their reversionary rights after her death as the mortgage was without consideration and necessity.

Held, that the collaterals had no right to control the alienations by the widow, no such right being given to them by the Tenancy Act. The right

course existed under Customary Law if the reversioners had the power to control the widow's alienation of ordinary land under that law. 1898 Pun Re No. 39 Diss. From : AIR (Vol 17) 1930 Lah 942.

——S. 59—Transfer of occupancy rights by widow.

Even a transfer of occupancy rights by a widow in favour of the landlord should not be recognised by the Mutation Officer. 6 P R 1913 Rev : 120 P L R 1914 : 22 Ind Cas 660.

——S. 59 (3) — Occupancy rights — Mortgage by widow—Assent of Landlord.

A mortgage of occupancy rights by a widow whether for necessity or not is void under S. 59 (3) of the Act even if he receives the assent of the landlord, and a reversionary heir is entitled to take possession of the land without payment on the death of the widow. 26 P W R 1913 : 50 P L R 1913 : 18 Ind Cas 623.

——S. 59 (3)—Sale of occupancy land by widow—Void sale.

The sale of occupancy land by the widow of a deceased tenant succeeding to a right of occupancy is absolutely void. 54 P L R 1911 : 195 P W R 1911 : 9 Ind Cas 339.

——S. 59 (3)—Joinder of parties—Remedy.

If a widow of occupancy tenancy makes a transfer under S. 59 (3) the landlord in a suit to set the sale aside cannot join the next reversioner as party. The reversioner may have his remedy in a civil Court if the landlord takes no action or the widow abandons the lands. 3 P R 1910 Rev : 6 Ind Cas 942.

3. Customary succession.

——S. 59—Occupancy holding—Customary succession.

S. 59 (2) of the Tenancy Act lets in custom in case of succession of an occupancy holding. 87 Ind Cas 902 : AIR (Vol 12) 1925 Lah 592.

4. Extinction of line.

——S. 59—Co-tenants—Rights of succession.

Where, the line of two co-tenants holding joint occupancy rights becomes extinct, the occupancy rights would go to the landlord and to no one else. Under S. 59, a co-tenant has no locus standi and is not entitled to succeed in preference to the landlord. AIR (Vol 23) 1936 Pesh 160 : 169 Ind Cas 664 (DB).

——S. 59 — Mortgage of holding—Death of tenant without heirs—Extinction of mortgagee's rights.

Where an occupancy tenant who has mortgaged his rights dies without heirs, the mortgage comes to an end and the mortgagee's interest ceases with it even though the mortgage was made with the landlord's consent. AIR (Vol 18) 1931 Lah 211 : 11 Lah 716 : 32 P L R 183 : 131 Ind Cas 342 (DB).

——Ss. 59, 111 and 112—Occupancy holding—Gift—Extinction of donee's line—Reversion.

The donee of an occupancy holding with the consent of the landlord becomes the tenant of the landlord and on his line becoming extinct the holding is extinguished in the landlord's favour and does not revert to the donor.

The rule that land reverts to the donor's family on the extinction of the donee's line does not apply to S. 59 of the Act, The rule affects only the line of the donor and donee and cannot prejudice the rights of the third party. 303 P L R 1913 : 198 P W R 1913: 113 P R 1913 : 20 Ind Cas 771 (DB).

5. Joint tenancy.

——S. 59—Death of tenant— Rule of survivorship — Division of tenancy among tenants without landlord's consent—If alters nature ef tenancy.

Joint tenants of a holding are to be regarded as a single tenant and as long as any of them or the descendants of any of them survive the landlord cannot claim the share of any tenant whose line has become extinct. A mere division of the tenancy by an agreement among the tenants to which the landlord is not a party, does not alter the nature of the tenancy.

The consent of the landlord is an essential prerequisite to the determination of the joint tenancy and the creation of a number of separate tenancies. AIR (Vol 36) 1949 East Punj 325 : 51 P L R 100 (DB).

——S. 59—Several persons jointly acquiring occupancy right.

The provisions of S. 59 are not exhaustive and if a tenancy has been jointly acquired, the heirs of all the joint tenants succeed by survivorship. It is obvious that until all the descendants have become extinct, the tenancy does not revert to the landlords. AIR (Vol 25) 1938 Lah 611 : 40 P L R 292 : 177 Ind Cas 870.

——S. 59—Line of one joint tenant becoming extinct —Right of surviving tenants.

Per Full Bench. — A is the landlord of the holding of which B, C and D are the occupancy tenants. The shares of B, C and D are specified, and it is admitted that they are not members of a joint Hindu family, nor are they "joint tenants" in the sense in which that expressjon is used in English law. On the line of D becoming extinct, that is, there being no person in existence who is entitled to succeed to D under sub-s. (1), S. 59, Punjab Tenancy Act, his share in the holding passes to the other occupancy tenants B and C and does not lapse to the landlord A. (Agha Haidar, J. contra.); (1) 1908 PR No 100 (2) 60 Ind Cas 513 (Lah) (3) 60 Ind Cas 862 (Lah) (4) AIR (Vol 13) 1926 Lah 338, Overruled. AIR (Vol 17) 1930 Lah 515 (FB).

——S. 59—Line of one joint tenant becoming extinct —Rights of survivors.

In cases of succession, as against the landlord the body of joint tenants of an occupancy holding even though the land was not held by the common ancestor, is to be regarded as a single tenant and, as long as any of them or the descendants or any of them survive, the landlord cannot claim any share of the tenant whose line has died out.

This principle applies even though widows have been allowed to succeed and even if the shares are defined in the revenue records. (1) 60 Ind Cas 513 (Lah) (2) 60 Ind Cas 862 (Lah), Not appr. AIR(Vol 16) 1929 Lah 74 : 113 Ind Cas 773.

——S. 59—Occupancy right—Joint tenants—Defined shares—Survivorship.

The right of a landlord to claim the extinction of an occupancy right when there are joint tenants does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors.

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship. AIR (Vol 5) 1918 Lah 353 : 95 P W R 1918 : 45 Ind Cas 574.

——S. 59—Occupancy holding joint — Death of one tenant without heirs—Landlord, right of.

On the death of one joint tenant of an occupancy holding without heirs his share devolves on the other tenant or his heirs and not on the landlord. 6 P R 1917 Rev. : 5 P W R 1917 Rev : 42 Ind Cas 87.

6. Mode of succession.

(a) Male lineal descendants.
(b) 'Widow'.
(c) 'Collaterals'.
(d) Proviso.

(a) Male lineal descendants.

——S. 59 (1) (a)—Appointed heir.

Under S. 59 (1) (a) of the Punjab Tenancy Act, only a son formally adopted can be regarded as a male lineal descendant of his adoptive father. It is well settled that a mere customary adoption or appoint-

ment as an heir does not carry with it the right to succeed to the occupancy rights of the adopter or the appointer. AIR (Vol 36) 1949 East Punj 197 : 51 PLR 9.

——S. 59—Adoptee under Hindu Law.

Where the effect of the adoption is to give the adopted son all the rights under Hindu Law, he succeeds to occupancy right under S. 59. AIR (Vol 30) 1943 Pesh 47 : 207 Ind Cas 515 (DB).

——S. 59—Adopted son—If male descendant.

A person belonging to the districts of the old Delhi territory whose adoption though prohibited by Hindu Law is valid under custom which gives such an adoption the full effect of a formal adoption under Hindu Law can be regarded as a male descendant within the meaning of S. 59 (1) (a). AIR (Vol 17) 1930 Lah 764 (FB).

——S. 59—Right to inheritance—Sons.

Under S. 59 widow of a pre-deceased son in spite of custom has no right to an occupancy tenancy; the sons and sons alone can inherit the tenancy. AIR (Vol 16) 1929 Lah 778: 116 Ind Cas 457: 10 Lah 510: 30 P L R 667 (DB).

——S. 59—Interpretation—'Male lineal descendant'.

The words "male lineal descendants" in S. 59 include the sons of the tenants, and sons of such sons, without limit, and where the personal law of the tenants permits adoption, the word "sons" as above used includes adopted sons; but where there has merely been an appointment of an heir, the person so appointed is not a "male lineal descendant" within the meaning of the section. AIR (Vol 16) 1929 Lah 491 : 117 Ind Cas 902.

——S. 59—If male descendant.

Where a Jat occupancy tenant in Gurgaon District adopted A and died thereafter, held in a suit by the plaintiffs-landlords for possession of the occupancy lands, that A's adoption being a formal one, A must be regarded as a male lineal descendant of the adopter within the meaning of S. 59 of the Act and that the suit for possession must fail. AIR (Vol 7) 1920 Lah 284 : 59 Ind Cas 82 : 6 P W R 1921 (DB).

——S. 59—Illegitimate son of Rajput.

An illegitimate son of a deceased Rajput is not a male lineal descent of his putative father within S. 59 of the Act and cannot succeed to the occupancy tenancy left by the deceased. 301 P L R 1913 : 203 P W R 1913 : 15 P R 1914 : 20 Ind Cas 755 (DB).

——S. 59 (1) (a)—Adopted son—Lineal descendant.

A formally adopted son under Hindu Law is a "male lineal descendant" of his adoptive father within S. 59 (1) (a) of the Act and he is entitled to succeed to the holding of the latter. A customary adoption or an appointment of an heir does not fall within this section. 30 P W R 1913 : 2 P R 1913 : 71 P L R 1913 : 19 Ind Cas 40 (FB).

(b) 'Widow'.

——S. 59—(As amended by Act 20 of 1939)—Amendment, effect of.

The word "devolve" in S. 59, as it originally stood conclusively shows that it was a piece of substantive law and not adjective law. The change in the law effected in 1939 by the amendment of S. 59 does not divest rights which had vested under old S. 59 because they are protected by S. 6, cl. (c), N. W. F. Provinces General Clauses Act.

Consequently, a Muhammadan widow who had acquired occupancy rights of her husband under the old S. 59 is entitled to hold those rights till death or remarriage. AIR (Vol 30) 1943 Pesh 9: 205 Ind Cas 410 (DB).

——S. 59 (c)—Re-marriage of widow—Forfeiture.

Under S. 59 (c), the rights of occupancy inherited by a widow will cease on her re-marriage, even though there is no male collateral in existence. AIR (Vol 20) 1933 Lah 140 : 34 P L R 403 : 142 Ind Cas 645.

(c) 'Collaterals.'

——S. 59—Occupancy tenant dying without male lineal descendant or widow :

Held, that the collaterals claiming descent through female are not entitled to succeed even though such female has been allowed to be in possession till her death. A I R (Vol 23) 1936 Lah 97 (DB).

——S. 59 (1)—Rights of collaterals.

Under S. 59, an occupancy tenancy devolves upon the male collateral relatives of a deceased occupancy tenant after the widow's death in the absence of male issue provided that the common ancestor had occupied the land. But the section cannot be construed as meaning that a tenant holding an occupancy tenancy for a brief period under the existing occupancy tenant or a trespasser holding the land say, for a few days, is a person who occupied the land. AIR (Vol 18) 1931 Lah 507 : 32 P L R 399 : 132 Ind Cas 391.

——S. 59—Succession to collateral—Determination.

When a collateral succeeds to the occupancy rights, further succession is determined with reference to him and not with reference to the deceased tenant. (1928) 110 Ind Cas 203 (Lah).

——S. 59—Priority among collaterals—Whole blood and half blood.

Section 59 of the Tenancy Act governs the succession to an occupancy tenancy. But the rights of collaterals inter se would be governed by the tribal or village custom that may be relevant.

The result will be that among themselves those collaterals who are related to the deceased in the whole blood will exclude those who are only related to him in half blood. AIR (Vol 12) 1925 Lah 227 : 78 Ind Cas 450 (DB).

(d) Proviso.

——S. 59—'Occupation' by common ancestor—Presumption.

Where, in the summary settlement of 1852, the sons of X were entered as in joint possession of a tenancy along with their uncle and the tanqih haquq muzarian of 1865 stated that the tenancy was an old established one :

Held, that there was a presumption that X had occupied the land. (1931) 32 P L R 601 : 134 Ind Cas 791.

——S. 59—Alienation with landlord's consent—Right of reversioner to contest if affected.

The mere fact that the landlords have consented to an alienation of the land by an occupancy tenant does not bind the reversioners if they have any right to contest it under Customary Law. It is not necessary for the plaintiffs to prove that the common ancestor held the land as an occupancy tenant, all they have to prove is that they are the reversionary heirs of the alienor and if the land has been the ancestral property of the plaintiffs they could have contested the alienation. AIR (Vol 9) 1922 Lah 278 : 3 Lah 69 : 67 Ind Cas 38 (DB).

——S. 59—Occupation by common ancestor—Burden of proof.

When the contest is between the landlord on the one hand and the collaterals of the late occupancy tenant on the other, the burden of proving that their common ancestor occupied the land lies on such collaterals to entitle them to succeed to the occupancy tenant, even though the collaterals are in possession of the occupancy holding. AIR (Vol 8) 1921 Lah 344: 60 Ind Cas 456.

——S. 59—Rights of husband's collaterals.

Succession to an occupancy tenancy is governed not by Customary Law but by the provisions of S. 59 of the Tenancy Act. Unless the plaintiff can prove

that the land was occupied by the common ancestor, he has no locus standi to contest an alienation by the widow of an occupancy tenancy, even though he may be a collateral of her deceased husband.

So far as he is concerned the consent or otherwise of the landlords is immaterial. AIR (Vol 8) 1921 Lah 27 : 3 L L J 89 : 66 Ind Cas 919 (DB).

——Ss. 59, 111 — Succession to occupancy rights — Right of collaterals.

Where an occupancy tenant dies without leaving male lineal descendants and collaterals claim to succeed as against the landlord they must under S. 59 show that the common ancestor of themselves and of the deceased occupied the land and also must establish an agreement referred to in S. 111. A I R (Vol 2) 1915 Lah 120 : 21 P W R 1915 : 16 P R 1915: 64 P L R 1915 : 26 Ind Cas 404 (DB).

7. Religious institutions.

——S. 59—Occupancy holding belonging to religious institutions — Presumption from succession from guru to chela—When arises.

Where occupancy rights are not attached to a religious institution but are entered in the name of the Mahant, a chela has no right ot succession under S. 59 of the Punjab Tenancy Act. But where occupancy rights belong to a religious institution, the chela of the last incumbent who has become Mahant of the institution is entitled to succeed to them in his representative capacity as head of such institution.

The fact that there is a long line of succession of occupancy holding from guru to chela does not by itself give rise to a presumption that the holding belongs to the institution. Something further has to be shown and among others it should be established that the gurus were not complete ascetics, that they had natural heirs who could succeed to the holding by virtue of S. 59 and that there was actually a competition between those heirs and the chelas or there could have been such competition between them on the question of succession. AIR (Vol 35) 1948 East Punj 41 : 50 P L R 129 (DB).

8. Succession by agreement.

——S. 59—A person who rests his case upon an agreement overriding the statutory rules of succession contained in S. 59 must show that the language of the agreement is clear and that the intention is unmistakable.

The idea of a right accruing only to descendants of a person who once held the land is a fundamental idea in the minds of the peasantry. AIR (Vol 22) 1935 Lah 20 : 36 P L R 31 : 151 Ind Cas 233.

——S. 59—Co-tenant — Mutation in names of widow and mother by mutual consent—Re-marriage of widow —Suit by reversioners.

Where, on the death of an occupancy tenant, the tenancy was mutated in the names of his widow and his mother in equal shares by mutual consent, and on the re-marriage of the widow, the reversioners filed a suit claiming that they were entitled to succeed to the occupancy tenancy :

Held, that the mere fact that mutation was effected in favour of the mother could not confer any rights on her as a co-tenant as neither the reversioners nor the landlord had consented to the arrangement between the mother and the widow and that the reversioners were entitled to succeed to the tenancy. AIR (Vol 20) 1933 Lah 396 : 149 Ind Cas 511.

——S. 59—Agreement—Effect of.

A person who rests his case upon an agreement overriding the statutory rules of succession contained in S. 59 must show that the language of the agreement is clear and that the intention is unmistakable.

Where a wajib-ul-arz qualified the right of qarabatis by the words "jo mustahiq hai".

Held, that the entry can reasonably be interpreted to confine the right to those entitled under S. 59, that is, those qarabatis whose common ancestor had occupied the land. AIR (Vol 18) 1931 Lah 371 : 12 Lah 652 : 32 P L R 958 : 135 Ind Cas 46 (DB).

——Ss. 59 and 112—Succession — Burden of proof.

A person who rests his case solely upon an agreement overriding the rules of succession in S. 59 must show that the language of the agreement is clear and that the intention is unmistakable. AIR (Vol 4) 1917 Lah 437 : 19 P R 1917 : 39 Ind Cas 232.

9. "Will".

——S. 59—Contest regarding validity of will—Applicability.

The Act regulates the relations between the landlord and the tenant. Where the contest regarding validity of will disposing of occupancy rights is between the heirs of the deceased occupancy tenant, the right to challenge an alienation is governed by custom. AIR (Vol 26) 1939 Lah 329 : 41 P L R 806.

——S. 59—Legality of.

Section 59 enacts the mode of devolution of property held by occupancy tenants and there is no power in the occupancy-tenant to dispose of the occupancy-tenancy by a will taking effect after his death. AIR (Vol 20) 1933 Lah 400 : 149 Ind Cas 520 (2) (DB).

——S. 59—Parties not governed by custom—Reversioner's competency to challenge — Specific Reliet Act (1 of 1877), S. 42.

An occupancy-tenant governed by Muhammadan Law made a will in regard to the tenancy with the consent of his wife and daughter and his nephew sought to challenge the will :

Held, that the consent of the daughter was immaterial as she was not an heir according to the provisions of S. 59 and that the wife being only a life-tenant, her consent was not sufficient and that the nephew was entitled to obtain a declaration prayed for according to S. 42, Specific Relief Act, provided the will was invalid to any extent. AIR (Vol 20) 1933 Lah 184 : 34 P L R 1049 : 145 Ind Cas 204.

——Ss. 59, 60 and 53—Tenant of peasant class — Will.

Tenancies created by Government Tenants Act (1893) are governed, in matters of succession, by S. 59. The Act lays down the law governing the relations of the landlord and tenant in the Punjab, and the law of succession, is as laid down in S. 59. The expression "shall devolve" in S. 59 means that the succession must take place in the order specified and not that it must necessarily arise. S. 59 is confined to matters of succession and does not deal with a tenant's power of alienation.

Therefore an alienation that will prevent "succession" from taking place in the order specified in the section is not forbidden by it. That is, a tenant can defeat succession by making an alienation to the landlord or to an outsider in accordance with the procedure laid down in the Act, subject to the right of his heirs and collaterals to object to such alienation on grounds outside the Act.

Per Chevis J.—An alienation made by a male tenant by a will ranks along with alienations made in contravention of S. 53 or S. 56 of Act and it is voidable at the instance of the landlord but it is not void. A will made by a tenant of the peasant class being in contravention of the provision of S. 59 is governed by S. 60. A will by a tenant of self-acquired or non-ancestral tenancy which is not avoided by the landlord under S. 60 cannot be avoided by the heirs of the tenant. 97 P L R 1911 : 11 P W R 1911 : 8 Ind Cas 869 (DB).

——S. 60.

——S. 60—Right to sue — Proprietor-mortgagor.

A proprietor who has mortgaged his land with possession continues to be a landlord as defined in S. 4 (6) of the Punjab Tenancy Act, even though the rent is payable to the mortgagee.

He is therefore competent to bring a suit under S. 60 of the Act for cancellation of a transfer of occupancy rights made by the occupancy tenant without his consent. (1947) 26 LLT 38.

——S. 60—Joint occupancy-holding — Alienation by one of joint tenants — Co-landlords, whether can challenge.

In the case of a joint occupancy-holding under S. 6, if one of the joint tenants alienates his occupancy rights in favour of one of several landlords without consent in writing of all landlords, the alienation is invalid and can be challenged by the landlords under S. 60. It can also be challenged by his reversioner, if so permitted by the custom. AIR (Vol 32) 1945 Lah 249 : 47 PLR 329 : ILR (1945) Lah 475 : 221 Ind Cas 293 (FB).

——S. 60 — Alienation by widow — Rights of reversioners.

The reversioners of the widow have a right to get an alienation by widow declared to be void, independently of the question of valid necessity and consideration for the alienation. The mere fact that according to provisions of S. 60, a transfer of occupancy rights by a widow falling within S. 59 (3) would be voidable at the instance of the landlord would not show that the transaction would remain valid until it is so avoided. AIR (Vol 27) 1940 Lah 364 : 42 PLR 538 : ILR (1941) Lah 212 : 190 Ind Cas 769 (FB).

——S. 60—Starting point of limitation.

Obiter.—Section 60 gives the landlord the right to avoid such an alienation and presumably, he can exercise the right as against the alienee as soon as the alienation takes place. The period of limitation would, therefore, run from the date of the alienation. AIR (Vol 27) 1940 Lah 364 : 42 PLR 538: ILR (1941) Lah 212 : 190 Ind Cas 769 (FB).

——Ss. 60, 59 (3)—Widow transferring her fractional share in occupancy-tenure to sole landlord—Right of reversioners to challenge transfer.

There is no distinction in the matter of transfer of occupancy-tenure between the right of a male tenant and the right of a widow. For, though it is usual to speak of the life-tenancy of a widow, actually the widow's estate is not a life-estate as known to the English Law, but she fully represents the estate and is competent to deal with it and if her action extinguishes the tenancy, then obviously there is nothing left for the reversioners to challenge as in the case of the alienation by the male tenant.

Where, however, the widow has only a fractional share in the tenancy, the transfer by her of such a share to the sole landlord does not extinguish the tenancy, since the landlord is a landlord qua one tenancy; and the reversioners have a right to challenge such a transfer. A I R (Vol 26) 1939 Lah 374 : 41 PLR 340 : 184 Ind Cas 753.

——S. 60—Occupancy-tenant under S. 6 mortgaging occupancy holding—Landlord challenging alienation —Validity—Effect.

An unauthorized transfer by an occupancy-tenant under S. 6 in favour of a stranger, if challenged by the landlord under S. 60 is void not only qua the landlord and the transferee but even qua the transferor and the transferee. A transaction which is void cannot become valid even if the parties act on it. Courts of Law cannot render any help to the parties to such transaction. AIR (Vol 24) 1937 Lah 664 : 39 PLR 261 : 172 Ind Cas 246 (DB).

——Ss. 60, 59—Sale of occupancy right by widow — Whether voidable at instance of landlord — Sale in favour of landlord—Suit by him for declaration that occupancy-rights extinguished by reason of sale — Jurisdiction of Civil Court.

Primarily, the Punjab Tenancy Act has been enacted to regulate the relationship between landlord and tenant and it has nothing to do with the rights of the reversioners which are governed by rules of inheritance based on the personal law of the parties or on the Customary Law.

A sale of occupancy rights by a widow in contravention of provisions of S. 59 is voidable at the option of the landlord.

A suit by a person who previously was a landlord and who claims that the occupancy rights have been sold to him by the defendant for a declaration that the occupancy rights which vested in the defendant had been extinguished by the sale in his favour is cognizable by the Civil Courts. AIR (Vol 23) 1936 Lah 922 : 38 PLR 564 : 163 Ind Cas 888.

——S. 60 — Transfer set aside at instance of suit by one of landlords — Decree, if enures for benefit of all landlords — Decree-holder landlord waiving his right of execution — Effect — Occupancy-tenant's right of possession.

Where one of the landlords obtains a decree setting aside under S. 60, a mortgage by an occupancy-tenant of his rights without the consent of the landlords, and even if the decree-holder landlord waives his right to execute the decree, the waiver cannot affect the other landlords. A decree of this kind also enures for the benefit of the occupancy tenant and he is entitled to recover possession. The tenant is, however, entitled to a decree only on condition of his refunding the consideration received by him. AIR (Vol 23) 1936 Lah 706 : 38 PLR 922 : 165 Ind Cas 640.

——Ss. 60, 59 — Widow selling occupancy rights — Reversioner when competent to question.

Independently of the provisions of Ss. 59 and 60, there are privileges conferred on reversioners and co-tenants. The reversioners are competent under custom to question the sale of occupancy rights by a widow, but it has to be shown that the common ancestor of the plaintiffs and her husband had held the land. AIR (Vol 22) 1935 Pesh 3: 153 Ind Cas 941.

——S. 60 — Mortgage set aside — Mortgagee's right to refund of money.

Where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside under S. 60, the mortgagee is entitled to sue the mortgagor for refund of mortgage money. AIR (Vol 21) 1934 Lah 853 (2) : 15 Lah 751 : 36 PLR 233 : 151 Ind Cas 1 (FB).

——S. 60—Alienation contrary to S. 59 (3)—Effect.

Section 60 governs the provisions of S. 59 (3) so that if the widow alienates property the alienation is voidable at the landlord's instance and not at the instance of any other person. AIR (Vol 17) 1930 Lah 942.

——S. 60—Effect of declaration about voidity—Suit between landlord and tenant—If binding on alienee.

Where the landlords have obtained a declaration that a transfer is void under S. 60 such transfer must be held to be void completely even as between the tenant vendor and his vendee. AIR (Vol 14) 1927 Lah 871 : 100 Ind Cas 916.

——S. 60—Consent of one landlord—Effect on heirs of consenting landlord.

Where one of the landlords consents to the alienation of occupancy tenancy, qua his share of the occupancy tenancy he made the transaction non-voidable; apart from the Customary Law his own

son and grandson who succeed to him are bound by his act. AIR (Vol 14) 1927 Lah 135 : 99 Ind Cas 390.

——Ss. 60, 59 (3) and 77 (3) (h)—Transfers under—Voidable.

According to S. 60 transfers under S. 59 (3) and Chap. V are voidable at the instance of the landlord. The landlord should bring a suit in Revenue Court according to S. 77 (h). 3 PR 1910 Rev: 6 Ind Cas 942.

——S. 70.

——Ss. 70, 70 (2), 74 and 84 (5) — Notice of ejectment — Compensation — Court-fee.

The Court has no power to ask the tenant to pay Court-fee for improvements claimed by him but is bound to determine the amount in the suit to contest the notice of ejectment. A finding on the merits could not be disturbed on revision. 4 PWR 1915 Rev: 30 Ind Cas 848.

——S. 76.

——S. 76—Suits cognizable by Civil Court—Possession with mortgagor — He paying land revenue—Payment by him of malikana to mortgagee — Suit for possession by mortgagee — Jurisdiction of Civil Court.

Where the mortgagor in possession had himself to pay the land revenue, though the annual payment made by him to the mortgagee was described as malikana, the relation created between the mortgagee and the mortgagor is not that of landlord and tenant and hence the suit by mortgagee for possession is cognizable by the Civil Court and not by Revenue Court. AIR (Vol 16) 1929 Lah 489.

——S. 77.

1. Applicability.
2. Civil Courts, suits cognizable by.
3. Clause (3).
4. Clause (3), Proviso (1).
5. Clause (3) (a).
6. Clause (3) (b).
7. Clause (3) (c).
8. Clause (3) (d).
9. Clause (3) (e).
10. Clause (3) (g).
11. Clause (3) (h).
12. Clause (3) (i).
13. Clause (3) (j).
14. Clause (3) (k).
15. Clause (3) (n).
16. Clause (3) (o).

1. Applicability.

——Ss. 77 and 100 — Suit primarily for ejectment — Plea of occupancy right in defence — Proper procedure to be followed — Decree passed without adopting proper procedure — If can be registered under S. 100 as a decree of a revenue Court.

Where in a suit for possession which is primarily for ejectment the defendant pleads occupancy rights, and it becomes necessary on that plea to adjudicate as to the status of the defendant the jurisdiction of the Civil Court is ousted and the suit becomes one cognizable by the revenue Court and the Court should at that stage return the plaint for presentation to the proper Court.

But where a decree is passed without following the above procedure such a decree cannot be registered under S. 100 of the Punjab Tenancy Act as the section is not applicable to such a case. A I R (Vol 37) 1950 Him Pra 33.

——S. 77—S. 77, when operates as bar to civil suit.

It is only when the relationship of landlord and tenant is admitted but the nature of the tenure is disputed that S. 77 operates as a bar to a civil suit. AIR (Vol 27) 1940 Lah 154 : 42 P L R 180 : 189 Ind Cas 449.

——S. 77—Jurisdiction of Civil Courts.

Matters provided in three groups of S. 77 raised in the defendant's pleas and required to be decided incidentally :

Held, that a Civil Court is not competent to take cognizance of such matters. A I R (Vol 23) 1936 Pesh 136 (DB).

——S. 77—Suit for possession by lessee never in possession as tenant.

The Punjab Tenancy Act bars the jurisdiction of the Civil Courts in cases only where the relationship of landlord and tenant has come into operation.

A person never in possession as a tenant under a lease is not a tenant. AIR (Vol 13) 1926 Lah 508 : 95 Ind Cas 855.

——Ss. 77 and 100 — Panahi tenant — Suit for establishing occupancy right.

Act III of 1912 does not set up any bar to action under S. 100 of the Tenancy Act.

A panahi tenant is not debarred from establishing occupancy rights under the Punjab Tenancy Act 1887. AIR (Vol 2) 1915 Lah 164 : 111 PLR 1915 : 64 PWR 1915 : 73 P R 1915 : 29 Ind Cas 778 (DB).

2. Civil Courts, suits cognizable by.

——S. 77 — Suit between owner of trees and person planting them.

Trees standing on agricultural land are not land for the purposes of the Punjab Tenancy Act and consequently, a suit between the owner of the trees and the person who has planted them is not a suit between a landlord and his tenant. The Civil Court is, therefore, competent to try such a suit. AIR (Vol 29) 1942 Lah 152 : 44 P L R 157 : 200 Ind Cas 697.

——S. 77—Suit on account of services.

Suit by Chamar claiming certain amount on account of services rendered to jamindar in accordance with the terms of wajib-ul-arz is triable by Civil and not Revenue Court. (1937) 39 P L R 505.

——S. 77— Suit for declaration that petitioners were in possession as co-sharers and not as tenants— Dismissal of suit in Revenue Court contesting notice of ejectment—Res judicata.

The number of parties in a case was very large and the appeal had remained pending for a long time. The appellants were not negligent in making applications for substitution of legal representatives of the deceased respondent :

Held, that in the peculiar circumstances of the case the delay in making the application should be condoned and the abatement set aside.

The petitioners in a declaration suit claimed to be in possession of the portion of the shamilat in their capacity as co-sharers in the village and they did not admit that they were tenants under the proprietary body :

Held, that such a suit was not barred under any clause of S. 77 or any other provision of law. It was cognizable by a Civil Court and the dismissal of a suit by the plaintiff in the Revenue Court contesting a notice of ejectment did not operate as res judicata. A I R (Vol 23) 1936 Lah 710 : 38 P L R 915 : 165 Ind Cas 521.

——S. 77—Suit relating to building site.

Where the land in dispute is neither occupied nor has it been let for agricultural purposes or for purposes subservient to agriculture or for pasture, but on the other hand, it is occupied as the site of a building in a village, the provisions of the Act do not govern the case and the jurisdiction of the Civil Court to take cognizance of such a suit is not excluded by S. 77. I R (Vol 23) 1936 Lah 662 : 38 P L R 854 : 164 Ind Cas 749.

——S. 77—Jurisdiction of Civil Court.

Suit for possession of occupancy-land and home in abadi is cognisable by Civil Court. A I R (Vol 23) 1936 Lah 97 (DB).

——Ss. 77, 88 — Agricultural property attached in execution of money-decree — Order prohibiting transfer issued — Another money-decree — Another attachment—Another prohibitory order — Objection that property is mortgaged and cannot be sold—Civil Court, if has jurisdiction to entertain suit by decree-holder to establish his claim against objector.

A lease of certain lands (250 kanals) was granted to the 2nd respondent. The deed provided that the debtor should have no power to sell or mortgage the hypothecated land during the period of the lease and that the appellant could recover his lease money by sale or mortgage of such land. The rent fell into arrears, and the appellant obtained in the Revenue Court a decree for Rs. 1484-8-0, and the hypothecated property was made liable for the payment, but the decree was treated as money-decree. The appellant obtained from the Assistant Collector prohibitory order restraining the debtor from transferring the property.

An attachment of the 250 kanals followed. In the meantime further rent became due from the debtor and the appellant obtained in the Revenue Court a decree for the same. The Assistant Collector granted a further prohibitory order. Meantime, an objector who was the transferee of a mortgage with possession (created before either of the prohibitory orders) on some part of the attached land appeared. The mortgage did not include the 250 kanals. The objector was also the purchaser (but after both the prohibitory orders) of the debtor's interest in all the attached lands including the 250 kanals.

In a suit, the appellant claimed that the 250 kanals hypothecated by the lease were attached under the 1st attachment and still remained under attachment and that the rest of the land in dispute was attached and still remained attached under the 2nd attachment, and that the appellant, could recover his decretal monies by a leasing of the attached lands, and further that all transactions of mortgage or sale under which the objector claimed, subsequent to the date of the hypothecation or that of the attachment were null and void and ineffective, against the appellant's rights :

Held, that the real purpose of the present suit was to determine the rights between the appellant and the 1st respondent objector. That was not a suit which the Revenue Court was competent to entertain under S. 77 of the Punjab Tenancy Act. Having regard to S. 88 of the same Act and the rules made thereunder, O. 21, Rr. 58 to 63 of the Civil P. C., applied to the case when once the rights of the 1st respondent intervened, and the Revenue Commissioner was right in holding that the matter could only be determined by a suit under R. 63, O. 21. That suit had to be brought in a Civil Court of competent jurisdiction. The revenue Court, the jurisdiction of which is strictly limited, was not such a Court. A I R (Vol 21) 1934 P C 217 : 11 O W N 1158 : 36 P L R 285 : 40 L W 396 : 67 M L J 641 : 60 C L J 261 : 18 R D 475 : 39 C W N 89 : 15 Lah 836 : 4 A W R 398 : 61 I A 371 : 151 Ind Cas 221.

——S. 77—Alienation of occupancy holding—Possession taken by landlord after getting alienation set aside—Suit for possession by tenants—Jurisdiction of Civil Court.

Where an occupancy tenant alienates his rights and the landlord getting the alienation declared void obtains possession of the holding, a suit by the tenants for possession of the occupancy holding is cognizable only by Civil Courts. AIR (Vol 17) 1930 Lah 934 (DB).

——S. 77—Suit by occupancy tenant against landlord for possession.

Where a tenant claims possession of land against the landlord, Civil Courts have jurisdiction to entertain the suit and decide all points other than the question whether an occupancy tenancy had or had not been made out. AIR (Vol 16) 1929 Lah 586: 11 LLJ 248: 30 PLR 427: 121 Ind Cas 507. (DB).

——S. 77—Suit for possession against co-tenants.

A suit for possession by one of the occupancy tenants against another occupancy tenant is cognizable by Civil Court though the occupancy tenant in question is one of the landlords. AIR (Vol 15) 1928 Lah 334: 107 Ind Cas 770.

——S. 77—Termination of relation of landlord and tenant—Substitution of relation of debtor and creditor—Suit based on old relationship.

Where the liability arises out of the existence of the original lease and the relation of landlord and tenant between the parties, but the old contract of case is terminated and superseded and a new contract substituted by an agreement whereby the relation becomes that of creditor and debtor a suit can be instituted in the Civil Court. AIR (Vol 13) 1926 Lah 578: 7 Lah 479: 96 Ind Cas 275 (DB).

——S. 77—Suit for a share in holding.

Where the plaintiffs claim a share in the occupancy holding and not as tenants under defendants, the suit is triable by Civil Courts. AIR (Vol 10) 1923 Lah 500: 4 Lah 195: 6 LLJ 47: 75 Ind Cas 545 (DB).

3. Clause (3)

——S. 77 (3)—"Such", meaning of.

The word "Such" in S. 77 (3) appears in the original Gazette of India dated September 24, 1887, but does not occur in the Punjab Record 1887 where the Acts are printed; the Gazette must have precedence over the Punjab Record since that deals with an Act of the Central Legislature and must be presumed to be correct under the Evidence Act. AIR (Vol 29) 1942 Lah 217: 44 PLR 488: ILR (1943) Lah 191: 202 Ind Cas 497 (FB).

——S. 77 (3)—"No other Court—Might be instituted," scope of.

The words "no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted" occurring in S. 77 (3) are comprehensive enough to include disputes or matters whether they are raised in the averments in the plaint or arise out of the pleas of the defendants. If they are raised in the plaint, the suit would not be initially cognizable by a Civil Court.

But if they arise out of the pleas of the defendants, the suit may be initially cognizable by a Civil Court but would cease to be so when the Court finds that there is a dispute or matter with respect to which a suit falling within one of the clauses of the subsection could be instituted. (1) AIR (Vol 13) 1926 Lah 128: 92 Ind Cas 597: (2) AIR (Vol 9) 1922 Lah 33: 65 Ind Cas 520, (3) AIR (Vol 13) 1926 Lah 338: 98 Ind Cas 339, Impliedly overruled. AIR (Vol 29) 1942 Lah 217: 44 PLR 488: ILR (1943) Lah 191: 202 Ind Cas 497 (FB).

——S. 77 (3)—Construction.

Per Dalip Singh J. — The words "dispute or matter" in S. 77 (3) must be read as qualified by the words " with respect to which any such suit might be instituted." AIR (Vol 29) 1942 Lah 217: 44 PLR 488: ILR (1943) Lah 191: 202 Ind Cas 497 (FB).

——S. 77 (3)—Suit for haq.

Suit not disputing question whether particular 'haq' is village cess but merely seeking decision as to plaintiff's liability to pay it is triable exclusively by Revenue Court. AIR (Vol 28) 1941 Pesh 62: 195 Ind Cas 540 (DB).

——S. 77 (3)—Suit challenging liability to pay cess—Jurisdiction of Revenue Courts.

Quaere.—It is doubtful whether a person can bring a suit for declaration in the Revenue Court that he is not liable to pay a village cess. It appears to be

contemplated by the Legislature that the plaintiff's remedy in such a case is limited to defence in an action brought by the village proprietor who is suing for such cesses. AIR (Vol 28) 1941 Pesh 62: 195 Ind Cas 540 (DB).

——S. 77 (3)—Suit by collateral.

Suits by collaterals of last occupancy tenant claiming occupancy rights are not barred from the jurisdiction of Civil Courts under S. 77 of the Pun. Ten. Act. The question whether a deceased tenant had or had not abandoned his right does not come within the terms of S. 77 (3) and such a plea can be tried by the Civil Court. (1938) 40 PLR 111.

——Ss. 77 (3), 50 – Suit for possession.

Occupancy-tenants applying for adjudication as insolvents—Occupancy rights included in details of property—Adjudication and appointment of Receiver —Occupancy rights sold—Tenants not objecting—Suit by landlord for cancellation of sale—Suit decreed and possession obtained—Suit by tenants for possession.

Held, that the Civil Court can take cognizance and Ss. 50 and 77 (3), did not apply. AIR (Vol 23) 1936 Lah 657: 38 PLR 465: 166 Ind Cas 495 (DB).

——S. 77—Amount of rent due from lessee to lessor.

A Civil Court is precluded from determining the amount of rent due from a lessee to a lessor by S. 77. The mere fact that the lessee was proceeded against ex parte and that as a witness he admitted a certain sum to be due on this head, cannot possibly confer jurisdiction upon the Court which it would not otherwise possess. AIR (Vol 22) 1935 Pesh 107: 157 Ind Cas 240 (DB).

——S. 77—Suit by purchaser for removal of structure erected by lessee is cognizable by Revenue Court only—Such suit if tried by Civil Court, decree cannot be registered as that of Revenue Court. AIR (Vol 22) 1935 Pesh 20: 154 Ind Cas 896.

——Ss. 77 (3), 5, 6, 8—Jurisdiction of Civil Courts.

Where the dispute between the parties is one in execution proceedings and is as to whether occupancy rights of the judgment-debtor fall under S. 5 or S. 6 or S. 8, and are attachable or not, it is not covered by S. 77 (3) of the Act is, therefore, cognizable by a Civil Court. AIR (Vol 21) 1934 Lah 733: 35 PLR 781: 155 Ind Cas 320.

——S. 77 — Suit for declaration of title and possession, by landlord, on the death of occupancy-tenant.

Where the mortgagees in possession are also impleaded in a suit by a landlord for declaration of title and for possession of the land on the death of the occupancy tenant, the suit is not cognizable by Civil Court as against the mortgagees but only by the Revenue Court. AIR (Vol 21) 1934 Lah 445 : 37 P L R 153 : 154 Ind Cas 52.

——S. 77 — Status of tenant — Revenue Courts.

The question whether a person was or was not an occupancy-tenant should be decided by a Revenue Court and not by a Civil Court. AIR (Vol 20) 1933 Lah 999 : 147 Ind Cas 505.

——S. 77 (3) — Lease of Government land — Breach of conditions — Suit by Secretary of State for ejectment of lessee.

Where the Secretary of State for India instituted two suits in a Revenue Court for ejectment of tenants to whom Government land had been leased on certain conditions, on the allegation that there had been a breach of the conditions of the lease and that he was, therefore, entitled to resume possession of them, and there was nothing in the lease to show that the defendants had taken the lands for the purpose of sub-letting them :

Held, that the defendants were 'tenants' and the suits were cognisable by the Revenue Court :

Under cls. (e) and (i) of S. 77 (3) suits for ejectment of tenants or any other suits between landlord and tenant arising out of the breach of conditions on which a tenancy is held are cognizable by a Revenue Court and not by a Civil Court. AIR (Vol 19) 1932 Lah 67 : 133 Ind Cas 895.

——S. 77 (3) — Grant of land to Brahmins and remission of land revenue — Award determining dues payable to Brahmins as adna maliks — Suit for arrears of dues.

A village was gifted by a Raja to certain Brahmins and the land revenue was remitted in perpetuity in favour of the grantees. This grant was confirmed by the British Authorities. Subsequent to this gift, certain Rajputs settled in this village and a dispute arose between the Brahmins and the Rajputs as to their respective rights.

The matter was referred to arbitrators who decided that the Rajputs were not tenants but full proprietors of the lands they occupied and that they were liable to pay to the Brahmins nothing more than the 13¼ seers per maund which included the revenue which otherwise would have been payable to Government but which had been remitted in favour of the Brahmins. A suit was instituted in the Civil Court for recovery of arrears of the produce payable to the Brahmins:

Held, that no portion of the produce represented priestly dues and the suit was cognisable only by a Revenue Court. AIR (Vol 18) 1931 Lah 652:32 P L R 477 : 134 Ind Cas 105 (DB).

——S. 77 (3) — Assignment of share of rent — Suit by assignee.

Where a person purchased two thirds of the rent to which two out of three landlords were entitled and instituted a suit against the tenants for recovery of his share of the rent :

Held, the suit was cognisable by the Civil Court and not by the Revenue Court. AIR (Vol 18) 1931 Lah 623 : 12 L 433 : 32 P L R 924:134 Ind Cas 1119.

——S. 77 (3) — Tenant suing for refund of advance rent.

Where a landlord fails to put the tenant in possession and the latter institutes a suit for refund of the rent paid in advance, the suit is cognizable by the Civil Court. AIR (Vol 18) 1931 Lah 269 : 32 P L R 203 : 133 Ind Cas 119.

——S. 77 — Suits triable by Revenue Court—Landlord ceasing to have interest at date of suit — Suit to recover rent from tenant.

A suit to recover rent payable by a person on account of occupation by him of land given to him by the plaintiff, is a suit between a landlord and tenant. The mere fact that on the date of the institution of the suit the plaintiff had parted with his interest to another person, does not give Civil Courts jurisdiction to try the case. AIR (Vol 16) 1929 Lah 135 : 112 Ind Cas 495.

——S. 77 — Plaintiff claiming to be in possession as occupancy tenant of land before it was washed away — Mutation in plaintiff's name not disputed — Suit for possession on subsequent re-appearance of land.

The plaintiffs instituted the suit that they were originally the occupancy tenants of the land in suit and that it was washed away by the Aik about 30 years ago, that on its reappearance they took possession of it but were forcibly ejected by the defendants, the proprietors of the land, that is to say, their former landlords. The Revenue Courts following some conditions in the wajib-ul-arz had mutated the land in favour of the plaintiffs and this was never disputed by the defendants.

Held, that the suit was cognizable by the Revenue Courts being clearly a suit between tenant and land-

lord to establish rights of occupancy. AIR (Vol 16) 1929 Lah 10 : 117 Ind Cas 237.

——S. 77 — Ousting of jurisdiction by plea raised.

A plea raised by the defendant may oust jurisdiction of the Civil Courts in a suit which is initially cognizable by the Civil Courts on the allegations made in the plaint. (1929) 119 Ind Cas 721 : 11 L L J 236.

——S. 77 — Mortgagee leasing out mortgaged land to mortgagor for a term — Suit for possession by mortgagee after the expiry of the term.

A suit for possession against the mortgagor by the mortgagee who has leased the land to the mortgagor, after the term of the lease is over, is not a suit for ejectment of tenant by landlord and as such is cognizable by Civil Court.

The terms of S. 77 (3) cannot be held to include a suit the claim in which arises out of a contract of mortgage merely because between the mortgagor and mortgagee there subsists also the relationship of landlord and tenant. In order to bring the case between the purview of S. 77 (3) the claim in the suit must be directly referable to the lease or the conditions on which the tenancy is held. AIR (Vol 14) 1927 Lah 715 : 104 Ind Cas 144.

——S. 77 — Jurisdiction — Revenue Court or Civil Court.

Where one of the claims in the suit can be determined only by the Revenue Court the suit as a whole should be heard by a Revenue Court. AIR (Vol 14) 1927 Lah 35 : 98 Ind Cas 875.

——S. 77 — Suit for possession from trespasser—Defendant pleading that he is occupancy tenant.

The jurisdiction of Civil Court is ousted and the suit is cognizable by Revenue Court only, when the suit is for possession on the allegation that the defendant is a trespasser but the defendant pleads that he is an occupancy tenant and so it becomes necessary to adjudicate upon the status of the tenant. AIR (Vol 13) 1926 Lah 418 : 94 Ind Cas 514.

——S. 77—Suit in Revenue Court—Occupancy tenant wrongfully dispossessed—Suit for possession.

A suit for possession by an occupancy tenant who has been wrongfully dispossessed from his holding by the landlord lies in a Revenue Court only, even though one year from the date of dispossession has expired. AIR (Vol 13) 1926 Lah 128 : 7 L L J 600 : 27 P L R 24 : 92 Ind Cas 597.

——S. 77—Suit for ejectment where defendant claims occupancy right.

Plaintiffs landlords sued to eject defendants alleging that they were trespassers. Defendants pleaded that they were occupancy tenants.

Held, that the suit was cognizable only by a Revenue Court. 103 P R 1918 Diss. from. AIR (Vol 11) 1924 Lah 636 : 75 Ind Cas 818.

——S. 77—Suit by occupancy tenant for possession—Jurisdiction of Revenue and Civil Courts.

Where plaintiff claimed possession over certain land on the allegation that he was its occupancy tenant and had wrongfully been dispossessed by the defendants-landlords about 6 years ago.

Held, that a suit of this nature is cognizable only by a Revenue Court and not by a Civil Court even though not brought within one year from the date of plaintiff's dispossession. AIR (Vol 11) 1924 Lah 539 : 78 Ind Cas 346 (DB).

——S. 77 — Reopening Revenue Court's decree — Jurisdiction of Civil Court.

Where the plaintiff in substance wanted to go behind a decree of Revenue Court commuting rent from cash to kind.

Held, the Civil Court, had no jurisdiction, though plaintiffs asserted that defendants acted fraudulently in obtaining the decree of Revenue Court. AIR (Vol 10) 1923 Lah 412 : 76 Ind Cas 1010.

——S. 77— Suit for recovery of price of trees cut down by tenant.

A suit by a person describing himself as a landlord against the defendant described as an occupancy tenant, for price of trees cut down by him on the ground that the tenant had exceeded his rights was held to be one cognizable by a Revenue Court and not by a Civil Court. (1921) 64 Ind Cas 152 (Lah.)

——S. 77 (3) — Suit by mortgagor for redemption — —Defence of occupancy right.

When plaintiffs mortgaged their lands with possession to defendants who were tenants-at-will and the defendants in a suit for redemption, set up occupancy right.

Held, that the Court could not take cognizance of such a plea under S. 77 (3). AIR (Vol 4) 1917 Lah 462 : 59 P R 1916 : 93 P L R 1916 : 35 Ind Cas 597 (DB).

——S. 77 (3)—Land Revenue Act, S. 158 (2).

Where a suit was not covered by S. 77 (3), a Revenue Court could not try it since S. 158 (2) of the Punjab Land Revenue Act which debars a Civil Court from trying suits mentioned therein did not confer jurisdiction on a Revenue Court as distinguished from a Revenue Officer.

A suit for correction of an entry in Record of Rights, Annual Record or the Register of Mutations is not cognizable by Revenue Court. AIR (Vol 4) 1917 Lah 411 : 102 P W R 1917 : 64 P R 1917 : 41 Ind Cas 895 (DB).

——S. 77 (3)—(As amended by Punjab Act 3 of 1912) —Procedure—Civil and Revenue Court.

Under the proviso to sub-s. (3) of S. 77, the question whether defendants are occupancy tenants of the land arising in the suit, should be determined by a Revenue Court in the manner laid down in the said proviso. AIR (Vol 4) 1917 Lah 223 : 111 P R 1916 : 37 Ind Cas 390.

——S. 77 (3)—Civil or Revenue Court.

A suit falling within the purview of S. 77 (3) of the Act must be heard by a Revenue Court whether or not the suit also falls within the purview of the Specific Relief Act. AIR (Vol 3) 1916 Lah 86 : 104 P W R 1916 : 58 P L R 1917 : 34 Ind Cas 209 (FB).

——S. 77 (3) — Civil and Revenue Court — Punjab Land Rev. Act, Ss. 45 and 158— Specific Relief Act, S. 42—Declaratory suit.

In all cases coming under statutory provisions excluding the jurisdiction of Civil Courts such as S. 158 of the Land Revenue Act and S. 77 (3) of the Tenancy Act a declaratory suit is also excluded from the Civil Courts' cognizance. Revenue Courts are not debarred from giving the equitable relief for which the Special Relief Act makes a provision in cases otherwise within their jurisdiction. 3 P W R 1913 Rev : 81 P L R 1913 : 2 P R 1913 Rev : 18 Ind Cas 796.

——S. 77 (3)—Profits of agricultural land belonging to a partnership.

Under S. 77 (3) when once the profits of agricultural land belonging to a partnership firm are realized jointly and duly entered in the books of the firm as part and parcel of its assets, they become moneys had and received by the firm and a suit by the representative of a partner for his share of such profits is cognizable by Civil Courts. 97 P R 1910 : 142 P W R 1910 : 11 P L R 1911 : 8 Ind Cas 999 (DB).

——S. 77 (3) —"Dispute or matter ..... instituted" —Meaning.

Where a Revenue Court has finally decided the status of the parties, mere denial that the point has been decided, or allegation that the decision was erroneous is not a "dispute or matter with respect to which any suit specified in S. 77 (3) might be institut-

ed," and a Civil Court can take cognizance of the decision and proceed with the suit before it on the basis of that decision. 76 P R 1909 : 66 P L R 1910 : 119 P W R 1909 :3 Ind Cas 498 (FB).

4. Clause (3) Proviso (1).

——S. 77 (3), Proviso — Plea of defendant raising matter cognizable by Revenue Court—Proper procedure for civil Court.

Where in a suit cognizable by and instituted in a civil Court the plea raised by the defendant makes it necessary for the Court to decide a matter which can only be heard and decided by a revenue Court under sub-s. (3) of S. 77 of the Punjab Tenancy Act, the proper procedure for the civil Court under the proviso to that sub-section is to return the plaint for presentation to the Collector. AIR (Vol 36) 1949 East Punj 29 : 50 P L R 167 (DB).

——S. 77 (3), Proviso (1) — "Matter," meaning of — Object of proviso.

Per Bhide J.—The word "matter" in S. 77 (3), proviso (1), is more comprehensive than the word 'dispute.' A matter on which ihe parties are 'at issue' may be described as a 'dispute,' but when the parties are not at issue, the matter could only be described as a 'matter.' The object of the proviso perhaps was that whether the parties are or are not at issue on a particular matter, if the matter is such that it can only be heard and determined by a Revenue Court and if a finding has to be given thereon the Court should adopt the procedure laid down in the proviso.

Even if a point is not disputed, a finding may still be necessary and may have to be given on the admission of a party. The proviso must obviously be read with sub-s. (3). AIR (Vol 29) 1942 Lah 217 : 44 P L R 488 : ILR (1943) Lah. 191 : 202 Ind Cas 497 (FB).

——S. 77 (3), Proviso (1)—Applicability —Suit by occupancy tenant out of possession to recover possession from his landlord of land— Jurisdiction of Civil Court.

A suit by a dispossessed occupancy-tenant to recover possession from his landlord of the land to which he claims the occupancy-rights does not fall within S. 77 (3) (d) because it is not a suit by a tenant to establish a claim to a right of occupancy and hence, is initially within the jurisdiction of the Civil Court.

In such a suit, the Civil Court is not precluded by reason of S. 77 (3) proviso (1) from trying the question raised by the defendant that the occupancy right has been extinguished by abandonment because the suit, as filed by the tenant, does not come within S. 77 (3) (d) and if it were brought by the defendant landlord against the plaintiff tenant on the plea of abandonment, it would not be within S. 77 (3) (d) because the landlord would not be admitting the plaintiff tenant to be a tenant in the hypothetical suit. (1) AIR (Vol 13) 1926 Lah 128 : 92 Ind Cas 597 ; (2) AIR (Vol 9) 1922 Lah 33 : 65 Ind Cas 520 ; (3) A I R (Vol 13) 1926 Lah 338 : 98 Ind Cas 339.

(Impliedly overruled in AIR (Vol 29) 1942 Lah 217: 44 P L R 488 : ILR (1943) Lah 191 : 202 Ind Cas 497 (FB).)

——S. 77 — Court finding it necessary to decide matter cognisable exclusively by Revenue Court.

According to the proviso to S. 77 as soon as the Civil Court finds it necessary to decide any matter which is cognizable exclusively by a Revenue Court under S. 77 (3), its jurisdiction is ousted and the whole suit becomes triable by a Revenue Court. A I R (Vol 23) 1936 Lah 46 : 16 Lah 695 : 37 P L R 842 : 160 Ind Cas 281 (D B).

——S. 77 (3) (1)—Suit for compensation by ex-tenant who was dispossessed.

A person who has been in possession of land with the right to possess it continues to hold the land and to be a tenant in spite of having been wrongfully put out of possession.

A suit brought by a tenant, who had been expelled by a landlord for compensation on account of dispossession, and for the recovery of over-payment of rents and land revenue is cognizable only by the Revenue Court. A I R (Vol 22) 1935 Lah 903 : 16 Lah 687 : 37 P L R 836 : 157 Ind Cas 684 (D B).

——S. 77 (3) (1) — Suit by tenant for declaration that he was entitled to fraction of produce — Trial in Civil Court in good faith.

A suit instituted by an occupancy-tenant against his landlord for a declaration that the tenant was entitled to a fraction of the total produce of the land which was the subject of the tenancy is cognizable by a Revenue Court. A Civil Court has no jurisdiction to try such a suit.

Where, however, the decree of the Civil Court has been passed in good faith and the objection as to jurisdiction has not prejudiced either of the parties, the Civil Court decree may be registered as a decree of the Revenue Court. 34 P L R 970 : (1933) 146 Ind Cas 30.

——S. 77 (3), provisos (1) and (2)—Suit for possession by occupancy tenant — Landlord pleading extinction of occupancy rights :

Held, that if it was necessary to decide the issue raised by the landlords, S. 77 (3) proviso (1), applied and the plaint should be returned for presentation to the Collector and the Revenue Court would have to decide the suit; if, however, the suit could be disposed of without going into the question exclusively triable by the Revenue Court, the Civil Court could decide the suit. A I R (Vol 18) 1931 Lah 294 : 12 L 646 : 32 P L R 362 : 134 Ind Cas 203 (D B).

——S. 77 — Plea of res judicata — Determination of plea.

A Civil Court has jurisdiction to try a suit brought by a person who has been dispossessed from his tenancy after a notice issued to him under S. 43 of the Tenancy Act, and who has been unsuccessful in a suit under S. 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he had a right of occupancy therein, and S. 77 (3) (d) is no bar to such a suit, inasmuch as the person ceases to be a tenant, but if in the course of the trial of that suit it becomes necessary to decide any "matter" which can under Sub-s. (3) of S. 77 be heard and determined by a Revenue Court alone, the Civil Court shall decline to proceed further and deal with the suit in the manner laid down in proviso (1) to S. 77 (3).

Therefore, if plea of res judicata has been raised, the Civil Court should decide whether the rule of res judicata bars any further inquiry into the matter indicated, and it would only proceed to take action under proviso (1) if it holds that it was not res judicata. A I R (Vol 14) 1927 Lah 452 : 9 Lah 38 : 105 Ind Cas 507 (F B).

——S. 77 — Plea relating to a 'matter' in suit — Effect.

The word "matter" in proviso (1) to S. 77 is used in contradistinction to "suit" and the intention is that although the "suit" as laid would be within the jurisdiction of the Civil Court if the pleadings raised any matter involving an issue which it becomes necessary to decide and the decision of which would necessitate the encroachment on the jurisdiction of the revenue Courts, the whole suit and not just the "matter" is to be referred to the revenue Courts for decision. A I R (Vol 14) 1927 Lah 452 : 9 Lah 38 : 105 Ind Cas 507 (F B).

——S. 77 — Declaratory suit for rents.

A suit for a declaration that the plaintiffs are entitled to receive rent in kind and not in cash, is not triable by the Civil Courts and is covered by Section 77 (3) (1). But even if the contention that the suit is one for the correction of a revenue entry be sound

it would be triable by a Revenue Court alone, and the jurisdiction of the Civil Courts would be barred under Section 158 (2) (vi) of the Land Revenue Act. A I R (Vol 10) 1923 Lah 405 : 4 Lah 127 : 5 L L J 335 : 73 Ind Cas 673 (D B).

——S. 77 — Return of plaint for presentation to Collector.

When after having entertained the suit the Court reaches a point in the trial at which it holds that the plaintiff is a tenant and is suing as such the proviso takes effect and makes it incumbent on the Court to return the plaint for presentation to the Collector. A I R (Vol 9) 1922 Lah 173 : 69 Ind Cas 645 (D B).

——S. 77 — Proviso — Suit for possession — Civil and Revenue Courts.

The plaintiff stated that defendants were mere trespassers and the defendants pleaded that the plaintiffs had no rights. On examination by Court, plaintiffs urged that the defendants were their tenants-at-will and the defendants pleaded that they were occupancy tenants.

Held, that the order returning the plaint to the Revenue Court was right, for it was impossible in a case of this kind for the Civil Court to ignore the plea put forward by the defendants having regard to the Act 3 of 1912. A I R (Vol 5) 1918 Lah 128 : 68 P L R 1918 : 171 P W R 1918 : 47 Ind Cas 594.

5. Clause (3) (a)

——S. 77 (3) (a) — Civil or Revenue Court.

A suit for possession by the purchaser from a deceased occupancy tenant against one who claimed under a gift from the same tenant but the validity of which was disputed by the plaintiff falls under S. 77 (3) of the Act and is cognizable by the Revenue Court. A I R (Vol 5) 1918 Lah 323 : 141 P W R 1918 : 46 Ind Cas 882.

——S. 77 (3) (a) — Suit by one proprietor against another for occupancy rights — Decree of Civil Court, if can be registered in Revenue Court — Return of plaint.

A suit by one proprietor against another for claiming occupancy rights in the land of the latter falls under S. 77 (3) (a) of the Act and is triable only by a Revenue Court. A decree by a Civil Court in a suit of such a nature cannot be registered as that of a Revenue Court. In such cases Civil Courts should return the plaint for presentation to Revenue Courts. A I R (Vol 1) 1914 Lah 395 : 156 P W R 1914 : 282 P L R 1914 : 26 Ind Cas 89.

6. Clause (3) (b)

——S. 77 (3) (b) — Ejectment — Sub-tenant.

A suit to eject a sub-tenant on the death of the occupancy tenant without heirs who had granted the sub-lease is simply a suit in ejectment of a person holding under time expired lease and is not a suit falling under S. 77 (3) (b) of the Act. 1 P W R 1916 Rev : 34 Ind Cas 248.

7. Clause (3) (c)

——S. 77 (3) (c), (d)—Occupancy rights, created by widow—Reversioner's suit.

A suit by a reversioner to contest the validity of the creation of occupancy rights by the widow is cognizable by a Civil Court. AIR (Vol 7) 1920 Lah 197 : 56 Ind Cas 465.

——Ss. 77 (3) (c) and 100 (2) — Suit for possession of land when deft. is paying share of produce as rent — Registration of such suits on the Revenue side not allowed—Procedure.

A suit for possession of land on the ground that deft. is paying a share of produce as rent falls under Ss. 77 (3) (c) and is cognizable by Asst. Collector of First Grade.

Where a Civil Court tries a revenue case in his revenue capacity but without competency cannot be registered in the Revenue Court and the procedure to be followed is to return the plaint for institution in a Revenue Court having jurisdiction. 39 P W R 1909 : 25 P R 1909 : 70 P L R 1909 : 1 Ind Cas 465 (DB).

8. Clause (3) (d)

——S. 77 (3) (d)—Scope—Claim by tenant that right of occupancy was not taken away from him by virtue of alleged sale—Proper forum.

Where a suit by a tenant is not one for establishing a claim to a right of occupancy but is for a declaration that a certain sale upon which the landlords rely and by which the landlords are alleged to have purchased the tenant's right of occupancy, did not, as a matter of fact take place between the parties, the question is essentially one for the determination of the Civil Court, and the mere fact that the parties are related to each other as landlord and tenant will not bring it within S. 77 of the Punjab Tenancy Act. AIR (Vol 37) 1950 Lah 144 : Pak L R (1950) Lah 223.

——S. 77 (3) (d)—Scope and applicability.

Section 77 (3) (d) contemplates suit either by a tenant, that is, a person who claims to be a tenant and is a tenant, to establish a claim to a right of occupancy, or by a landlord, that is, a person, who claims, or is admitted to be, or is found to be the landlord, to prove that a person admitted to be a tenant has not a right of occupancy. Section 77 (3) (d) applies only when the relationship of landlord and tenant is admitted and the nature of the tenancy is alone in dispute. AIR (Vol 29) 1942 Lah 217 : 44 PLR 488 : ILR (1943) Lah 191 : 202 Ind Cas 497 (FB).

——Ss. 77 (3) (d), 5, 6, 7— Question, whether occupancy rights of judgment-debtor sought to be attached and sold fall under S. 5 or Ss. 6 and 7, can be decided by Civil Court.

The question whether the occupancy rights held by the judgment debtor which are sought to be attached and sold in execution fall under S. 5 or Ss. 6 and 7 can be decided by a Civil Court. Such a suit is not by a tenant to establish a claim to a right of occuancy or by a landlord to prove that a tenant had not such a right. AIR (Vol 25) 1938 Lah 677 : 40 PLR 946 : 179 Ind Cas 58 (DB).

——S. 77 (3) (d)—Jurisdiction of Civil Court.

The question whether a deceased tenant had or had not abandoned his rights does not come within the terms of S. 77 (3) (d). AIR (Vol 22) 1935 Lah 686 : 37 PLR 378 : 159 Ind Cas 419.

——S. 77 (3) (d)—Suit to establish right to occupancy by inheritance.

A suit by persons who are admittedly in possession as occupancy-tenants against the landlord to establish their right to hold the property as occupancy-tenants on the ground of inheritance comes within the ambit of cl. (d) of S. 77, and is consequently cognizable by a Revenue Court. AIR (Vol 20) 1933 Lah 610 : 34 PLR 435 : 142 Ind Cas 857 (1) (DB).

——S. 77 (3) (d)—Nature of tenancy not in dispute—Dispute as to the right of claimant — Proviso, effect of.

Section 77 (3) (d) is applicable to those cases only in which the relationship of landlord and tenant is admitted and the object of the suit is to determine the nature of the tenancy. Where the point for decision is not the nature of the tenancy but whether the defendant is related to the deceased and if so, whether the common ancestor had occupied the land, the suit is cognizable by Civil Court and the prohibition under S. 77 (3) (d) has no application.

The practical effect of the proviso to S. 77, sub-s. (3), is that whereas before its enactment, Civil Courts were prohibited from trying those suits only in which the question raised in the plaint ex facie fell within one or other of the clauses of S. 77 (3), their jurisdiction is now barred in those cases also in which, on

the averments in the plaint the suit is properly triable by a Civil Court but the defendant's pleas raise a question, which, under the sub-section, is to be determined by the Revenue Courts only. Where, however, neither the plaint nor the pleas raise a question within cl. (d) or any other clause of S. 77 (3), the proviso does not come into operation AIR (Vol 18) 1931 Lah 362 : 32 PLR 329 : 12 L 111 : 132 Ind Cas 15 (DB).

——S. 77—Suit by tenants for establishing their occupancy right.

A suit by tenants to establish their right as occupancy tenants falls under Cl. (d), sub-S. (3), S. 77, Punjab Tenancy Act, and is cognizable by a revenue Court. AIR (Vol 14) 1927 Lah 848 : 9 LLJ 547.

——S. 77—Suit to establish occupancy right — Civil Court wrongly exercising jurisdiction — Powers of High Court.

A suit by a tenant to establish his claim to a right of occupancy falls within S. 77 (3), group (2) (d) and is exclusively triable by a Revenue Court.

Where, however, a Court of first instance or of appeal wrongly exercises its jurisdiction in respect of such matter, the High Court is competent under S. 100 to quash the orders of such Court or to direct that any such decree be registered in a Revenue Court. AIR (Vol 14) 1927 Lah 761 : 100 Ind Cas 165.

——S. 77 (3) (d)—Occupancy Right—Adverse possession—Civil or Revenue Court.

A claim that plaintiff has acquired occupancy rights by more than 12 years' possession coupled with assertion of occupancy rights adversely to the owners falls within S. 77 (3) (d) and is not cognisable by a Civil Court. AIR (Vol 7) 1920 Lah 400 : 159 P R 1919 : 54 Ind Cas 911 (DB).

——S. 77 (3) (d)—Person ejected from tenancy under S. 43—Suit for possession of holding in Civil Court.

A Civil Court has jurisdiction to try a suit for possession of the land as occupancy tenant ought by a person who has been dispossessed from his tenancy in accordance with a notice issued under S. 43 of the Act, and who has been unsuccessful in a suit to contest his liability in ejectment. S. 77 (3) (d) of the Act having no application to such a suit, AIR (Vol 6) 1919 Lah 297 : 49 P R 1919 : 51 Ind Cas 443 (DB).

——Ss. 77 (3) (d) Proviso (1) and 100 (3) — Civil and Revenue Court —Jurisdiction.

A plaint filed in a Civil Court for possession of certain land wherein the plaintiff in order to succeed must establish a claim to a right of occupancy which is within the cognizance of a Revenue Court under S. 77 (3) (a) of the Act and must therefore be returned for presentation to the proper Court. AIR (Vol 6) 1919 Lah 283 : 147 P W R 1918 : 46 Ind Cas 811.

——S. 77 (3) (d)—Civil and Revenue Courts—Suit by proprietors on death of occupancy tenant's widow.

A suit by landlord to eject the reversioner on the ground that he is not entitled to succeed to the land as occupancy tenant thereof, on the death of the widow of the last male owner, is cognizable by a Civil Court only. AIR (Vol 5) 1918 Lah 36 : 103 P R 1918: 179 PWR 1918: 130 PLR 1918 : 48 Ind Cas 363.

9. Clause (3) (e).

——S. 77 — Suit against defendants as trespassers — Court finding them to be tenants-at-will.

All suits by a landlord to eject a tenant can only be instituted and heard and determined by a Revenue Court under S. 77 (3) (e). Although the defendants are described as trespassers in the plant, when the Court comes to the conclusion that defendants were holding the land as tenants at-will, and, therefore, could not claim that they were in adverse possession of the land as against the proprietors, the suit becomes one in which it is necessary to decide a matter which, under S. 77, can only be heard and decided by a Revenue Court, and the Civil Court should then return the plaint for presentation to the Collector. AIR (Vol 21) 1934 Lah 353 : 35 P L R 411 : 155 Ind Cas 242

——S. 77 (3) (e) — Occupation of house in abadi — Agreement to pay kallar — Suit for ejectment.

The plaintiff instituted a suit in the Court of Assistant Collector for ejectment of the defendants alleging that they had settled the defendants in houses constructed by them and the latter, in lieu of rent, agreed to supply them kallar and that the defendants having failed to perform the conditions on which the houses were given to them, were liable to ejectment. The houses were situated in abadi chak and the land on which they stood was shown in the revenue records as gair mumkin abadi, there being no other land in possession of defendants for cultivation along with the houses or with the sites thereunder :

Held, that the suit was cognisable by the Civil Court. AIR (Vol 18) 1931 Lah 726 : 132 Ind Cas 847.

10. Clause (3) (g).

——Ss. 77 (3) (g), 50 — After death of occupancy-tenant, his sons taking possession of occupancy land — Dispossesion by landlord — Suit by sons for possession.

Held, that suit is one under S. 50 and exclusively triable by Revenue Court. AIR (Vol 24) 1937 Lah 911 : 176 Ind Cas 326.

——S. 77 (3) (g) — Transfer by occupancy-tenant in contravention of Punjab Tenancy Act (16 of 1887) — Transfer becoming conclusive by lapse of time — Subsequent dispossession by transferor and some others — Suit for possession—Defendants not forming entire body of proprietors.

Where a transfer by an occupancy-tenant in contravention of Punjab Tenancy Act, 1887, in favour of plaintiffs has been validated by lapse of time, and the plaintiffs allege that they have been dispossessed by the defendants and some others, they not forming the entire proprietary body, the defendants are not the "landlords." Consequently, the suit is not triable by a Revenue Court but by Civil Court. AIR (Vol 24) 1937 Lah 824: 39 PLR 771: 170 Ind Cas 77.

——S. 77 (3) (g) and (i) — Suit by ex-tenant against landlord—Jurisdiction of Revenue Courts.

Section 77 (3) (g) and (i) cover all conceivable causes of litigation between a landlord and his tenant qua tenant. An ex-tenant in that capacity can look for no relief outside the Revenue Courts. This principle would apply even if the tenant is out of possession.

An occupancy-tenant transferred his land to the landlord on condition that the landlord should pay to him certain amount annually on account of the occupancy rights and himself get the rent from the tenants whom he might name.

The occupancy tenant received the amount in the landlord's lifetime but on his death, his son refused to pay. The occupancy-tenant was not in physical possession of the land and the actual tenants were not cultivating under him. He instituted a suit in Revenue Court to recover rent and possession of land:

Held, that the suit was rightly instituted in the Revenue Court as it was by a tenant to establish a claim to a right of occupancy. Though the tenant was not in physical possession, he was in juristic possession of the land and the landlord became his tenant when the land was transferred to him. The constructive possession of the tenant could not be said to have come to an end when the rent ceased to be paid. AIR (Vol 24) 1937 Lah 580: 174 Ind Cas 847.

——Ss. 77 (3) (g), 50 — Land owned by number of persons jointly.

Section 77 (3) (g) and S. 50 relate to suits between the 'landlord' and 'tenant' and in cases where the land is owned by a number of persons jointly, 'landlord' in these sections means all the co-owners col-

lectively. So where an occupancy-tenant brings a suit for recovery of possession more than one year after forcible dispossession, by some of the co-sharer landlords, and it is not shown that all the landlords acted collectively, S. 50 is not applicable and the suit is governed by Lim. Act, and is not barred The jurisdiction of the Civil Court also is not barred. AIR (Vol 24) 1937 Lah 258 : 174 Ind Cas 176.

——S. 77 (3) (g)—Mortgagee unlawfully dispossessed claiming possession — Defendant denying mortgage and raising question of tenancy :

Held, that cl. (g) of sub-s. (3) of S. 77, applies only where the relationship of landlord and tenant between the parties is admitted and hence the present suit was triable by a Civil Court. AIR (Vol 19) 1932 Lah 201 : 33 P L R 342 : 135 Ind Cas 684.

——S. 77—Question involving status or point of law —Jurisdiction.

A Civil Court can entertain a suit brought by a party in respect of an occupancy holding under Cl. (d) or Cl. (g), sub-s. (3), S. 77, Tenancy Act, under certain conditions, i. e., when it involves a matter of status or a point of law such as res judicata or any other similar matter. When such matters have been determined and it becomes necessary to decide any matter, which under S. 77 (3) can only be heard and determined by a Revenue Court the Civil Court must act under proviso 1 to S. 77 (3).

During partition of certain shamilat land, M in 1893 brought a suit against the co-sharers for declaration that he was occupancy tenant of the land in dispute, or in the alternative, was entitled to compensation for disturbance. A and F admitted the claim and the Collector gave a declaration as to M being an occupancy tenant of such land as might fall to A and F on partition.

The suit was dismissed as against the others. M thus became occupancy tenant of the land allotted to F on partition. Later on in 1895 F mortgaged the land with possession to M. In 1928 the descendants of F obtained redemption and possession of the land under the Punjab Redemption of Mortgages Act (1923). In 1928 M brought suit for possession of the land as an occupancy tenant.

Held, that the Civil Court had jurisdiction to decide the status of M. M was tenant as his right to possession was declared in 1893 by a Revenue Court and his status was altered by his wrongful dispossession as a mortgagee in 1926 by the order of the Collector under the Punjab Redemption of Mortgages Act. M's status having been determined by the Civil Court in suit qua possession fell under Cl. (g), S. 77 (3), and the claim must be heard and determined by a Revenue Court. The decree of the Revenue Court declaring M to be the occupancy tenant of the land in suit must be treated as res judicata on the point and subsequent conduct of either party did not create estoppel or affect the decree in any way. AIR (Vol 17) 1930 Lah 506 : 123 Ind Cas 273.

——S. 77 — Suit by occupancy tenant for possession of land encroached upon by co-sharer landlord.

Section 77 (3) Cl. (g) refers to suits brought by a tenant against the landlord and does not refer to suits brought by a tenant against persons other than the landlord.

An occupancy tenant brought a suit against a co-sharer landlord for possession of land encroached upon by the latter.

Held, that the suit would lie in a Civil Court because the defendant could not be said to be landlord of the plaintiff. AIR (Vol 15) 1928 Lah 895 : 110 Ind Cas 538.

11. Clause (3) (h).

——S. 77 (3) (h)—Ejectment suit of occupancy tenant —Civil Court bona fide trying suit.

Under S. 77 (3), cl. (h), a suit to dispossess a transferee of an occupancy-tenancy is cognizable by a Revenue Court; but where the suit has been tried on merits in good faith by the Civil Court and none of the parties has been prejudiced, the decrees should be registered as decrees of Collector. AIR (Vol 23) 1936 Lah 512 : 165 Ind Cas 833.

——S. 77 (3) (h)—Occupancy-holding mortgaged with possession by last holder— Landlord wanting to dispossess.

Where the occupancy-holding was alleged to be mortgaged with possession in favour of the mortgagee by the last holder and the plaintiffs want to dispossess him, a suit for the relief will fall under cl. (h), S. 77 (3), and the mere fact that the plaintiffs were claiming on the ground that the tenancy had become extinct on the death of the last holder would not make any difference. AIR (Vol 23) 1936 Lah 46 : 16 Lah 695 : 37 P L R 842 : 160 Ind Cas 281 (DB).

——S. 77 — Suit by landlord for possession against tenant's transferee.

Where, in a suit by the landlord to set aside a transfer made of a right of occupancy and to dispossess the transferee, the dispute was regarding nature of the tenancy, the suit falls under sub-cl. (h), Cl. 3, S. 77, and the fact that the transferor was dead before the institution of the suit will make no change. The suit, therefore, was exclusively cognizable by the Revenue Court. (1928) 112 Ind Cas 405 (Lah).

——S. 77 (3) (h) — Suit for possession by landlord against transferee from occupancy tenant after tenant's death.

Only Revenue Court entertain a suit by landlord of an occupancy holding to dispossess a transferee from the occupancy tenant after the occupancy tenant's death. Section 77 (3) (h) is not expressly confined to cases in which the transfer is bad ab initio; but covers cases in which the right to dispossess has occurred on the happening of an event subsequent to the transfer. 9 P R 1910 Overruled; 32 P R 1912 : 58 P L R 1911 : 8 Ind Cas 666 (DB).

12. Clause (3) (i)

——S. 77 (3) (i) — Suit for damages for wrongful seizure of produce.

A suit by a tenant against a landlord for damages for wrongful seizure of the produce of the land by the landlord is not a suit to recover a sum wrongfully taken or paid as rent nor a suit arising out of the conditions of the tenancy and is, therefore, cognizable by a Civil Court. AIR (Vol 19) 1932 Lah 494 : 33 P L R 571 : 13 Lah 786 : 137 Ind Cas 788 (DB).

——S. 77 (3) (i) — Suit for declaration — Plaintiffs not liable to pay rent as entered in Revenue record — Jurisdiction.

A suit for declaration that plaintiffs are not liable to pay rent as entered in the Revenue records falls within S. 74 (3) (i) of the Act, and is exclusively triable by a Revenue Court. A I R (Vol 7) 1920 Lah 85 : 55 Ind Cas 739

——S 77 (3) (i) — Civil and Revenue Court — Suit for injunction — User of site.

Plaintiffs occupancy tenants sued for an injunction restraining defendants, members of the proprietary body from preventing them using a certain site.

Held, that as plaintiffs claimed to use the land not by reason of their having been enjoying the use for it for many years, the suit did not fall under S. 77 (3) (i) of the Act and was cognizable by a Civil Court. A I R (Vol 7) 1920 Lah 65 : 55 Ind Cas 720.

——S. 77 (3) (i) — Suit by tenants for possession — Civil or Revenue Court.

A suit by occupancy tenants against the landlord for possession of the land in suit as a threshing floor is within S. 77 (3) (i) of the Act and is cognizable by the Revenue Courts alone. AIR (Vol 1) 1914 Lah 89 : 44 P R 1914 : 254 P L R 1914 : 25 Ind Cas 502 (DB).

——Ss. 77 (3) (i) and 100 — Revenue payable by defendant paid by plaintiff — Suit to recover.

A suit for the recovery of the money from the defendant which the plaintiff was obliged to pay as land revenue when it was payable by the defendant is not cognizable by a Civil Court. 45 P W R 1912 : 73 P L R 1912 : 13 Ind Cas 401.

13. Clause (3) (j)

——S. 77 (3) (j)—Cl (j), interpretation of.

Clause (j), S. 77, cannot be interpreted as applyiug only to cases where the sole dispute is as to the amount payable. What cl. (j) characterises is a class of claim; whether a suit comes within it or not does not depend on the defence taken to the claim. AIR (Vol 25) 1938 P C 219 : 1938 A W R 158 : 1938 M W N 762 : 4 B R 745 : 65 I A 301 : 1938 O W N 715 : 68 C L J 36 : 1938-2 M L J 323 : 1938 R D 662: 40 P L R 1040 : ILR (1938) Lah 514 : 32 S L R 835 : 175 Ind Cas 769.

——S. 77 (3) (j) — Civil Court, if can entertain suit for declaration that plaintiff is not liable to pay haq buha (village cess).

Civil Court has no jurisdiction under S. 77, cl. 3 to entertain a suit for declaration that the plaintiff is not liable to pay haq buha, a village cess. A suit, however, in a Civil Court is competent to declare that haq buha is not a village cess within the meaning of the Act and that the Revenue Courts have no jurisdiction in respect thereof. AIR (Vol 22) 1935 Lah 150 : 156 Ind Cas 450, Reversed; (1) 67 P R 1905 : 113 P L R 1905 (2) A I R (Vol 13) 1926 Lah 244 : 92 Ind Cas 1012, Overruled. A I R (Vol 25) 1938 P C 219 : 1938 A W R 158 : 1938 M W N 762: 4 B R 745 : 65 I A 301 : 1938 O W N 715 : 32 S L R 835 : 68 C L J 36 : 1938-2 M L J 323 : 1938 R D 662 : 40 P L R 1040 : ILR (1938) Lah 514 : 175 Ind Cas 769.

——S. 77 (3) (j)—Haq buha.

A suit for a declaration that the plaintiff non-proprietor is not liable to pay haq buha is cognisable by the Revenue Court. AIR (Vol 18) 1931 Lah 175 : 31 P L R 954 : 131 Ind Cas 338.

——S. 77—Suit for recovering dues payable by Rajputs of Pohlian Prohitan to the Brahmans.

The produce, with respect to lands in cultivating possession of the Rajputs of village Pohlian Prohitan recoverable by the Brahmans of the village is either a due recoverable by a superior land-owner from an inferior land-owner or it comes within the definition of "village cess." In either event the Civil Courts are barred under S. 77 (p) or S. 77 (j) from taking cognizance of a suit to recover them. AIR (Vol 14) 1927 Lah 259 : 100 Ind Cas 849.

——S. 77 — Suit for declaration that kamiana is not recoverable from house owners.

A suit for declaration that kamiana dues were not recoverable from such residents of a village as were owners of their houses does not come under cl. (j) of S. 77 of the Tenancy Act and is cognizable by the Civil Courts.

Though, therefore, the lambardars can sue in the Revenue Courts for the recovery of this cess the person proceeded against can bring a suit for a declaration in the Civil Courts whatever the value of such declaration may be to him. Kurhi kamini is a cess of the nature of a house or ground rent.

The burden of proving that the plaintiffs are liable to pay this cess is upon the landlord where it is admitted that the plaintiffs are out-and-out purchasers of their houses and sites inside the village. AIR (Vol 13) 1926 Lah 244 : 92 Ind Cas 1012 : 7 Lah 173 : 8 L L J 39 : 27 P L R 70.

——S. 77 (3) (j)—Applicability—Jurisdiction.

Clause (j) of S. 77 (3) applies only to suit between the person claiming dues and cesses and the person by whom they are payable. Therefore a suit between parties each of whom claims to be entitled to collect such dues, is not governed by the clause when the persons by whom such dues are payable are not parties thereto. Such a suit is cognizable by the civil Courts. 30 P L R 1913 : 110 P R 1912 : 17 Ind Cas 907 (Dp).

——Ss. 77 (3) (j) and 100— Suit for Kamiana.

A suit for share of 'kamiana' dues when it is not settled if the dues are leviable at all is one exclusively cognizable by a Revenue Court. But a decree passed in such a suit by a Civil Court may be registered as the decree of a Revenue Court when the defendant is not prejudiced in any way. 17 P L R 1909 : 128 P R 1908 : 4 Ind Cas 910.

14. Clause (3) (k).

——Ss. 77 (3) (k) - Suit against defendants for realizing plaintiff's share in tree — Jurisdiction of civil Courts.

The plaintiff sued to recover the sum realized by defendants on account of his share in certain trees.

The defendants were not co-sharers in the land on which the trees stood :

Held, that the case did not fall under S. 77 (k). AIR (Vol 21) 1934 Lah 196 : 149 Ind Cas 937.

——S. 77 (3) (k)—Suit against co-lessee for accounts.

A suit for accounts by the son of a co-lessee against the other co-lessee does not fall within cl. (k) of sub-s. (3) of S. 77, and is, therefore, not excluded from the cognizance of Civil Courts by any provision contained in S. 77. The said clause applies only to a suit by a co-sharer in an estate or holding for settlement of account. AIR (Vol 20) 1933 Lah 730 : 143 Ind Cas 719.

——S. 77 (3) (k)—Plaint containing claims triable by Civil and Revenue Courts—Proper procedure.

A suit by an occupancy-tenant to realise his share of the profits from a occupancy-tenant is triable by a Civil and not by a Revenue Court. Section 77 (k) relates to suits between co-sharers in an estate and not to occupancy-tenants.

Where one of the claims in the plaint is triable by a Civil Court and the other is triable by a Revenue Court, the whole suit does not become triable by the Revenue Court. The proper course in such a case is to have the plaint amended so as to bring in within the jurisdiction of the one Court or the other. AIR (Vol 19) 1932 Lah 595: 33 PLR 766: 138 Ind Cas 755.

——S. 77 (3) (k) — Suit for value of trees standing on shamilat.

A suit in respect of the value of trees cut by the defendant which the plaintiff claims as his exclusive property is maintainable in the Civil Court, even though the land on which the trees stand is Shamilat land jointly owned by them, provided there is no dispute as to the land or its profits. AIR (Vol 19) 1932 Lah 399: 33 PLR 466 : 137 Ind Cas 72.

——S. 77—Suit against lessee of land for one year by his partner for refund of earnest-money on lessee's failing to give him his share in the produce.

Where an alleged partner of a lessee of land for one year filed a suit against the lessee for the recovery of the earnest-money paid by him, as the latter failed to pay him his share in the produce.

Held, that the suit did not fall under S. 77 (3) (k), Punjab Tenancy Act, but was cognizable by a Civil Court. AIR (Vol 15) 1928 Lah 641: 108 Ind Cas 593.

——S. 77 (3) (k)—Limitation Act, Art. 120.

A suit by a co-sharer in a holding under S. 77 (3) (k) of the Act for a share of the profits comes under Art. 120 of the Limitation Act. 5 PR 1915 Rev: 7 PWR 1915 Rev: 32 Ind Cas 102.

——S. 77 (3) (k)—Applicability—Suit for value of trees.

S. 77 (3) (k) of the Act does not apply to a suit for the value of a tree on the ground that it is plff.'s

own exclusive property even though the finding is that it is the joint property of the plaintiff and the deft. 10 PR 1911: 81 PLR 1911: 50 PWR 1911: 9 Ind Cas 685.

—S. 77 (3) (k)—Revenue Court—Title.

Suit against co-sharer for share in the price of trees sold standing on the joint property is cognizable by Revenue Court. The denial by the deft. of the plaintiff's right as co-sharer does not affect jurisdiction. 52 PR 1910: 139 PLR 1910: 6 Ind Cas 939.

15. Clause (3) (n)

—S. 77 (3) (n)—Suit for arrears of rent by person to whom landlord has sold his right to recover arrears—Jurisdiction of Civil Court.

A suit to recover arrears of rent in respect of agricultural land by a person to whom the landlord has sold the right to recover the arrears, is not within the exclusive jurisdiction of the Revenue Courts and is cognizable by a Civil Court. Such a person not being a landlord as defined in the Punjab Tenancy Act, the suit is not covered by S. 77 (3) (n) of that Act. AIR (Vol 34) 1947 Pesh 11: 228 Ind Cas 638.

—S. 77 (3) (n)—Purchase of landlord's right to recover rent—Suit by purchaser against tenant.

Where, in execution of a decree the right of a landlord to recover arrears of rent of agricultural land from his tenant was purchased by the plaintiff and the plaintiff brought a suit against the tenant for recovery of the arrears:

Held, that the plaintiff could not be regarded as a landlord within the meaning of S. 77, sub-s. (3), Cl. (n), that the suit was therefore not one brought by a landlord for arrears of rent and that it was recognizable by a Civil Court. AIR (Vol 20) 1933 Lah 415: 34 PLR 496: 143 Ind Cas 297 (DB).

—Ss. 77 (3) (n), 100—Suit by assignee of mortgagee for rent—Assumption of jurisdiction by Civil Court—Power to register decree as Revenue Court decree.

A suit brought by the assignee of the mortgagee for the recovery of rent from certain persons to whom the lands are alleged to have been given for cultivation by the mortgagee in which neither the mortgagee nor the assignee claims to be the landlord is cognisable by a Civil Court; and even if it should appear afterwards that they are really suits triable by the Revenue Court, action can be taken under S. 100, Punjab Ten. Act, and the decree of the Civil Court can be registered as that of a Revenue Court. AIR (Vol 18) 1931 Lah 707: 132 Ind Cas 663.

—S. 77—A suit involving the question whether a sale of a right to realize rent by one person to another is valid.

A suit involving the question whether the sale of a right to realize rent by one person to another is valid or not is triable by a Civil Court, and S. 77 (3) (n) does not bar such a suit because the question whether the relationship of landlord and tenant subsists between the parties or not, does not arise. AIR (Vol 15) 1928 Lah 908: 110 Ind Cas 510.

—S. 77 (3) (n)— Jurisdiction — Civil or Revenue Court.

The defts. held cultivating possession of the land in suit under the plffs. who were mortgagees thereof. They had agreed to surrender possession to the plffs. and not to cultivate in future and promised that if they did cultivate the land in future they would pay Rs. 80 a year. The plffs. sued for recovery of Rs. 160 alleging that defts. had cultivated the land for two years contrary to the agreement. Upon the question whether the suit was cognisable by a Civil or Revenue Court:

Held, that as the object of the agreement was to enable plffs. to get back possession of the land from the defts. who had agreed to give it up and to ensure this object it was stipulated that the defts. should be liable to pay Rs. 80 a year as damages, the agreement was not a lease and from the date of agreement the relation of landlord and tenant, if it existed before, ceased to exist between the parties, and therefore the suit was cognizable by the Revenue Court under S. 77 (3) (n), and that the compensation assessed in accordance with the terms of the agreement did not affect the jurisdiction of that Court. AIR (Vol 4) 1917 Lah 188: 30 PR 1917: 41 PWR 1917: 38 Ind Cas 580 (DB).

16. Clause (3) (o)

—S. 77 (3) (o)—Suit between co-owners.

A suit between two sets of co-owners one of whom resists the rights of the other to use the joint land in a particular manner without payment of certain dues to him does not fall within the purview of S. 77 (3) (o) and is cognizable by the Civil Court. AIR (Vol 20) 1933 Lah 94: 14 Lah 11: 34 PLR 142: 140 Ind Cas 771 (1) (DB).

—S. 84.

—Ss. 84 (3) and 98—Revenue Record—Presumption of correctness.

In a suit for arrears of rent in respect of a holding, the entries in the Jamabandi were—"In the ownership column Shamilat Deh and the cultivators' column, certain tenants on behalf of Haider Shah co-sharer one-third and Tola Singh two-third." Defendant pleaded that they had paid in the entire rent to Haider Shah who was then joined as deft. and he repudiated Tola Singh's claim alleging that Tola Singh was out of possession altogether and that the entry in jamabandi was wrong.

Held, that a presumption of correctness attaches to Revenue Records. The proper course would have been to postpone the case for two months to allow Haider Shah to prove his exclusive title if so advised. If no suit was brought, the Court should decide in favour of the plff. 54 PLR 1912: 6 PWR 1912 Rev.: 15 Ind Cas 467.

—S. 84 (5)— Revision — Material and technical irregularities.

A technical irregularity is not a good ground for revision. The powers under S. 84 (5) of the Act will be exercised only where it is necessary for doing substantial justice.

The inclusion, in the notice of ejectment and in the subsequent delivery of possession of a particular field, held in previous judicial proceedings to be part of the land from which the tenants were not liable to ejectment is a material irregularity, but the omission of the direction for ejectment from the order of dimissal of the suit contesting the liability of ejectment, is only a technical irregularity. 4 PR 1914 Rev.: 198 PLR 1915: 25 Ind Cas 831.

—S. 84 (5)—Revision—Powers when to be exercised.

The broad principle to follow is to interfere in revision only where a refusal to interfere would result in injustice or a failure of justice. 1 P. R. 1914 Rev.: 199 PLR 1915: 25 Ind Cas 867.

—S. 88.

—S. 88 (2)—Proceedings in Revenue Court—Applicability of C. P. Code—Limits.

The applicability of C. P. Code to proceedings in Revenue Courts is limited by the conditions expressly laid down in sub-s. (2) of S. 88 of the Punjab Tenancy Act until rules are made under sub-s. (1). The C. P. Code, so far as it is applicable, applies; but the applicability is subject to the provisions contained in the Act itself. (1947) 26 LLT 27.

—S. 96.

—S. 96 — Decree for rent— Judgment-debtor's bullocks—Liability to attachment and sale.

Under S. 96 of the Punjab Tenancy Act, a Revenue Court is quite competent to order that a decree for an arrear of rant be executed by attachment and sale

of the judgment-debtor's bullocks, even though the judgment-debtor be an agriculturist and the bullocks may, in the opinion of the Court, be necessary to enable him to earn his livelihood as an agriculturist. (1947) 26 LLT 27.

——S. 96 — Decree for rent — Standing crops of tenant—Whether can be attached and sold—Punjab Debtors' Protection Act, S. 10.

The provisions of S. 96 of the Punjab Tenancy Act are subject to what is laid down in S. 10 of the Punjab Debtors' Protection Act, and the standing crops, other than cotton and sugarcane, of the tenant cannot be attached or sold in the execution of a decree for an arrear of rent. (1947) 26 LLT 26.

——S. 98.

——S. 98—Postponement of — Limitation.

Where the Revenue authorities refuse to sanction mutation of the land in suit in the plaintiff's name, limitation begins to run from that date for obtaining declaration of title and is not postponed by any reason of compliance with any requisition made by the Revenue authorities under S. 98. A I R (Vol 3) 1916 Lah 390 : 71 P L R 1916 : 91 P W R 1916 : 34 Ind Cas 958.

——S. 99.

——S. 99—Suit by mortgagee for possession—Intention to create simple mortgage — Jurisdiction.

Where, in a suit by a mortgagee for possession of the mortgaged property or for return of money, it appeared from the allegations in the plaint that the intention of the parties was that there should be a simple mortgage accompanied by collateral security and while the mortgagor was to remain in possession, the mortgagee was to receive rent in kind as consideration for his advance :

Held, that in view of the provisions of S. 99, the suit was triable by the Civil Court. AIR (Vol 20) 1933 Pesh 73 : 146 Ind Cas 766 (FB).

——S. 100.

——S. 100—Applicability — Decree passed by Court without jurisdiction. See AIR (Vol 37) 1950 Him Pra 33.

——S. 100—Appeal under Letters Patent.

An order registering a decree as that of a Revenue Court under S. 100 is a judgment within Cl. 10, Letters Patent (Lahore) and is appealable. AIR (Vol 14) 1927 Lah. 540: 102 Ind Cas 843, Overruled. A I R (Vol 29) 1942 Lah 95 : 44 P L R 140 : ILR (1942) Lah 491 : 200 Ind Cas 652 (FB).

——S. 100—Suit exclusively triable by Revenue Court tried by Civil Court—Question of res judicata involved :

Held, that decree passed cannot be registered under S. 100 as decree of Revenue Court. A I R (Vol 24) 1937 Lah 911 : 176 Ind Cas 326.

——S. 100—Case triable by Revenue Court heard and decided by Civil Court — Proper issues and evidence recorded — Remand, if necessary — Decree, if should be registered as one of Revenue Court.

According to S. 100, Punjab Tenancy Act, if it appears that the suit was determined in good faith and that the parties have not been prejudiced by the mistake as to jurisdiction, the decree can be registered as that of a Court having jurisdiction.

Where the proper issues had been framed and the whole evidence had been recorded, it is not necessary in the interests of justice to remand the case. Section 100 gives discretion to the High Court to register the decree as that of a Revenue Court in such cases. A I R (Vol 23) 1936 Lah 244 : 37 P L R 785 : 161 Ind Cas 349.

——Ss. 100, 77 (3)—Scope.

Section 100 applies to all cases in which a Court, whether Civil or Revenue, has determined a suit which it had no jurisdiction to entertain. It is immaterial whether the objection to the jurisdiction of the Court could be raised initially on the institution of the suit or whether it came into existence on the pleadings of the defendants. In either case, from the stage that the objection to jurisdiction comes into existence, the Court ceases to have jurisdiction to entertain the suit and if it continues with its determination, then S. 100 would empower the High Court to take action provided the other conditions laid down therein are satisfied. AIR (Vol 20) 1933 Lah 119 : 34 P L R 2 : 141 Ind Cas 179.

——S. 100—Applicability.

A suit by the assignee of the mortgagee for recovery of rent from persons to whom lands are alleged to have been given for cultivation by the mortgagee, in which neither mortgagee nor assignee claims to be the landlord is cognizable by Civil Court and even if it appears afterwards that they are really suits triable by Revenue Courts, action can be taken under S. 100 and the decree of the Civil Court can be registered as that of a Revenue Court. AIR (Vol 18) 1931 Lah 707 : 132 Ind Cas 663.

——S. 100—Discretion — Revenue Court dismissing suit as multifarious—Power of High Court to register decree as of Civil Court—Discretion.

The jurisdiction vested in the High Court under S. 100 is discretionary and it will not register the decree of the Revenue Court as a decree of the Civil Court when it has, without going into the merits of the dispute, dismissed the suit on the ground of multifariousness. A I R (Vol 16) 1929 Lah 128 : 112 Ind Cas 464.

——S. 100—Entertaining suit in good faith—No prejudice — Effect.

Where Courts have entertained suits and appeals in good faith though without jurisdiction and the defective jurisdiction has not prejudiced the parties, then the case is a fit one for exercise of discretion under S. 100. (1929) 11 L L J 236 : 119 Ind Cas 721.

——S. 100—Doubtful jurisdiction — Powers of High Court.

In cases under the Punjab Tenancy Act the question of jurisdiction is often an extremely complicated one. It is better for the Court in matters of doubt, unless the parties insist, to proceed with the case to give a decree. A decree so given, if subsequently held by High Court to have been given by a Court without jurisdiction, can be registered as a decree of the corresponding Court on the revenue side. A I R (Vol 15) 1928 Lah 908 : 110 Ind Cas 510.

——S. 100—Powers of High Court.

Under Punjab Tenancy Act the question of jurisdiction is frequently of a very complicated nature and no possible harm is done by trying a suit of doubtful jurisdiction unless the parties raise the question of jurisdiction and unless the point is absolutely settled by rulings of the Punjab High Court, because under S. 100 the High Court can always order the decree to be recorded as a decree of whatever Court was in its opinion competent to try it. AIR (Vol 15) 1928 Lah 895 : 110 Ind Cas 538.

—— S. 100—Registering as decree of Revenue Court —When proper.

If a suit exclusively cognizable by Revenue Courts is tried and decreed by a Civil Court, and if all the relevant evidence is on record and no prejudice is caused to either party by the trial of the suit by a Civil Court, the proper course is to take action under S. 100 and register the decree of the Civil Court as that of a Revenue Court. (1928) 112 Ind Cas 405 (Lah.).

——S. 100—Power of High Court.

Under Section 100 of the Punjab Tenancy Act High Court has the power to order that a decree passed by a Civil Court be registered as a decree of a

Revenue Court. AIR (Vol 10) 1923 Lah 405 : 4 Lah 127 : 5 L L J 335 : 73 Ind Cas 673 (DB).

——S. 100—Scope.

Where the Financial Commissioner decides that the relationship of landlord and tenant has not been created between the mortgagee and the mortgagor and so dismisses the ejectment suit and the Chief Court also disallows the mortgagee's claim for possession of the land but holds the decision of the Financial Commissioner as erroneous, it is both impracticable and illegal to act on the provisions of S. 100. The only remedy to the mortgagee in such a case is to have the Financial Commissioner to review his order. 110 P W R 1910 : 150 P L R 1910 : 7 Ind Cas 1001 (DB).

——S. 100(1)(b) and (2)—Scope.

Where a suit cognizable by the Civil Court has been decided by the Revenue Court, the Appellate Revenue Court's decree can be registered in the Appellate Civil Court provided the parties were not prejudiced by the mistake as to jurisdiction. A I R (Vol 29) 1942 Pesh 7 : 198 Ind Cas 183.

——S. 100(2)—Registering Collector's decree.

Section 100(2)of the Act gives the Chief Court power to act only where the parties have not been prejudiced by a mistake as to jurisdiction. Where the effect of registering the Collector's decree in a suit of value under Rs. 500 (Small Cause) would apparently be to deprive the deft. of all further remedy, the chief Court will not intervene. AIR (Vol 1) 1914 Lah 80 : 56 P R 1914 : 235 P L R 1914 : 154 P W R 1914 : 25 Ind Cas 506.

—S. 109.

——S. 109—Right to trees—Entry adverse to tenant in wajib-ul-arz of 1872—Same not repeated in later settlements—Effect—Application to repeat previous entry—Sustainability—Difference between Acts of 1868 and 1887.

The Tenancy Act of 1868 was considerably less favourable to tenants in the matter of improvements in which are included trees than the later Act of 1887. Where an entry adverse to the tenants was made in a wajib-ul-arz of 1872 and the same was not repeated in subsequent years.

Held, that the entry in 1872 should not be reapeated a settlement made long after the new Tenancy Act came into force. (1930) 9 Lah L T 9.

—S. 111.

——S. 111—Wajib-ul-arz recording agreement — If operative after expiry of settlement.

In the absence of an express intention to the contrary, an agreement between landlord and tentant entered in a wajib-ul-arz is not intended to take effect after the expiry of the period of the settlement, more so, if the terms of the entry expressly limit it to that particular settlement.

A mere repetition of that entry in a subsequent wajib-ul-arz made without questioning the persons concerned as to whether they consented to accept it as a binding agreement, cannot obviously satisfy the requirements of S. 111 of the Punjab Tenancy Act. AIR (Vol 37) 1950 East Punj 90 : 51 P L R 401 (D B).

—— S. 111—Agreement under S. 111 limited to term of settlement cannot persist through later settlement unless renewed. AIR (Vol 28) 1941 Lah 239 : 43 PLR 188 : 195 Ind Cas 519 (DB).

——S. 111—Agreement, what is.

Where the terms of an entry in a wajib-ul-arz of 1852 expressly limited it to that particular settlement but the same entry was repeated in the settlements of 1881 and 1914 without investigation :

Held that the later entries in the wajib-ul-arz could not be treated as an agreement between landlord and tenant within the meaning of S. 111. A I R (Vol 18) 1931 Lah 371 : 12 L 652 : 32 P L R 958: 153 Ind Cas 46 (DB).

——Ss. 111 and 112—Occupancy tenant—Rights of succession on alienation.

The provisions of the Act in regard to the alienation of, and succession to, an occupancy tenancy may be overridden by an agreement valid under Ss. 111 and 112 of the Act. An agreement entered in a settlement record must be interpreted in a reasonable manner, with due reference to all the provisions which it contains. 2 P R 1919 Rev. : 53 Ind Cas 531.

——S. 111—Quarabattis—Succession—Agreement.

The quarabattis ot a deceased occupancy tenant succeed to the land in suit under S. 111 of the Act in the absence of an agreement to that effect. A I R (Vol 1) 1914 Lah 164: 185 P W R 1913: 2 P L R 1914: 20 Ind Cas 528 (DB).

——Ss. 111 and 112 — Claim based on agreement — Agreement how proved.

A collection of a deceased occupancy tenant claiming to succeed to the tenancy upon an agreement must prove the agreement in one of the three following ways:—1. By producing a document containing terms agreed upon between parties.

2. By an entry made before 18th November 1871 and attested by proper officer in the record of regular settlement sanctioned by the Local Government.

3. By an entry in Record of Rights made after the abovementioned date or an entry in the Annual Record prepared under the provisions of the Punjab Land Revenue Act 1887. An entry in No. 2 is by law presumed to be an agreement and its production is sufficient but an entry in No. 3 not being so the party relying on it has to prove that it embodies the terms of the agreement between the parties.

In the absence of express intention to the contrary agreements recorded in a Settlement Record are not intended to take effect after the expiry of the period of settlement. AIR (Vol 2) 1915 Lah 120 : 21 P W R 1915 : 16 P R 1915 : 64 P L R 1915 : 26 Ind Cas 404 (DB).

——Ss. 111 and 112—Scope of.

An agreement under Ss. 111 and 112 expressly limited to the term of the 1st settlement does not hold good after a later settlement unless it is renewed. 10 P L R 1910 : 97 P R 1909 : 166 P W R 1909: 4 Ind Cas 851.

PUNJAB TENANCY (N. W. F. P. AMENDMENT) ORDINANCE (5 of 1948)

—S. 8.

——S. 8—If ultra vires — Cr. P. Code, S. 260 and Government of India Act, S. 88.

Section 8 of the Ordinance lays down that all offences under it "shall" be tried summarily as provided in the Cr. P. Code. Section 260, Cr. P. Code, invests a Magistrate with a discretion to proceed summarily in cases, which can suitably be so tried. Section 8 of the Ordinance uses the word "shall" and thereby deprives a Court of law of a discretion vested in it by the Cr. P. Code.

As there is no proof that S. 8 which affects the Cr. P. Code, was inserted in the ordinance under instructions of the Governor-General, the provisions of that section are ultra vires and not in any way binding by reason of S. 88 of the Government of India Act as adapted by the Pakistan (Provisional Constitution) Order, 1947. A I R (Vol 36) 1949 Pesh 1 : 50 Cr L J 538 (DB).

—S. 10.

— S. 10—Prosecution under S. 3—Appeal and revision—If competent—Cr. P. Code, Ss. 408 and 435 to 439.

The moment a case is instituted in a Criminal Court under S. 3 of the Punjab Tenancy (N. W. F. P. Amendment) Ordinance, the questions of procedure

are governed by the Cr. P. Code, which has not been repealed by the Ordinance. The moment a case is disposed by the Original Court, a right accrues to the person affected to file an appeal or revision as the case may be, under Ss. 408 and 435 to 439, Cr. P. Code. AIR (Vol 36) 1949 Pesh 1 : 50 Cr L J 538 (DB).

PUNJAB TRADE EMPLOYEES ACT (10 of 1940)

—S. 2.

——S. 2 (d) and (e)—Military contractor carrying on tent making business on piece work terms and not on fixed wages :

Held, that premises are work of "commercial establishment." A I R (Vol 31) 1944 Lah 376 : 46 Cr L J 216 : 217 Ind Cas 175.

PUNJAB URBAN IMMOVABLE PROPERTY TAX Act (17 of 1940)

——Scope — If ultra vires — Government of India Act (1935), Sch. VII, List I, Item 54, and List II, Item 42.

The Punjab Urban Immovable Property Tax Act imposing a tax on property is not ultra vires the Punjab Legislature. In substance the tax is not a tax on income falling under Item 54 of List I of Sch. VII to the Government of India Act (1935); the tax falls under Item 42 of List II of Sch. VII, viz., tax on buildings.

It is not impossible to reconcile the seeming conflict between the Act and the Income-tax Act ; the extent of the invasion by the Provincial Legislature, if any, into the Federal field is not so great as to justify the view that in pith and substance the impugned tax is a tax on income. A I R (Vol 36) 1949 F C 81 : 1949 F L J 8 : 1948 F C R 207 : 51 Bom L R 333 : (1949) 1 M L J 213.

PUNJAB URBAN RENT RESTRICTION ACT (10 of 1941)

—Preamble.

——Construction.

Since the Act limits the legal rights of subjects, it has to be construed strictly and liberal and benevolent construction should not be adopted. AIR (Vol 33) 1946 Lah 20 : 47 P L R 299 : 222 Ind Cas 650.

—S. 10.

——S. 10 — Applicability — Lease of building site owned by Government — Ejectment of building site owned by Government — Ejectment.

Section 3 of the Crown Grants Act does not take a lease of a building site owned by Government outside the operation of the punjab Urban Rent Restriction Act, in so far, of course, as the provisions of that Act are otherwise applicable to it.

A tenant of that site cannot, therefore, be ejected except in compliance with the provisions of S. 10 of that Act. The Punjab Urban Rent Restriction Act is not being invoked by him for the purpose of prejudicially affecting any property or prerogative of the Crown as such. It is being invoked only for the purpose of showing that in order to eject one of its tenants the Crown has also to follow the same procedure which any other landlord similarly situate is required to follow. AIR (Vol 36) 1949 East Punj 246 (DB).

——S. 10—Applicability to cantonment area — Last proviso to S. 10—Effect of.

Where the Provincial Government exercises its power vested in it under S. 1 (3) of the Punjab Urban Rent Restriction Act and issues a notification in respect of a cantonment, the result is that every part of the Act comes into force in that area, including the whole S. 10 of the Act, as well. The last proviso to S. 10 laying down that it does not apply to any cantonment area is also applicable. The result therefore is that the applicability of S. 10 to a cantonment area is ruled out, and that section therefore does not apply to a cantonment. AIR (Vol 35) 1948 East Punj 47 : 50 P L R 82.

——S. 10 — Applicability — Tenancy terminable by operation of law.

Section 10 of the Punjab Urban Rent Restriction Act applies only to cases of tenancies which can only be determined by the landlord by the service on the tenant of a notice to quit. It has no application to cases of tenancies determinable by operation of law, (i. e.) by the expiry of the period of the lease or by forfeiture.

A reference to the definition of the words "landlord" and "tenant" in S. 2 of the Act clearly presupposes that the liability to pay and the right to receive rent is essential to constitute the persons concerned, landlord and tenant, within the meaning of the Act. As soon as the liability to pay and the right to receive rent has come to a termination the provisions of the Act governing the rights and obligations inter se of landlords and tenants, whether in the matter of ejectment or otherwise, must be held to have ceased to be applicable, assuming that they otherwise applied to the particular tenancy.

It cannot be disputed that on the determination of the tenancy by the operation of law, whether as a result of the efflux of time or in consequence of the erstwhile landlord taking advantage of any breach of the condition of the tenancy by the erstwhile tenant, giving him the right of re-entry, the right of the erstwhile landlord to receive and the liability of the erstwhile tenant to pay rent under the contract of the lease ceases. To a suit brought by the former for the dispossession of the latter, therefore, S. 10 of the Act can have no application. A I R (Vol 35) 1948 Lah 77 : 49 P L R 249.

——S. 10 — Notice given before termination of tenancy—Validity.

Section 10 of the Punjab Rent Restriction Act does not provide that the notice should have been given after the termination of the tenancy. In spite of the fact that the words "statutory tenancy" are used in the margin of the section, the section does not create a tenancy by operation of statute after the expiry of the period for which the premises were let by a landlord to his tenant. A I R (Vol 34) 1947 Lah 388 (DB).

——S. 10, proviso — Scope and effect — Premises required by landlord for his own use — Suit for ejectment without notice to quit—If maintainble.

The only effect of the proviso to S. 10 of the Punjab Urban Rent Restriction Act is that any suit brought for the ejectment of a tenant by a landlord who needs the premises for his own personal use should be decided according to the ordinary law governing the relations between landlords and tenants and not with reference to the provisions of S. 10.

The landlord in such a case cannot eject the tenant without service on him of a valid notice to quit. A suit for ejectment cannot be maintained by him without the determination of the tenancy. AIR (Vol 34) 1947 Lah 382.

——S. 10—"Order"—Includes decree for ejectment.

The word "Order" in S. 10 of the Punjab Urban Rent Restriction Act covers both the decree for ejectment and orders made during execution proceedings removing the defendant from the premises in dispute. AIR (Vol 34) 1947 Lah 301 : 49 P L R 157 (DB).

——S. 10—Retrospective operation.

Section 10 of the Punjab Urban Rent Restriction Act is retrospective in its operation. A I R (Vol 34) 1947 Lah 301 : 49 P L R 157 (DB).

——S. 10 — Notification by District Magistrate, Rawalpindi, preventing landlords from recovering rent from tenants at rate higher than is payable under the Act — Notification does not apply to tenacy determined before issue of notification.

A notification by the District Magistrate Rawalpindi, issued on 6th August 1943, preventing the

landlord from recovering rent from the tenants at a rate higher than that payable under the Punjab Rent Restriction Act of 1941 is only applicable to persons who are tenants and cannot apply to persons whose tenancy has been determined on the expiry of a valid notice under S. 10 of the Punjab Rent Restriction Act before the notification was passed.

It is not retrospective in operation. A decree for ejectment passed before the issue of that order is executable. The fact that the tenant continued to occupy the premises even after the tenancy had been determined under the agreement giving him grace period to vacate the premises is beside the point. AIR (Vol 33) 1946 Lah 47 : 222 Ind Cas 62.

——S. 10 — Scope—Decree for possession, if barred —Order for recovery of possession, distinction.

The expression "order for the recovery of possession" in S. 10 applies to the stage when the plaintiff comes and makes an application for execution of a decree which has been passed in his favour. The section does not prohibit the Court from passing a decree for possession.

It only bars an order for recovery of possession so long as certain conditions are not complied with. A decree for possession is obviously different from an order for recovery of possession. A I R (Vol 33) 1946 Lah 20 : 47 P L R 299 : 222 Ind Cas 650.

——S. 10 —No retrospective effect.

Section 10 applies only to such actions or suits as are brought subsequent to that Act having been brought into force and not to a suit which had been instituted earlier and in regard to which a complete cause of action had accrued to the plaintiff before the institution of the suit. AIR (Vol 33) 1946 Lah 20 : 47 P L R 299 : 222 Ind Cas 650.

——S. 10—Suit for ejectment—Relationship of landlord and tenant not determined by notice under S. 10 —Effect of not issuing notice — Plaint cannot be regarded to be a notice under S. 10.

Suits for ejectment cannot be decreed if the tenancies under which the tenants were found to have been occupying the premises had not come to an end before the institution of the suits and suits themselves cannot be regarded to be notices for ejectment when they form conditions precedent to determine jural relationship between landlords and tenants and without terminating which landlords cannot be held to have any locus standi to maintain action for ejectment.

If the relationship between landlord and tenant has not been determined by notice under S. 10 before the institution of the suit for ejectment, the defendant must then be held to be a tenant of the plaintiff at the time when the suit was instituted and the suit for ejectment thrown out on the ground that the plaintiff was not entitled to ask for ejectment on the date on which the suit was instituted by him.

The plaint in which a landlord asks the Court to eject the tenant cannot be regarded to be a notice under S. 10 and the landlord cannot get a decree in his favour simply on the ground that the period for which tenant was entitled to get a notice has lapsed without landlord's consent during the pendency of the suit. AIR (Vol 32) 1945 Lah 175 : 47 P L R 130: 222 Ind Cas 301.

——S. 10 — Notice under, by landlord to tenant— Tenancy, when terminates.

It is almost elementary but it must be remembered that a tenancy does not come to an end on the date on which a notice for ejectment is sent by a landlord but on the expiry of the period given in the notice— if that is legally sufficient — after that notice has, or is found to have been, served on the tenant. A I R (Vol 32) 1945 Lah 175 : 47 P L R 130 : 222 Ind Cas 301.

——S. 10, Proviso construction of — Eviction of tenant.

In order to enable the landlord to have the benefit of the proviso containing the penultimate paragraph of S. 10 either the tenant must have been, to part generally, guilty of such a conduct in his uses of the demised property as was not permissible under the law, or the demised premises must have been required by the owner for his own occupation or for the occupation of persons for whom the owner was holding the property.

The fact that the landlord requires the property for purposes of demolition and rebuilding it or for material to erect buildings somewhere else is not within the ambit of the proviso. A I R (Vol 31) 1944 Lah 477 : 46 P L R 331.

——S. 10—Sufficient reason—Question of law.

The question whether a reason pleaded by a plaintiff landlord is sufficient within the meaning of S. 10 is a question of law and a second appeal would lie. AIR (Vol 31) 1944 Lah 477 : 46 P L R 331.

——S. 10, Proviso—'Satisfactory' meaning of.

In order to decide whether the cause shown falls within the purview of the word 'satisfactory' as used in the proviso, the other reasons given by the Legislature and found in the penultimate paragraph cannot be ignored. It may be that they are not exhaustive, but the last words of that paragraph can only be read ejusdem generis with the other reasons or causes given in the proviso or, in other words, so as to cover causes of the like nature with those given in the proviso. AIR (Vol 31) 1944 Lah 467 : 46 P L R 331.

—S. 13.

——S. 13 (1)—Payment in excess of standard rent.

From the words "without prejudice to any other method of recovery" in S. 13 (1), it is clear that the ordinary common law remedy was not being taken away from the tenant if he happened to have paid anything in excess of the standard rent but he could only claim deduction out of the rent to be paid by him within six months after the commencement of the Act and not further. The right is a limited one and the tenant cannot ignore the limitation and exercise it without the limitation imposed by the Legislature.

The tenant's contention that he could have claimed deduction of the rent payable by him after six months of the commencement of the Act is not correct. A I R (Vol 31) 1944 Lah 134 : 46 P L R 85 : 214 Ind Cas 319.

PUNJAB URBAN RENT RESTRICTION ACT (6 of 1947)

—S. 13.

——S. 13 (1) — Institution of suit for eviction of tenant—If impliedly barred.

There is no implied prohibition in S. 13 (1) of the Punjab Act, VI of 1947 to the institution of a suit for the eviction of a tenant in possession of a building or rented land. On the other hand, the section contemplates decree being passed in such a suit subsequent to the 15th April, 1947, when the Act came into force. AIR (Vol 36) 1949 East Punj 357: 51 PLR 181.

—S. 15.

——S. 15 (4) — Whether ultra vires—Government of India Act, S. 93, Proviso.

The Punjab Urban Rent Restriction Act, which was promulgated by the Governor of the Punjab under the provision of S. 93 of the Government of India Act, brought into existence new rights and new tribunals which did not automatically by the very fact of their creation come under the superintendence of the High Court.

Therefore, it cannot be said that S. 15 (4) of the Punjab Act deprived the High Court of any rights which it possessed in the matter of appeal or rev-

sion, nor were such powers assumed by the Governor. It follows, therefore, that the provision of S. 15 (4) did not do any violence to the proviso to S. 93 of the Government of India Act and these provisions were, therefore, not ultra vires. A I R (Vol 37) 1950 East Punj 181 : 52 P L R 1 (FB).

——S. 15 (4)—If ultra vires—Revisional jurisdiction of High Court—Government of India Act, S. 93.

The provisions of S. 15 (4) of the Punjab Urban Rent Restriction Act which was passed by the Governor under S. 93 of the Government of India Act, in so far as they exclude the revisional jurisdiction of the High Court in respect of acts of Controllers and Appellate Authorities appointed under that Act, are in contravention of the proviso to S. 93 (1) of the Government of India Act and are to that extent ultra vires.

The High Court, therefore, still retains jurisdiction under S. 115, C. P. Code. The "Controller" under the Act is a Civil Court engaged in the determination of a dispute of a civil nature and as such is subordinate to the High Court and subject to its revisional jurisdiction under S. 115, C. P. Code, or S. 44 of the Punjab Courts Act. A I R (Vol 36) 1949 Lah 94 : Pak L R (1949) Lah 139 (DB).

PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

—S. 13.

——S. 13 — "Decree" — If includes order by Controller under Act of 1947.

An order passed by a Rent Controller in exercise of the powers conferred by the Act of 1947, cannot be said to be a "decree" within the meaning of S. 13 of the Punjab Urban Rent Restriction Act of 1949. AIR (Vol 38) 1951 Punjab 329.

——Ss. 13 and 17 — Order of Controller under S. 13 of Act of 1947 — If can be executed by Civil Court —Punjab General Clauses Act, S. 22.

An order passed by a Controller in accordance with the provisions of S. 13 of the Act of 1947 must be deemed, in view of the provisions of S. 22, Punjab General Clauses Act, to have been passed under S. 13 of the Punjab Urban Rent Restriction Act of 1949, and can, therefore, be executed under S. 17 of the latter Act by a Civil Court as if it were a decree of that Court. AIR (Vol 38) 1951 Punj 329.

PUNJAB VILLAGE PANCHAYAT ACT (3 of 1922)

—S. 18.

——Ss. 18 (1) (a), 39 (2) — Resolution by panchayat ordering demolition of certain chabutra—Suit to determine whether resolution was ultra vires — Jurisdiction of Civil Courts.

Where a person brings a suit against panchayat for perpetual injunction restraining it from demolishing certain chabutra on the ground that the resolution was ultra vires of the panchayat as under S. 18 (1) (a) it could order the removal of an encroachment on a public way, whereas the chabutra in question existed on his own private land and not on a public way, the suit to determine whether in passing the resolution the panchayat acted within the scope of the statutory powers, is outside the prohibition contained in S. 39.

If the Court finds that the chabutra is private property, the resolution would be ultra vires and the plaintiff will be entitled to the injunction asked for. If, however, the side is held to be a part of the public way, then the Court will have no jurisdiction to further enquire into the propriety of the resolution and the suit will be dismissed unless it is established that the resolution was passed mala fide. A I R (Vol 26) 1939 Lah 372 : 186 Ind Cas 377.

—S. 22.

——Ss. 22, 30, 31 — Panchayat acting under S. 22 is Court — Panchayat acting outside criminal powers given under Chap. IV—Its decision, if can be revised by High Court under S. 439 or S. 561-A, Criminal P. C.

When criminal judicial powers are conferred upon a panchayat by S. 22, the panchayat becomes a Court when acting in the exercise of these powers. Where, therefore, the panchayat acted as a Court, the High Court could have no power of interference. There is, however, no finality in the case of orders which are not passed under Chap. IV, and the Criminal P. C., would apply in such a case and the High Court can interfere with such orders under Ss. 439 and 561-A, Criminal P. C. Where the panchayat arrogates to keep a jurisdiction contrary to the provisions of the Panchayat Act and the case tried by it does not relate to an offence under S. 379 read with S. 426, Penal Code but is one which, if punishable at all, falls under S. 406, Penal Code it cannot be said that the proceedings were under Chap. IV, Panchayat Act and hence Ss. 30 and 31 of that Act would not bar the jurisdiction of the High Court to interfere under Ss. 439 and 561-A, Criminal P. C. AIR (Vol 28) 1941 Lah 5 : 42 P L R 623 : 42 Cr L J 248 : I L R (1941) Lah 121 : 192 Ind Cas 128 (DB).

—S. 26.

——S. 26, Proviso — Claim against minor—Jurisdiction of Panchayat Committee to entertain — Order passed by Committee in contravention of S. 26—Setting aside of.

Under S. 26, proviso I, a Panchayat Committee has no jurisdiction to entertian or decide a claim against minor defendants. An order passed by the Committee in direct contravention of the section which confers upon it limited jurisdiction is not maintainable. The High Court, under its general powers of superintendence under S. 107, Government of India Act, as well as under its inherent powers, can interefere in order to set right the obvious errors committed by the panchayat. A I R (Vol 21) 1934 Lah 156 : 35 P L R 140 : 15 Lah 80 : 149 Ind Cas 1050.

PUNJAB VILLAGE PANCHAYAT ACT (11 of 1939)

——S. 26.

——S. 26, Sch. 1—Jurisdiction.

Under S. 26 read with Sch. I, a Panchayat cannot take cognizance of any complaint for an offence of theft, if the accused has previously been fined for theft by any panchayat.

Where a complaint of theft is made against A and B and A had previously been fined for theft by a panchayat, the panchayat has no jurisdiction to take cognizance of the complaint against A and his joint trial with B renders the whole trial bad in law ab initio. AIR (Vol 31) 1944 Lah 218 : 45 Cr L J 734 : 214 Ind Cas 158 (DB).

——S. 36.

——S. 36—The sentences specified in S. 36 are in the alternative and consequently mutually exclusive. If the accused is sentenced to fine, he cannot be required to execute a bond in addition. AIR (Vol 31) 1944 Lah 218 : 45 Cr L J 734 : 214 Ind Cas 158 (DB).

——S. 39.

——Ss. 39 and 73—Order of Panchayat under Ch. IV —Revision.

When the Panchayat which has the alternative of proceeding against a person either on the executive side or on the judicial side decides to proceed against him on the executive side and passes an order under Ch. IV of the Panchayat Act, the only authority which is competent to revise that order is the Deputy Commissioner. The District Magistrate has no such power. AIR (Vol 34) 1947 Lah 298.

——S. 39—Magistrate basing his judgment on report of Assistant Panchayat Officer.

The words "if satisfied" in S. 39 contemplate that the Magistrate himself should be satisfied and should not derive satisfaction from any other quarter. That

is why he is empowered even to direct a retrial if there is a failure of justice.

The case can even be sent to any other panchayat or to a regular Court of law subordinate to the officer concerned. The action of the Magistrate under S. 39 in calling for a report from the Assistant Panchayat Officer and basing his judgment on the report submitted by the Assistant Panchayat Officer is, threfore, illegal. AIR (Vol 31) 1944 Lah 218 : 45 Cr L J 734 : 214 Ind Cas 158 (DB).

——Ss. 39, 65, 53 and 54—Order under S. 39 not in consonance with law—Revision.

If any special Court set up in the province does not conduct itself in accordance with the charter which creates it and acts in a manner not authorised by law, the High Court has jurisdiction to set the matter right even if its jurisdiction to interfere is excluded by the statute which sets up the special Courts. Section 561-A, Criminal P. C., makes it clear that this principle applies not only to a case of civil nature but also to criminal cases.

A Magistrate acting under S. 39, Punjab Panchayat Act, functions judicially and not admtnistratively and this being so, its functions at once become open to the revisional jurisdiction of the High Court. AIR (Vol 31) 1944 Lah 218 : 45 Cr L J 734 : 214 Ind Cas 158 (DB).

——S. 55.

——S. 55 — Scope and effect of — Occurrence witnessed by members of Panchayat—Trial of case by Panchayat—Conviction—Legality.

S. 55 of the Punjab Panchayat Act, like S. 556, Cr. P. Code, accords statutory recognition to the principle that a person cannot be judge of his own cause. The trial and conviction by a Magistrate of an accused in a case where the Magistrate is himself a witness is illegal. Although the Panchayat Act has constituted a separate tribunal for certain kinds of offences, that tribunal cannot appropriate to itself the role of an adjudicator and a witness.

The Panchayat being a Court when acting in exercise of judicial powers conferred upon it by the Act, it cannot try a case which arises in respect of an occurrence which the members of the Panchayat have witnessed. If the Panchayat tries such a case, both the trial and the order of conviction are manifestly illegal and must be set aside. 227 Ind Cas 185 : 47 Cr L J 1017 : AIR (Vol 34) 1947 Lah 238.

PUNJAB VILLAGE WATCHMEN RULES

——Rr. 43 & 44—Proof of offence — Circumstances rendering information incumbent and headman's omission to inform.

To establish an offence under Rr. 25 and 32 against a village headman, it would be necessary to show that when a cognizable offence had been committed the village headman received information of its commission and there were certain circumstances existing which rendered it incumbent upon him to report to the police personally and he omitted to do so.

It is not sufficient to support conviction to prove the bare facts that a cognizable offence had been committed and the chowkidars had come to know of such offence and had not reported. 110 Ind Cas 685 : 10 Lah 219 : 11 A I Cr R 11 : 29 P L R 537 : 29 Cr L J 749 : 1929 Cr C 82 : AIR (Vol 16) 1929 Lah 520.

PURAKUDI
See Land Tenure.

PURCHASER
See (1) Civil P. C., O. 21, Rr. 93 and 94.
(2) Contract Act, Ss. 69 and 70.
(3) Sale of Goods Act.
(4) T. P. Act, Ss. 54 and 55.
(5) Vendor and Vendee.

PUROHIT OFFICE
See (1) Civil P. C., S. 9.
(2) Hindu Law—Religious Office.
(3) T. P. Act, S. 6.

PUTRA BHAG AND PATNI BHAG.
See Hindu Law—Partition.

PUTRA PAUTRADI
See (1) Deed—Construction.
(2) Hindu Law—Will.
(3) Will—Construction.
(4) Words and Phrases.

PUTRAVAKASAM GIFT
See Malabar Law.

PUTRESHTI YAG
See Hindu Law—Adoption.

QUANTUM MERUIT
See (1) Contract Act, Ss. 69, 70 and 73.
(2) Vendor and Vendee.

QUARRIES
See (1) Landlord and tenant—Mines.
(2) Lease.
(3) Mines and minerals.

QUASHING PROCEEDINGS
See Criminal P. C., S. 439.

QUASI EXECUTOR
See (1) Succession Act, S. 303.
(2) Trust—Trustee de son tort.
(3) Will—Executor.

QUASI JUDICIAL ORDER
See Specific Relief Act, S. 45.

QUEEN'S REMEMBANCER'S ACT (1859), (22 & 23 Vict. Ch. 21).

——S. 26.

——S. 26—The phraseology of S. 122, Civil P. C., is in no way analogous to that of S. 26, Queen's Remembrancer's Act. It is much wider. AIR (Vol 29) 1942 Lah 201 : 44 P L R 253 : ILR (1943) Lah 569 : 201 Ind Cas 667 (DB).

QUESTION OF FACT AND LAW
See (1) Civil P. C., Ss. 100, 110 and 115.
(2) Income-tax Act, S. 66.
(3) Privy Council.

QUESTION OF LAW
See C. P. C., Ss. 100, 110.

QUESTION OF LAW OR FACT
See (1) C. P. Code, Ss. 100, 110.
(2) Income-tax Act, S. 66.
(3) Privy Council.

QUESTION OF LAW—SUBSTANTIAL
See Civil P. C., S. 110.

QUESTION OF TITLE
See (1) Civil P. C., S. 9.
(2) Criminal P. C., S. 145.
(3) Provincial Small Cause Courts Act, S. 23.

QUETTA.

——Quetta is a part of the State of Khan of Qalat who is a foreign or Indian Prince within the meaning of S. 311 of the Government of India Act, 1935, and is situated within the territory of a foreign Prince or State and not within tribal areas. AIR (Vol 29) 1942 Pesh 49: 201 Ind Cas 610 (DB).

——Quetta is not a part of British India as defined in S. 3, General Clauses Act. AIR (Vol 21) 1934 Sind 123: 28 SLR 54: 155 Ind Cas 677 (DB).

QUINQUENNIAL REGISTER REGULATION, (Beng. Reg. 48 of 1793).

——Miscalculations in returns.

If in fact, the boundaries are proved to include an area for greater than that referred to in the returns such miscalculation or misrepresentation cannot defeat the title to the estate. AIR (Vol 8) 1921 Cal 687: 34 CLJ 141: 65 Ind Cas 866 (DB).

QUORUM
See (1) Club.
(2) Companies Act, S. 79.
(3) Company — Meeting.

QUO WARRANTO.
——Writ of.
See Specific Relief Act, S. 45.

RACE.
See Hindu Law—Applicability.

RACES.
See (1) Civil P. C., S. 9—Special Tribunal.
(2) Club.
(3) Racing.

RACING.
See also Club.

——Racing Club—Royal Western India Turf Club Rules, Rr. 103, 180—"Misconduct" in R. 103 is not restricted to offences under R. 180 — Misconduct sufficient for withdrawing licence of trainer explained.

There is nothing which restricts the word "misconduct" in R. 103 to the specific offences defined in R. 180; the word is very general, and has purposely been left very general. Hence the stewards are within their right in withdrawing the licence of a trainer, charged with any conduct which reasonable men might regard as misconduct in a trainer, provided they honestly entertain the opinion, and arrive at it in a proper way, that he was guilty of that conduct and that it is "misconduct" in connection with racing. AIR (Vol 33) 1946 Bom. 88: 47 Bom. LR 916.

——Racing club—Suit for damages against stewards.

Where a racing club is incorporated, a suit for damages against stewards in respect of the alleged wrong done by the committee is maintainable. Stewards must be considered to be agents of the committee for such a purpose. AIR (Vol 33) 1946 Bom. 88: 47 Bom. LR 916.

——Jurisdiction of Civil Courts — Registration of horses—Implied assurance — Dispute—Decision by stewards—Civil Courts, interference by.

By registering horses, the Club gives an implied assurance to the horse-owners that their horses will be allowed to enter for the races conducted by the Turf Club unless their entries are refused or cancelled by the stewards, further, if the matter in dispute between the horse-owner and the Club is within the jurisdiction of stewards, and they give the person against whom action is intended to be taken, a fair opportunity of answering the charges made against him, it is not open to the Civil Courts to sit in judgment on the orders passed by the stewards. It is, however, for the Civil Courts to determine whether a certain matter in dispute is within the jurisdiction of the stewards, and if so, whether they have acted in accordance with the elementary principles of natural justice and fair play. The jurisdiction of Civil Courts can only be exercised within these narrow limits. AIR (Vol 32) 1945 Sind 21: ILR (1944) Kar. 364: 218 Ind Cas 385.

——Turf Club—Registration of horses—Effect of.

Horses are registered for specified purposes, that is, that they would become eligible to enter races. Various expenses are incurred by the owner in order to acquire this eligibility. Therefore, by registering the horses, the Turf Club gives an implied assurance to the owner that his registered horses will be allowed to run in races unless their entries are refused by the Stewards of the Club. AIR (Vol 29) 1942 Lah 179: 44 PLR 236: 201 Ind Cas 619.

RAILWAY.
See (1) Carriers.
(2) Civil P. C. S., 80.
(3) Contract Act, Ss. 151, 152, 161.
(4) Land Acquisition Act, S. 4.
(5) Master and Servant.
(6) Railways Act.
(7) Tort—(a) Negligence.
(b) Secretary of State

RAILWAY COMPANY
—Coaching Tariff Rules.
See Railways Act (1890), S. 47.

RAILWAY RECEIPT
See (1) Contract Act, Ss. 107 and 178.
(2) Railways Act.

RAILWAYS ACT (9 of 1890)
——S. 3.

——S. 3 (4)—"Railway"—Backwater, whether railway.

Where there is a general contract between a Railway Company and a Canal Company by which a work of carrying boats on the backwater is done by the Canal Company, it cannot be said that the backwater is a railway within meaning of S. 3 (4) (d) of the Act. AIR (Vol 18) 1931 Mad 115: 1930 MWN 816: 130 Ind Cas 658.

——S. 3 (4)—Railway—"Staff quarters".

Staff quarters or any building of a residential character cannot be deemed to be part of a railway, and the fact that the place happens to be between two lines makes no difference if the lines by themselves are so quite apart that there can be even private lands between the lines. AIR (Vol 14) 1927 All 646 : 25 ALJ 710 : 8 AI Cr. R. 181: 28 Cr LJ 648: 103 Ind Cas 104.

——S. 3 (4)—"Railway"—Staff-quarters — Whether railway.

Staff-quarters for residence are not part of Railway within S. 3 (4). AIR (Vol 1) 1914 Mad 196: (1914) MWN 124: 15 Cr LJ 225: 23 Ind Cas 177 (DB).

——S. 3 (4) and (5) — "Railway" and "Railway Company"—Meaning—New plea.

"Railway" includes all ferries, ships, etc., used on inland waters for the purposes of the traffic of a Railway and belonging to or hired by the authority administering the Railway; hence a navigation company which undertakes to convey goods despatched by Railway to other places is also a "Railway."

A plea that the deft. Company is not a Railway Company within the meaning of the Act cannot be raised for the first time on appeal. 233 PLR 1912: 111 PR 1912: 224 PWR 1912: 15 Ind Cas 12 (DB).

——S. 3 (4)—"Railway"—Meaning.

"Railway" includes "all stations, offices, warehouses, etc., constructed for the purpose or in connection with a Railway Company." 116 PLR 1911: 36 PR 1911 : 102 PWR 1911: 9 Ind Cas 1011 (DB).

——S. 3 (6) — "Railway Administration"— Prosecution of Manager of State Railway in representative capacity for offence under S. 14, Bengal Act (1 of 1893), if misconceived—Applicability of S. 197, Criminal P. C., and S. 270, Government of India Act, 1935.

Section 3 (6) means that the manager of a State Railway will represent that railway to the same extent as the company represents a railway administered by that company. It would, therefore, follow that, as in suitable cases it would be possible to prosecute a railway company, it would also be legal to prosecute a manager as representing a railway administered by the Government.

Hence, the prosecution of the manager of the State Railway in a representative capacity for any offence under S. 14 of Bengal Licensed Warehouse and Fire Brigade Act, cannot be said to be misconceived by reason merely of the form of the complaint. Section 197, Criminal P. C., and S. 270, Government of India Act, have no application to such a case. AIR (Vol 28) 1941 Cal 319: ILR (1941) 1 Cal 345: 45 CWN 347: 42 Cr LJ 855: 196 Ind Cas 394.

——S. 3 (6)—"Railway administration"—Civil P. C. (Act 5 of 1908), S. 80—Suit against State Railway—Notice under S. 80—Necessity of.

A suit cannot be instituted against a Railway Administration which is owned by the Govt. without giving a notice under S. 80, Civil P. C. A notice served on the Manager of the Railway Administration under the Railways Act is insufficient. AIR (Vol 18) 1931 Pat 393: 12 PLT 681: 135 Ind Cas 98 (DB).

——S. 3 (6) — "Railway Administration" — Scope—Agent of a railway is not viewed as an agent but a principal and the maxim delegatus non potest delegare does not apply in his case—Maxims—Delegatus non potest delegare and notice to agent's nominee is notice to agent.

The maxim delegatus non potest delegare lays down the general rule that when a principal has entrusted a power or duty to an agent, the latter cannot delegate that power or duty to another person. But the law enacted by S. 77 read with S. 3 sub-s. (6) of the Indian Railways Act views the Agent of a railway as a principal and not as a delegate; and the maxim which prohibits, subject to certain exceptions, a delegation by a delegate, in other words, a second delegation, cannot be invoked for the purpose of preventing the principal himself from delegating his power.

The doctrine is well recognized that whatever a person has power to do himself he may do by means of an agent, qui facit per allum facit per se. Moreover, the maxim has a very limited application even to a delegate or agent. It applies only when the delegation involves a trust or a discretion in the agent for the exercise of which he is selected.

It applies only to acts which the delegate has expressly or impliedly undertaken to perform personally, but it does not apply to acts for which in the ordinary course of business a sub-agent may or must be employed. AIR (Vol 13) 1926 Lah 253: 7 Lah 238: 8 LLJ 206: 27 PLR 356: 95 Ind Cas 808 (FB).

——Ss. 3 (6) and 140—"Railway Administration"—Connotation.

The connotation of the words, "Railway Administration" in S. 3 of the Act is not in any way cut down by S. 140 of the Act. AIR (Vol 4) 1917 Cal 640: 44 Cal 16: 23 CLJ 547: 31 Ind Cas 130 (DB).

——Ss. 3 (6), 77, 140—"Railway administration"—Notification of claim for refund as condition precedent to suit—To whom such notification must be given.

Where the plaintiff sued a Railway Company for recovery of money alleged to have been taken by the defendant as freight upon certain goods in excess of what was legally due, and before filing the suit gave notice of her claim for a refund to the General Traffic Manager. It was held, that this was not a compliance with the provisions of the Indian Railways Act, and the suit could not be maintained. 1906 AWN 101: 3 ALJ 329: 28 A 552 (553) (DB).

——"S. 3 (7)—"Railway servant" — Cabinman, if railway servant.

A cabinman is a railway servant within the meaning of S. 3 (7). AIR (Vol 28) 1941 Sind 117: 42 Cr LJ 786: 195 Ind Cas 833 (DB).

—— S. 3 (7)—"Railway servant"—'Employed,' meaning of — Person contracting with Railway to perform service on its behalf — Whether 'employed' by the Railway.

The word "employed" is freely used to denote the relationship between a person who wants a work done and an independent contractor, whom he gets to do it for him and in a very large proportion of the cases, in which a person contracts with the Railway to perform certain service on its behalf, he can be said to be employed by the Railway to do that service and so comes within the definition of S. 3 (7) of the Railways Act. The case of a person who, in pursuance of an agreement between himself and a Railway Administration by which he used certain premises belonging to the Administration to provide meals for passengers by that Railway, is one of these cases. AIR (Vol 24) 1937 Lah 547 : 38 Cr L J 793 : 169 Ind Cas 649.

——S. 3 (7) — "Railway servant."

"Service of a railway" is not limited to the actual running of the trains. AIR (Vol 11) 1924 Rang 373 : 3 Bur LJ 147 : 26 Cr LJ 190 : 83 Ind Cas 894.

——S. 3 (7)—"Railway servant."

A person employed by one authorised by a Railway Company to act on their behalf is a Railway servant. AIR (Vol 11) 1924 Rang 373 : 3 Bur LJ 147 : 26 Cr L J 190 : 83 Ind Cas 894.

——S. 3 (7)—"Railway servant."

One who is engaged by a Railway to pass sleepers and who is paid by results partly by the Railway and partly by the contractor is a Railway servant. AIR (Vol 11) 1924 Rang 373 : 3 Bur L J 147 : 26 Cr LJ 190 : 83 Ind Cas 894.

——S. 3 (11) — Traffic.

Traffic does not include person going to a Railway station to see a friend off. 116 PLR 1911 : 36 PR 1911 : 102 PWR 1911 : 9 Ind Cas 1011 (DB).

——Ss. 3 (14), 41 — "Terminals" — Transhipment charges, nature of — Suit — Jurisdiction of Civil Court.

Transhipment charges, though designated by a special name, come within the general definition of 'terminals' in S. 3 (14), and can only be levied as such and a Civil Court has, therefore, no jurisdiction to entertain a suit relating to such charges. In India, there is no distinction between 'service terminal' and 'station terminals.' AIR (Vol 19) 1932 Nag 53 : 28 NLR 27 : 137 Ind Cas 159.

——S. 7.

——S. 7—Railway, whether can be legally prosecuted under S. 14 of Bengal Act for using unlicensed warehouse.

The Railways Act is a Central Act and, in a matter of erecting warehouses, the Local Legislature has no authority to enact provisions relating to railways which are inconsistent with those of Central Act. It is not, therefore, incumbent on the railway to take out a license for their warehouse under the Bengal Licensed Warehouse and Fire Brigade Act and the Railway cannot be legally prosecuted under S. 14 of the Bengal Act for using unlicensed warehouses even if these warehouses were being used for the purpose of storing customers' goods in connection with the ordinary course of the Railway's business. AIR (Vol 28) 1941 Cal 319 : 45 CWN 347 : ILR (1941) 1 Cal 345 : 42 Cr L J 855 : 196 Ind Cas 394.

——S. 7—Level crossing—Closing of, if justifiable.

Railway Company can close the level crossing and open a new one at any point lower down the line. AIR (Vol 7) 1920 Bom 155 : 22 Bom LR 822 : 57 Ind Cas 601 (DB).

——Ss. 7, 10 and 11—Level crossing—Public street—Street vested in Municipality — Sanction of Government.

The respondent Railway Co., constructed a line of railway across a public street vested by statute in the appellant Municipal Corporation without obtaining the consent of the latter and without taking proceedings under the Land Acquisition Act for the acquisition of the highway.

Held, that the provisions of the Land Acquisition Act did not cut down the power of the Railway Company under S. 7 of the Railways Act, to carry a

line of railway across a public street, subject to the control of the Governor-General in Council, that the construction of the railway line across the street was not an acquisition of immoveable property within S. 7 and that the Railway Company had power to lay the railway lines under S. 7 without obtaining the consent of the appellant Municipality. AIR (Vol 3) 1916 P C 3 : 41 Bom 291 : 21 MLT 1 : 19 Bom L R 48 : 15 ALJ 63 : (1917) MWN 83 : 21 C W N 447 : 25 CLJ 209 : 43 IA 310 : 38 Ind Cas 923.

[On appeal from A I R (Vol 1) 1914 Bom 104 : 38 Bom 565: 23 Ind Cas 765 (DB).]

——S. 7—Laying line across Municipal street—"Notwithstanding anything in any other enactment" etc.

The words "Notwithstanding anything in any other enactment ....." in S. 7 empower a Railway Co. to do certain acts specified in it, regardless of provisions in other enactments so that a Railway Co., desiring to lay a line across a Municipal street, need not proceed under Land Acquisition Act, nor obtain permission under S. 293 of the City of Bombay Municipal Act. AIR (Vol 1) 1914 Bom 104 : 38 Bom 565 : 16 Bom L R 104 : 23 Ind Cas 765 (DB).

[On appeal A I R (Vol 3) 1916 P C 3 : 41 Bom 291 : 38 Ind Cas 923.]

——S. 7—Storage of sleepers.

Where it was found that it was necessary for the convenient making, maintaining, altering or repairing Railway that the Railway Co., should be at liberty to store Railway sleepers on a certain premises within Bombay Municipality.

Held, that the statutory powers given by S. 7 precludes the necessity of obtaining a license from the Municipal Commissioner, Bombay City. That section provides for an undivided and exclusive control of Railway Administration by the Supreme Government. (1910) 34 Bom 252 : 11 Bom L R 1181 : 10 Cr LJ 543: 4 Ind Cas 281 (DB).

——S. 7 — City of Bombay Municipal Act (Bombay Act (III of 1882), S. 394 — Railway Company storing sleepers on their premises—License from the Municipal Commissioners for the use of premises not necessary.

The G. I. P. Railway Company used certain plots of land in Bombay for the purpose of storting sleepers (timber) for the use of their line. In the Presidency Magistrate's Court the agent of the Company was charged, under S. 94 (1) (d) of the City of Bombay Municipal Act with having used the plots for storing timber without a license from the Municipal Commissioners.

Held (1) that no licence was necessary, as S. 7 (1) of the Indian Railways Act enabled the Railway Company to do all acts necessary, for making, maintaining, altering or repairing and using the Railway notwithstanding anything in any other enactments for the time being in force.

(2) That the storing of sleepers was necessary for the maintenance, repairing, etc. of the Railway line.

(3) That under Sub-s. (2) to S. 7 the exclusive control of the Railway administration was vested in the Governor-General in Council, and if the Company was exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it was open to the Municipal Commissioners to make a representation to that effect to the Governor-General in Council. (1909) 11 Bom L R 1181: 34 Bom 252 (258, 259) (DB).

——Ss. 7, 10, 11 — Construction and maintenance of works — Compensation for damage caused by Railway works — Suit to enforce construction of a channel to irrigate land—Maintainability.

Plaintiff alleged that the execution of certain works by a Railway Company interfered with his right to the flow of water to his land, and sued to enforce construction of a channel to irrigate his land. He did not allege that the Company exceeded its power.

Held, that he had no cause of action. The effect of S. 11 is that the opinion of the executive, with reference to the sufficiency of accommodation works, is final. (1901) 25 Mad 632 (633, 634) (DB).

——S. 7 (1)—Watercourse—Natural navigable stream —Portion of bed of stream vested in some person — Rights of.

A portion of the bed of a natural navigable stream which flows through lands of many owners is not and cannot be the private property of the person in whom that portion of the bed of the stream is vested (by the proceedings under the Land Acquisition Act). He has, therefore, no right to cut the embankment and divert the water of the khal in such a way as to interfere with the natural rights of other persons in the stream. A I R (Vol 30) 1943 Cal 128 : 47 C W N 130 : 76 C L J 67 : I L R (1943) 1 Cal 172 : 206 Ind Cas 84 (DB).

——S. 7 (1) (f) — Test to see whether acts are authorised — Interference by Court — Construction of channel, held not authorised.

Under S. 7 (1) (f), the railway oompany can execute only those works which are reasonably necessary for the authorised purposes. The fact that certain works will effect a saving of expense to the company is not sufficient to constitute such necessity; but the Court does not, as a rule, interfere with a company in the bona fide exercise of its discretion to execute authorised works, on the ground merely that other equally authorised works would be less inconvenient or cause less damage to individuals. [Construction of channel by railway company, held not authorised within S. 7 (1) (f)]. A I R (Vol 30) 1943 Cal 128 : 47 C W N 130 : 76 C L J 67 : I L R (1943) 1 Cal 172 : 206 Ind Cas 84 (DB).

——S. 10.

——S. 10 Sub-s. (2)—Suit for compensation — Land acquisition for constructing a bridge.

A suit for damages for permanant injury to a ferry caused by acquisition under Land Acquisition Act, by irregularities committed in notice under S. 9 of the Land Acquisition Act, is maintainable in Civil Court, notwithstanding an award has been made by the Deputy Collector not allowing any compensation for the ferry. S. 10 (2) of the Railways Act does not bar such a suit when the collector refuses to adjudicate upon the claim put forward by the owner. (1907) 5 C L J 669:11 C W N 356:34 Cal 470 (483-485) (DB).

——S. 11.

——Ss. 11 (3) (b) and 12 — Applicability — Railway company constructing culvert under railway line as accommodation-work to take off overflow water from a tank within municipal limits—Culvert found subsequently insufficient to take off the entire water — Requisition by Provincial Government to Railway company to enlarge the culvert as a further or additional accommodation work—Legality — Work done by Railway company under protest and without prejudice to its claim to be repaid its cost either by Government or Municipality — Right of Railway to recover by suit the cost from the Municipality—Contract Act (IX of 1872), S. 70—Applicability.

In 1902 when a branch line was constructed the Railway company provided a culvert over a channel as an accommodation work under S. 11 (1) (b) of the Railways Act to take off the surplus water of a tank and the storm and sewage water of several municipal drains which ran into the channel. Both the channel and culverts and the adjoining lands were within the municipal limits of the town of Madura.

In 1936-38 it was found that the culvert was unable to discharge the suprlus water and the surrounding areas were flooded. On a representation by the Municipality, the Provincial Governmeat of Madras

purporting to act in exercise of the special powers vested in them under S. 11 (3) (b) of the Railways Act issued a requisition to the Railway company to enlarge the culvert at its own cost as a further or additional accommodation work.

The Railway company always denied its liability and protested that the requisition was illegal and ultra vires, but nevertheless carried out the work without prejudice to its claim to be repaid the cost either by the Provincial Government or by the Municipality or by both.

But both the Government and the Municipality repudiated all liability for such expense. In a suit by the Railway company to recover the cost from the Municipality on the ground that the requisition of the Government was ultra vires and that the company was entitled to recover the cost from the Municipality by reason of the provisions of S. 70 of the Contract Act.

Held, the obligation imposed upon the Railway company by S. 11 (1) of the Act is to be measured by the conditions existing at the time of the making of the branch line in 1902. It cannot be said the enlargement of the culvert was a work which was as necessary in 1902 as it was in 1938 because it is only the growth of the city of Madura that made the enlargement necessary. Hence, the Provincial Government had no power to issue the requisition in question.

But the Railway company cannot succeed in the suit for the reason, that though the work was lawfully done and it was not intended to be done gratuitously, it cannot, in the circumstances, be said that it was done for the Municipality or that the Municipality enjoys the benefit of it within the meaning of S. 70 of the Contract Act. A I R (Vol 36) 1949 P C 39 : 75 I A 213 : I L R (1949) Mad 529 : 53 C W N 294 : 51 Bom L R 927 : 62 L W 912 : 1948 A L J 462 : (1948) 2 M L J 546.

——S. 11 (3) (b)—Accommodation work within Municipal limits—Liability of Municipality for costs — Contract Act, S. 70.

Where a railway administration, in pursuance of the Govt. orders under S. 11 (3) (b), widens a culvert to take out the overflowing water of a tank situated in a Municipal area, at its own costs, a suit by the railway administration against the Municipality for the recovery of the costs is not maintainable. Section 70, Contract Act has no application, because the work was done under the Govt. orders for the benefit of private owners of property in the neighbourhood and not for the benefit of the Municipality. A I R (Vol 32) 1945 Mad 427 : 58 L W 338 : (1945) 2 M L J 155 : 1945 M W N 441 (DB).

——S. 11 (3) (b) — Scope — Accommodation work — Order under—English rule.

Section 11 (3) (b) gives power to the Govt. to require an additional accommodation work to be carried out by the railway administration at any time at the cost of the railway administration, even if many years have elapsed since the construction of the railway. In this respect, the English Law differs from the law in British India and therefore, the rule laid down in English cases that the Railway Company cannot be required to make works beyond what is necessary at the time of the construction of the railway has no application to S. 11 (3) (b). A I R (Vol 32) 1945 Mad 427 : 58 L W 338 : (1945) 2 M L J 155 : 1945 M W N 441 (DB).

——S. 12.

——S. 12—Scope and applicability.

Section 12 applies when an owner or occupier of land affected by a railway asks for further accommodation works to be carried out or if the Provincial Govt. or a local authority desires to construct a public road or other work across, under or over a railway. It has no application where the work is carried on pursuance of Govt. orders under S. 11 (3) (b) of the Act to widen the existing culvert to take out the overflowing water from a tank situated in municipal area. A I R (Vol 32) 1945 Mad 427 : 58 L W 338 : (1945) 2 M L J 155 : 1945 M W N 441 (DB).

——S. 13.

——S. 13 — Duty to cut grass from Railway track — Dry grass in vicinity catching fire from engine sparks—Contributory negligence.

There is obviously no statutory duty on a Railway Company to cut all grass from the railway track and to see that at no place any grass grows or that any dry grass is allowed to remain there. At the same time, this may be a reasonable precaution which a Railway Company should take. So far as damage caused by sparks emitted from the funnel of an engine is concerned, proof of negligence would depend on the defective nature of the contrivance used to prevent the emission of sparks.

So far as fire caused to dry grass growing on or near the railway track is concerned, the damage may be caused by the ignition of such grass by live cinders falling from the engine. It is for the Court to decide whether dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence on the part of the Railway Company.

Where the plaintiff, fully knowing the danger from the engine sparks, allows the dry grass of hiram to remain near the railway line and this is allowed to grow due to the non-feasance of the Railway Company and the fire occurs, the plaintiff is guilty of contributory negligence. AIR (Vol 22) 1935 All 669 : 155 Ind Cas 631, Reversed. A I R (Vol 23) 1936 All 771 : 1936 A L J 262 : 1936 A W R 301 : 58 A 771 : 165 Ind Cas 882 (DB).

——S. 13 — Precautions mentioned whether exhaustive—Negligence on part of Railway depends on circumstances.

Under S. 13, the Governor-General in Council is authorised to require certain precautions to be taken. But the enumeration of the precautions mentioned in S. 13 is not in any way exhaustive, for instance, defects in the contrivance of an engine are not mentioned therein and it cannot be urged that such a defect would not make the Railway Company liable.

Each case must depend on its own circumstances and the Court has to decide on the evidence before it whether there has been negligence to such an extent as to make the company liable. AIR (Vol 23) 1936 All 771 : 1936 A L J 262: 1936 A W R 301: 58 A 771 : 165 Ind Cas 882 (DB).

——S. 16.

——S. 16—Nuisance to public.

Where there is no restriction imposed on the Railway Company as regards their right to use locomotives only at scheduled times or at a particular speed, whatever nuisance or inconvenience may be caused to the public in general it cannot be regarded as a violation of any duty which the company owe to them or as amounting to any negligence which may form a ground of action so far as they are concerned. A I R (Vol 15) 1928 Cal 504 : 108 Ind Cas 37 : 48 C L J 45.

——S. 41.

——S. 41—Jurisdiction of Civil Court to investigate into Railway Company's liability created by statute.

Chapter V of the Railways Act provides the detailed remedies under Ss. 72 to 82. Chapter V of the Act gives a particular remedy against the Railway Company for a liability created by the statute itself and S. 41 excludes the jurisdiction of the Civil Court. It is to be inferred that the litigant is confined to this remedy which has been specially provided. AIR (Vol 26) 1939 Nag 141 : 1939 NLJ 124 : 185 Ind Cas 241.

——S. 41—Transhipment charges — Suit — Jurisdiction.

Transhipment charges are terminals within meaning of S. 3 (14) and not toll for using a ferry under S. 51 (f) and Civil Court has no jurisdiction to entertain a suit relating to such charges. AIR (Vol 19) 1932 Nag 53 : 28 NLR 27 : 137 Ind Cas 159.

——S. 41—Accused charged under S. 109 (1) — Defence if contravention of Chap. V.

A person accused of an offence under Railways Act (S. 109 (1)) can allege a contravention of the provisions of Chap. V by Railway Administration in his defence since he cannot be said to have taken proceedings thereby. AIR (Vol 9) 1922 Mad 35 : 45 Mad 215 : 23 Cr L Jour 296 (DB) ; See also A I R (Vol 10) 1923 Bom 1 : 47 Bom 465 : 24 Cr L Jour 297 (DB).

——S. 41—Reservation of compartment for particular class.

S. 42 deals not only with goods traffic and the rates charged to traders but also with the traffic by the carriage of human beings, and therefore under S. 41 the question as to the legality of the reservation of a compartment for a certain class of passengers is outside the scope of the jurisdiction of the civil Courts. 42 All. 327, Diss. from. AIR (Vol 8) 1921 Bom 73 : 45 Bom 1324 : 23 Bom L R 809 : 62 Ind Cas 1004 (DB).

——S. 41—Undue or unreasonable preference—Ordinary Court, it could consider.

Ordinary Courts cannot in view of the provisions of Ss. 26 to 41 of Chapter V of the Railways Act, consider whether there has been any undue or unreasonable preference within S. 42 of that Act. (1913) 7 SLR 42: 21 Ind Cas 499 (DB).

——S. 42.

——S. 42—Carrying at railway risk— Option of the railway.

Under S. 42 the railway are bound according to their powers to afford reasonable facilities, but that cannot be construed as imposing on them the duty to take any particular class of goods at railway risk, if they do not think fit to do so. AIR (Vol 14) 1927 Bom 468 : 29 Bom L R 944 : 104 Ind Cas 773 (DB).

——S. 42—Resevation of compartment for particular class—Undue preference —General power of Company to regulate traffic.

In particular circumstances the reservation of a compartment for a class of passengers or intending passengers without remuneration may amount to undue preference within the meaning of S. 42 (2) of the Railways Act. Traffic includes not only carriage of goods only but of passengers also.

The departmental rule enabling the Company to reserve a compartment for a class of ordinary passengers may be a violation of the term of S. 42 (2) in certain circumstances but the Company has a general power to regulate its traffic and arrange for the accommodation and convenience of its passengers so long as it does not bring itself within that section.

A Railway Company has an absolute right to regulate its own traffic in its own way, its own interest being the best security that its strict legal right to do so will not be abused so long as it does not contravene any express provision of the law. AIR (Vol 11) 1924 Cal 687: 51 Cal 168 : 28 CWN 388: 39 CLJ 107: 25 Cr L J 1012 : 81 Ind Cas 788 (DB).

——S. 42—Undue preference—Onus of proof.

The railway is entitled to reserve accommodation for a particular class of persons without showing undue preference. The onus of proving undue preference is on the person who asserts it. It is a question of fact whether there has been undue preference.

Per Shah, Ag. C. J. :—A penal provision ought to be strictly construed and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on the occasion. A reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42 (2). AIR (Vol 10) 1923 Bom 1 : 25 Bom L R 26 : 24 Cr L J 297 : 47 Bom 465 : 72 Ind Cas 25.

——S. 42 — Reservation — Legality — Authority to reserve.

A Railway Company can legally reserve a compartment for the use of Europeans and Anglo Indians only.

Per Ayling, Officiating Chief Justice and Oldfield, J. (Krishnan, J., dissenting). — A person who is not a European or Anglo-Indian commits an offence under S. 109 (1) by entering and persisting in remaining in a 3rd class compartment to which a card has been attached purporting, over the signature of a Senior Ticket Examiner, to reserve it for Europeans and Anglo Indians.

Per Officiating, C. J.—There is nothing in any of the rules of the Traffic Working Orders indicating that a compartment can only be legally reserved by a label or notice signed or initialled, since the direction in the Rule 172-A to the effect that a station master should label a carriage or compartment does not necessarily imply that he must do so with his own hands or himself sign the label.

Per Oldfield, J.—The expression "traffic" in section 42 (2) is not confined to conveyance of animals and goods and fixing the charges thereof.

Per Krishnan, J.—Where the label was in the carriage door and was not the usually printed label signed or initialled by the station master, the compartment is not reserved.

Per Officiating C. J. and Oldfield, J. — The term "passenger" in section 109 (1) is not restricted to a person who actually enters a railway carriage for the purpose of travelling but also includes possible passengers, who may join at any later station. The object and the result of making rules under S. 47, Cl. (1) with the sanction of the Governor-General in Council are only to make their breach an offence punishable by the Courts.

The Traffic Working Orders are not such rules. The reservation of a compartment for Europeans and Anglo-Indians or for any class of passengers is not an undue or unreasonable preference in favour of a particular description of traffic within S. 42, Cl. 4. AIR (Vol 9) 1922 Mad 35 : 45 Mad 215 : 42 MLJ 21 : 1922 MWN 34 : 30 MLT 134 : 15 MLW 207 : 23 Cr L J 296 : 66 Ind Cas 520 (FB).

——Ss. 42, 45, 47 and 109— Reservation of seals — Legality of —Breach of the rules -Offence.

A by-law or rule providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for general convenience of the travelling public is legal under S. 47 of the Railways Act.

The "preference" forbidden by Ss. 42 and 43 refers to goods traffic and rates charged upon traders and does not apply to passengers. A person who enters a compartment of a Railway carriage reserved by a Railway Co., for the use of passengers of a particular class to which he does not belong and refuses to leave when required to do so by a Railway servant, is liable to penalty under S. 109 of the Railways Act. AIR (Vol 7) 1920 All 106 : 42 All 327 : 2 UPLR (All.) 65 : 21 Cr L J 294 : 18 ALJ 254 : 55 Ind Cas 342 (DB.)

——S. 45.

——S. 45—Transhipment—Charges.

The Railways Act makes no distinction between terminal charges and transhipment charges but transhipment charges are not allowed by the resolution of the Governor-General-in-Council and must be considered terminals. AIR (Vol 19) 1932 Nag 53 : 28 Nag L R 27.

——S. 47.

1. Meaning of terms.
2. Powers of Railway Company—Rules, interpretation of.
3. Liabilities of Railway Company.
4. Responsibility of Railway employees.
5. Validity of rules.
6. Scope.

1. Meaning of terms.

——S. 47—Rules under — B. B. and C. I. Railway Rules, Rr. 79 and 21—The word "package" in R. 79, meaning of—Effect of Rr. 21 and 79.

The word 'package' in R. 79 of B. B. and C. I. Railway Rules, framed under S. 47 is used as the receptacle which contains goods; that is to say, a packing case, a bale, trunk, a sack, a suit case or anything of the sort. The effect of Rr. 21 and 79 is that where the goods and articles contained in a consignment are misdescribed, the highest rate under R. 21 should be applied to the whole consignment and not merely to the weight of the misdescribed articles or goods. AIR (Vol 30) 1943 All 219 : 1943 A W R (H C) 44 : ILR (1943) All 488 : 207 Ind Cas 478.

——S. 47—Rules under—Rates for carriage—Transport via foreign line—Quoted rate, effect of.

The words 'for traffic' to a certain place constitute a phrase which is current in Railway parlance to indicate that the rates are for carriage to a junction whence the goods will be transferred to a foreign line.

Where rates are quoted for carriage of goods from a station on a railway line to another junction station on that line 'for traffic' to a station on a foreign line, the rates so quoted are for carriage of the goods only up to the junction, and do not include the rate chargeable for carriage to the station on the foreign line. AIR (Vol 19) 1932 Nag 180 : 141 Ind Cas 236.

——S. 47—'Day' definition of — Notice — What is sufficient.

A rule by a Railway Company that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day is neither unreasonable nor ultra vires. A specification on the ticket itself of the day of expiry is sufficient notice of the rule. AIR (Vol 1) 1914 Sind 149 : 8 S L R 14 : 25 Ind Cas 801 (DB).

——S. 47—Rules for the guidance of Public and Railway Officials having business on Railway Premises.

The desire of a person to see his friend off does not constitute business especially when his friend does not require any assistance from him. 116 P L R 1911: 36 P R 1911 : 102 P W R 1911 : 9 Ind Cas 1011 (DB).

2. Powers of Railway Company—Rules, interpretation of.

——S. 47 (1) (g)—Coaching Tariff Rules—R. 23 (B. B. and C. I. Railway Co.)—Contract by Station Master with passenger regarding amount of fare less than prescribed tariff.

A railway servant is bound to charge the correct rates of fares as mentioned in the Coaching Tariff. If a station master or a servant of a Railway Company makes any contract in accordance with the terms of the Coaching Tariff, the Railway Company will certainly be bound by it but where he ignores the provisions of the Coaching Tariff, then the contract made by him as regards the amount of fare with a passenger is not binding on the Railway Company. Rule 23 of the Coaching Tariff is a clear notice to the passengers that the Railway Company will have a right to correct any charges that may have been incorrectly made and to recover undercharges from whatever cause arising. Under the law, it will be implied that when a passenger makes a contract with the Railway, he does so with full notice of the conditions in the Coaching Tariff and the contract is subject to those conditions.

Where, therefore, the Station Master contracts with a passenger to carry a special train for him for a fare less than that prescribed by the Coaching Tariff, the contract is not binding on the Railway Company and the passenger cannot recover from the company the excess fare paid by him over and above the fare fixed by the contract. AIR (Vol 27) 1940 All 235 : 1940 A L J 122 : ILR (1940) All 212 : 1940 A W R 106 : 188 Ind Cas 400.

——S. 47 (1) (2)—Rules under—Any one infringing rules is punishable—Infringement of R. 17 — Person need not be railway servant.

Per Ferrers J. C.—A Railway Station is private property, and it is intended for certain purposes. Of those purposes a public market is not one. The rule forbidding the hawking and exposure for sale of goods on any station or platform comes within the meaning of the words "(g) generally, for regulating the travelling upon, and the use, working and management of, the Railway," and any person infringing the rules made thereunder is liable to be punished, for the words "any person" in Cl. 2 cannot be taken to be used for the restricted class of railway servants but applies to the public in general also.

Per Rupchand A. J. C.—Section 47 authorizes the framing of rules in respect of different objects, and these are enumerated in cls. (a) to (g). A bare reading of these clauses makes it abundantly clear that except cl. (e), the other clauses contemplate rules being made not only for the guidance of railway employees, but also for the guidance of the public. There are a number of decided cases in which rules framed under some of these clauses have been held binding upon the public and not to be ultra vires of the Section.

Per Ferrers J. C.—The wording of S. 134 clearly shows that any person, not being a railway servant, can be tried and punished for a breach of R. 17 made under S. 47.

Per Rupchand A. J. C.—In Chap. IX penalties are provided for breaches of certain rules both by the Railway employees and the public, and Ss. 107, 109, 117, 118 to 122, pre-suppose the framing of rules by the Railway under S. 47, binding upon the public, the non-compliance of which is made punishable by these sections.

There is no magic in the use of the expression "offence". It means any act or omission made punishable by the law for the time being in force. Clause (2) of S. 47 empowers the railway to provide punishment for breach of the rules and thereby impliedly makes a breach of such rules an offence. AIR (Vol 22) 1935 Sind 91 : 29 S L R 27 : 36 Cri L J 1345 : 158 Ind Cas 212 (DB).

——S. 47—Rules under—Freight — Consignment under "To pay" system—Consignor's liability for freight—Delivery of goods to consignee without recovering freight, effect of—Construction of invoice —Reference to rules of Company, propriety of.

Where goods are consigned to a Railway Company for carriage under the 'To pay' system, the Company is not bound to look to the consignee for freight and does not lose its right to recover the freight from the consignor by delivering the goods to the consignee without recovering the freight. The receipt of the goods by the consignee in such a case though it does not of itself create any obligation to pay freight, may amount to evidence of a new contract distinct from the contract of carriage whereby the consignee in consideration of the Railway Company giving up their line, agrees to pay them the freight. But whether this new contract exists or not is to be determined by the circumstances of each particular case.

It is not permissible to supplement the contract contained in the invoice in such a case by referring

to the rules of the Railway administration to the effect that freight was to be paid before the delivery.

The person who is primarily liable for the freight is the consignor and not the consignee. AIR (Vol 18) 1931 Cal 33 : 53 C L J 143 : 57 Cal 1168 : 129 Ind Cas 315 (DB).

——S. 47—Coaching Tariff Rules—Where a passenger has reached his destination.

Rule 64 applies only when a passenger is in transit. It has nothing to do with a passenger who has arrived at his destination. The rule is meant to apply to a case in which a passenger, either deliberately or by mistake has selected a route by which he is not permitted to travel by the ticket. In those circumstances, the rule lays down that the railway administration will make him travel by the shortest or the quickest route whichever he prefers. The rule cannot by any possible interpretation be made applicable to a case in which the journey has come to an end. AIR (Vol 15) 1928 All 670 : 51 All 399 : 1929 A L J 78 : 112 Ind Cas 654.

——S. 47—Coaching Tariff Rules — Travel by alternate routes—E. I. Ry.—Limit.

Clause (r) does not permit a passenger to travel beyond the place which he has to reach. The illustration given clearly shows that the point, which he must not go beyond, would be a place on the same longitude as the place of his destination. AIR (Vol 15) 1928 All 670 : 51 All 399 : 1929 A L J 78 : 112 Ind Cas 654.

——S. 47 (1)—Change in rates—Publication.

Section 47 (1) (g) and its related provisions require publication of a general rule governing the maximum and minimum rates, but the publication of a change in freight rates is not necessary in order to bind the public by that change. AIR (Vol 14) 1927 All 316 : 100 Ind Cas 260.

——S. 47—Rules under R. 59—Calculation of charges — Alteration of rates.

The Railway Company is not entitled to alter the basis of calculation at maund-rates on a consignment on which the rail receipt was granted to a calculation at wagon-rates or vice versa. AIR (Vol 13) 1926 All 296 : 92 Ind Cas 532.

——S. 47—Alteration of rates.

Though the Railway Company reserve to themselves a right of re-measurement and re-calculation on the arrival of the goods at their destination they are not entitled, when they have made a contract with the plaintiff to convey his goods at a particular rate on the amount of goods consigned, subsequently and without his knowledge to alter the entire basis of calculation merely because they have used for the conveyance of the goods a much larger wagon than was actually necessary to suit their own convenience. AIR (Vol 13) 1926 All 146 : 48 All 217 : 24 A L J 129: 6 L R A Civ 615 : 90 Ind Cas 99.

——S. 47—Rules under R. 59—Scope of power under —Alteration of the basis of rates.

A rule reserving the Railway Company's right of re-measurement, re-weighment, re-calculation and re-classification of rates, terminal and other charges at the place of destination did not give the railway company power to alter the contract between the parties and charge maund-rate in lieu of wagon rate. AIR (Vol 11) 1924 All 180 : 46 All 55 : 21 A L J 830: 4 L R A Civ 570 : 79 Ind Cas 562.

——S. 47—Change of the basis of rates.

The word "re-classification" must be limited to errors in calculation and not to any fundamental re-adjustment of the basis of the calculation itself, so where originally at the consignment station charges according to weight were levied, it is not open to the authorities at the delivery station to charge the consignor according to the wagon rates of the goods. AIR (Vol 8) 1921 Mad 621 : 13 M L W 300 : 62 Ind Cas 602.

——S. 47—Change of maund rate into waggon rate.

Where a Railway Company has accepted a consignment of goods and charged for their conveyance at maund rate, the maund rate cannot be changed into waggon rates for though the Company may have under the consignment note, the right of re-measurement, re-weighment, re-classification and re-calculations of rates at destination, this is not a case of re-calculation. AIR (Vol 4) 1917 All 424 : 34 Ind Cas 104.

——S. 47—General Rules—Great Indian Peninsula Railway Working Time Table, Order VII—Rules not invalid — Ultra vires—Guard's duty to see pair of points to ensure the safety of his train.

The rules in Order 7 of the G. I. P. Ry. Working Time Table though not made under S. 47 of the Indian Railways Act, are yet absolutely within the power of the Company to impose, so long as they are not inconsistent with the Railways Act or with the General Rules made under that Act.

The rules in Order 7 are merely administrative orders or executive directions, nevertheless, the Company's servants are bound to obey them. There is no inconsistency between the rules in Order 7 and the Railways Act or the General Rules made under that Act. The object of Rule 1, Order 7, is that the guard of a train waiting at a station on a loop line in order to enable another train running in the opposite direction to cross at the station, is to prevent a collision with his own train; in other words, he is to secure the safety of his own train by seeing to the particular pair of points which lead into the line occupied by his train. (1910) 12 Bom L R 930 (933, 934) : 8 Ind Cas 134 (DB).

——S. 47—Rules thereunder — Criminal offences, if created.

Neither S. 47 nor the rules made by a Railway Company under that section create any criminal offence. The section merely gives to the Company power to frame rules and to enforce them by imposing fines on its own officers. (1907) 11 C W N 583 (584).

3. Liabilities of Railway Company.

——S. 47 (1) (b) — Rules framed under — Deposit of luggage in cloak-room—Liability of railway—Extent of — Loss of such luggage—Quantum of damages.

Under the rules relating to deposit of luggage in cloak-rooms, framed under S. 47 (1) (f) of the Railways Act, the liability of a railway is that of a bailee as under Ss. 152 and 161 of the Contract Act. In the absence of any conditions limiting the liability, a passenger depositing his luggage in the cloak-room is entitled, in the event of its loss, to the entire value of the goods lost, but he is not, as a rule, entitled to any consequential damages resulting from the loss. A I R (Vol 36) 1949 Cal 591 : 53 C W N 406.

——Ss. 47, 72, 54—R. 28(2)—Goods Tariff, Part I. A —Condition in rule exempting Railway Company from liability for loss if goods are not removed within time allowed free of demurrage — Validity—Contract Act, S. 151.

The condition requiring that the goods shall be removed from the railway premises within a certain period after which demurrage and wharfage will be charged may be a valid condition relating to the delivery but the further condition laid down in R. 28 (2) of the Goods Tariff, Part I. A., that the railway is not liable in respect of any loss, destruction, deterioration or damage to such goods arising from whatever causes if the goods are not removed within the time allowed free of demurrage and wharfage is not a condition affecting delivery. It is condition exempting the railway from its liability for loss. Such a condition cannot be held to be valid because it not only exceeds

the rule making power of the railway but is also inconsistent with the liability imposed on the railway under S. 72. A bailee may, no doubt, contract himself out of the obligation under S. 151, Contract Act, but it is not open to him to put an end to his obligation by a rule made by himself which also is beyond his rule-making power. Under the general law, the railway is clearly liable as a bailee for loss of the goods. AIR (Vol 30) 1943 Lah 244 : 46 P L R 62 : 211 Ind Cas 216.

——S. 47 Rules under—Rr. 19, 27—Company, whether can escape statutory liability by issue of rules.

Railway Companies, like all statutory bodies, have certain rights, privileges and liabilities. Some of these liabilities are imposed by common law, others by statute. A Railway Company is not entitled by the mere issue of rules and regulations to escape a statutory liability unless the Legislature has sanctioned such a procedure. Under the Railways Act, in respect of all goods delivered to it for purposes of transportation, the Railway Company's liability is that of a bailee. The rule by which a Railway Company attempts to escape that liability is a rule which is inconsistent with the Railways Act itself, and therefore, ultra vires. A I R (Vol 23) 1936 All 69 : 1935 A W R 1389 : 1936 A L J 387 : 58 A 576 : 160 Ind Cas 703 (DB).

——S. 47—Rules under — Rate of freight — Wrong entry by station master—Company, if bound.

Even if the Station Master of the despatching station entered in the carriage forward receipt rates as chargeable to the station of destination, though it is really a rate chargeable up to the junction station the Railway Company is not bound by this entry of the Station Master. AIR (Vol 19) 1932 Nag 180 : 141 Ind Cas 236.

——S. 47(f) - Sale of goods — Rules under R. 12.

A sale by the Railway Company of the goods consigned before expiry of six months from date of consignment amounts to illegal conversion being in contravention of R. 12. AIR (Vol 14) 1927 All 220 : 49 All 300 : 25 A L J 159 : 99 Ind Cas 440 (DB).

——Ss. 47 (1) (f) and 72 — R. 2 of rules framed under S 47—Liability of Railway Co.

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises, it means some sort of acceptance by Railway a taking as a giving. The commencement of the Company's liability for goods delivered to be carried under S. 72 does not depend upon a receipt being granted and must be determined on the evidence in the case. AIR (Vol 2) 1915 Bom 24 : 39 Bom 485 : 17 Bom L R 496 : 29 Ind Cas 545 (DB).

—— S 47 (1) (f)—North-Western Railway Tariff Rule No. 464 (V) —Negligence of servants — Liability of Railway.

Tariff Rule 464 (V) of N. W. Ry. is a rule passed under S. 47 (1) (f) and has the force of law. The rule is wide enough to include the loss due to the negligence of Railway or the servants. So the railway is not liable for the damage caused by the negligence of its servants after the goods had arrived for delivery. (1912) 6 S L R 103 : 17 Ind Cas 37 (DB).

——S. 47 (b) — Responsibility of Railway Company for goods left on its premises without a receipt being got for them—Rules by the Company under the Act.

Held, that a rule by which a Railway Company disclaimed all responsibility for goods left on the Company's premises, unless certain conditions were fulfilled, the principle of which was that the goods should have been accepted on a receipt given for them by a duly authorized employee of the Company was a rule properly made under the provision of the Indian Railways Act, 1890, and that no suit in respect of the loss of goods merely deposited upon the Company's premises without such a receipt being taken for them could be maintained. (1901) A W N 107 : 23 All 367 (369) (DB).

4. Responsibility of Railway employees.

——Ss. 47 and 101 (c)—Rules 87 and 87 (a) — Accident—Message by guard.

If under Rr. 87 and 87(a) of the rules framed under Railways Act, the guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message. His omission to do so would make him liable under S. 101 (c) of the Act, if it results in endangering the safety of any person. AIR (Vol 7) 1920 Nag 18 : 54 Ind Cas 988.

5. Validity of rules.

——S. 47—General Rules, R. 27-A (5) and (6)— Validity.

Rule 27-A of the general rules that a Railway will not be responsible until a railway receipt is given is ultra vires and inconsistent with the Railways Act. AIR (Vol 20) 1933 Nag 261 : 29 NLR 333 : 147 Ind Cas 959.

——S. 47 — Rules under S. 54 — Validity of rules under—R. 27 (a), B. & N. W. Ry.

A Railway Company cannot avoid or unduly restrict its liability under the Railways Act by framing its own rules for the purpose and if any such rules are found to be unreasonable and inconsistent with the Act, such rules will be declared to be ultra vires and not binding upon those who have to deal with the railway company. Thus, R. 27 (a), B. & N. W. Ry., framed under S. 54, Railways Act, is ultra vires. AIR (Vol 16) 1929 Pat 296 : 117 Ind Cas 311 : 10 PLT 235 : 8 Pat 808 (DB).

——S. 47—Inconsistent with S. 72.

A Railway Company cannot enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the railway, nevertheless the Court shall not deem the goods to have been so delivered unless and until the railway servant in question has performed a particular act, for example, granted the railway receipt. No such rule controlling or limiting the liability under S. 72, being inconsistent therewith, is of any effect. AIR (Vol 9) 1922 All 9 : 65 Ind Cas 109 : 44 All 218 : 20 ALJ 31 (FB).

——Ss. 47 and 72 — Rule 76 made under S. 47, ultra vires.

Where a passenger delivered a package containing merchandise to the Railway servants to be taken as passenger's luggage and it was not delivered to him, and he sued for damages:

Held, that the Company was liable under S. 72, Rule No. 76 made under S. 47 of the Act, provides that "Persons tendering amongst their luggage articles not properly classible as such, do so at their risk.

Held, that further under S. 47 (2) the Company can only make a rule "consistent with the Act" for "regulating the carriage of passenger's luggage," that the above rule was inconsistent with the Act and therefore it did not absolve the Company from their liability under S. 72. (1909) 36 Cal 819 : 13 C W N 847 : 3 Ind Cas 470 (DB).

6. Scope.

——S. 47—Rules adopted by Company and published in the Gazette, if satisfy S. 47.

Rules adopted by the Company though not originally prepared but which had received the sanction of the Governor-General and published in the Gazette, are completely covered by S. 47 and it is unnecessary that the identity of the rules made by the Company and those published, should appear in the circular or Gazette. (1912) 16 C W N 360 : 15 C L J 215 : 13 Ind Cas 529 (DB).

——S. 47 — Resolution of the Government of India, at pp. 18, 19 Supp. Gazette of India, 1884—"Rule."

The Government of India resolution pp. 18 and 19 of the supplement of the Gazette of India, 1884 does not constitute a rule under Act IV of 1879 as it merely defines the conditions under which all but ticket-holders may be excluded. The Railway Company has the right to exclude from Railway premises all persons excepting those having business with them and may impose on the rest of the public any terms they think proper. 116 P L R 1911 : 36 P R 1911 : 102 P W R 1911 : 9 I C 1011 (DB).

——S. 47—Rules, publication of.

The rules imposed on all Railways by Government by a notification do not become the rules of a particular Railway Co., till they are published in the India Gazette in the manner provided by S. 47. (1911) 15 C W N 195 : 13 C L J 150 : 9 Ind Cas 331 (DB).

——Ss. 47, 54 — Carriers — Delivery, meaning of — —Railway company, liability of as carriers — Rules, bye-laws and conditions under Ss 47, 54 — Reasonableness.

"Delivered" in S. 72 of the Railways Act refers merely to a physical event and is a word devoid of any legal significance.

A Railway company has cast upon it by S. 72 the duties of an ordinary bailee, but it may determine the conditions under which those duties may vest and in particular may specify the point of time at which they shall vest by rules under Ss. 47 and 54. (1904) 8 C W N 725 : 31 C 951 (957, 958).

—S. 51.

——Ss. 51 (f) and 3 (14)— Transhipment charges.

Transhipment charges are terminals within meaning of S. 3 (14) and not toll for using a ferry under S. 51 (f). AIR (Vol 19) 1932 Nag 53 : 28 N L R 27 : 137 Ind Cas 159.

—S. 53.

——S. 53—Agreement to convey goods at maund rates — Railway Company subsequently charging at wagon rates.

When a Railway Company makes a contract with a consignor to convey his goods at a particular rate, the Railway Company is not entitled to subsequently alter the basis of calculation merely because it had used for the conveyance of the goods, a much larger wagon than the one actually necessary to suit their own convenience. Where the railway receipt is given charging certain goods according to maund rates, the railway is not entitled to charge subsequently at waggon rates, even though larger waggons may have been used for the purpose. AIR (Vol 21) 1934 All 19: 1933 A L J 1180 : 148 Ind Cas 610.

—S. 54.

——S. 54—Railway charging excess freight in excess of what had been paid on consignment — Condition No. 6 on Railway Receipt—Applicability.

No general rule as to whether a Railway Company has authority to charge excess freight at the place of destination can be laid down. It will depend upon the circumstances of each case as to whether condition No. 6 printed on the back of the Railway Receipt is or is not applicable.

[Held, on facts of the case that the condition No. 6 was applicable.] AIR (Vol 24) 1937 All 400 : 1937 A L J 344 : 1937 A W R 325 : 169 Ind Cas 802.

——S. 54—Freight—Liability of consignee.

Ordinary freight is payable only by the contracting party. The person who is liable is the consignor and in the absence of an independent contract express or implied the consignee is not liable. AIR (Vol 18) 1931 Cal 33 : 57 Cal 1168 (DB).

——S. 54—Recalculation of charges—Right reserved in the Railway receipt.

Where the right of "remeasurement, reweighment, reclassification and recalculation of the rates" is reserved by the Railway Company in the railway receipt, the railway has the right to reclassify and recalculate rates and charge an additional sum of money. AIR (Vol 16) 1929 All 848 : 1930 A L J 206 (DB).

——S. 54 — Rules about packing — Test for determining the validity of rules.

No doubt the Railway Company is a common carrier and is bound to accept consignments for despatch; but if the consignments are despatched at Railway risk, it is entitled to take reasonable precautions to protect itself from loss. It is entitled to impose conditions by making rules under S. 54 (1) as regards the form of packing as a condition precedent to the acceptance of goods by it for carriage as its own risk as a common carrier.

The proper test for determining as to whether a particular rule made by a Railway Administration is or is not valid, is to see whether that rule framed is a reasonable one and is not inconsistent with the Railways Act. The fact that another mode of packing is as secure as the one enjoined by a rule framed by the Railway administration is irrelevant for the purpose of determining the validity of that rule. AIR (Vol 14) 1927 All 400 : 100 Ind Cas 571.

——S. 54 — Reservation of right in Railway receipt.

The Station Master by mistake charged goods at a lower rate. On arrival at destination the mistake was discovered and the difference between the amount paid and the correct charge was recovered from the consignors. There was a condition in the railway receipt which permitted the railway to remeasure, reweigh or reclassify the goods or re-calculate the rates and other charges at destination.

Held, that the difference of rate was properly realized as destination. (1926) 96 Ind Cas 349 : 24 A L J 393.

——S. 54 — Scope.

Section 54 describes general conditions with regard to receiving, forwarding, and delivering goods. That section has nothing to do with the responsibility of Company as bailee. AIR (Vol 9) 1922 All 9 : 44 All 218:20 A L J 31 : 65 Ind Cas 109 (FB).

——S 55.

1. Essentials of notice of public auction.
   See also N. 7.
2. Essentials of public auction.
3. Interpretation.
4. Liability of Railway Administration.
5. Rights of Railway Administration.
6. Scope.
7. Validity of notice.
   See also N. 1.
8. Validity of sale.

1. Essentials of notice of public auction.
   See also N. 7.

——Ss. 55, 56 — Notice of proposed sale by public auction – Sufficiency — Essentials.

Obiter.—A notice under Ss. 55 and 56 of an intention to sell at a public auction cannot be sufficient or effective unless it specifies the time and place of the proposed public auction, the nature of the goods intended to be sold and all other particulars necessary to enable the members of the public to appreciate what it is which it is intended to put up for sale at the public auction. AIR (Vol 25) 1938 P C 12 : 1938 O W N 15 : 65 I A 21 : 4 B R 207 : 1938 A L J 81:42 C W N 225 : 19 P L R 29:47 L W 78:(1938) 1 M L J 83 : 17 Pat 58 : 40 Bom L R 285 : 66 C L J 476: 1938 A W R 14 : 1938 M W N 781 : 40 P L R 843 : 172 Ind Cas 439.

——S. 55 — Notice, essentials of.

In order to attract bidders to the auction, the notice should contain adequate materials so that

possible bidders may be informed of the class of the goods to be offered for sale, the quantity of the goods and the time and place where the sale is to be held. A notice which does not give these particulars is not a "notice of the intended sale." AIR (Vol 21) 1934 Pat 507 : 1 B R 5 : 16 P L T 61 : 13 Pat 752:151 Ind Cas 995 (DB).

2. Essentials of public auction.

——Ss. 55 (2), 56 (2)—"Public auction," meaning of.

The words "public auction" in Ss. 55 and 56 must bear the meaning which is ordinarily given to them in the English language. The words mean a public sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder. This involves the auction being held in public, all members of the public having a right to attend, and a valuable element being the competition between the persons who are openly bidding for the subject-matter of the sale. This is of importance not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price.

Notice of the intended sale was given by proclamation and notice on the Board at the station, and some offers were sent to the station-master which were forwarded by him to his superior officer who directed him to accept the certain offer which was, in fact, the highest. But there was no public auction in the ordinary meaning of the words; there was no sale in public, there was no opportunity for competitive bidding; in fact, what was done bore no resemblance to a "public auction" :

Held, that the Railway Company did not sell the goods in the manner prescribed by Ss. 55 (2) and 56 (2) and, therefore, the Railway Company could not rely on the protection given by the Act. AIR (Vol 25) 1938 P C 12 : 1938 O W N 15:4 B R 207: 1938 A L J 81 : 42 C W N 225 : 19 P L T 29 : 17 Pat 58 : (1938) 1 M L J 83 : 40 Bom L R 285 : 66 C L J 476 : 1938 M W N 781 : 40 P L R 843 : 65 I A 21 : 32 S L R 251 : 1938 A W R 14 : 172 Ind Cas 439.

——S. 55 (2) — Sale of goods—Omission to publish—Validity of sale.

A Railway Company putting up goods for sale under S. 55 (2), must publish a notification of the intended auction in one or more of the local newspapers as provided in the said clause and if this condition is not complied with, no valid sale could take place. AIR (Vol 18) 1931 All 337 : 1931 A L J 335 : 53 All 595 : 131 Ind Cas 683.

3. Interpretation.

——S. 55 — "Local newspapers," meaning of.

The word "local newspapers" in S. 55 (2), means papers of the place where the sale is to be held, and the provision is intended to give notice of the sale to persons of the locality who are likely to attend the purchase. AIR (Vol 22) 1935 All 601:1935 A L J 793: 1935 A L J 793 : 1935 A W R 918 : 57 A 843 : 157 Ind Cas 1080 (DB).

——S. 55 — Re-classification.

Goods classed under "schedule rates" can be reclassified under "class rates." Re-classification does not mean changing the class of goods under the same "class heading." AIR (Vol 24) 1937 All 642 : 1937 A L J 834 : 1937 A W R 723 : 171 Ind Cas 937.

——S. 55 — 'Local newspaper,' meaning of.

The expression 'local newspaper' in the clause (2) means a newspaper issued from the locality and not a newspaper which is merely read at the locality. AIR (Vol 18 1931 All 337 : 1931 A L J 335 : 53 All 595 : 131 Ind Cas 683.

4. Liability of Railway Administration.

——S. 55—Sale of goods — Railway's liability for damages.

Unless the sale is conducted with the formality provided by S. 55, the Railway Company is not protected from what is, but for the section a tortious act notwithstanding that they have a right to detain goods, and a person whose goods are lawfully detained, can justly claim damages if the goods are wrongfully sold. AIR (Vol 21) 1934 Pat 507 : 1 B R 5 : 16 P L T 61 : 13 Pat 752 : 151 Ind Cas 995 (DB).

——S. 55—Sale without demand.

In the absence of a demand for a fixed sum the Railway Company is not empowered to sell the goods under S. 55. 99 Ind Cas 440 : 49 All 300 : 25 A L J 159 : AIR (Vol 14) 1927 All 220 (DB).

——S. 55—Right of party to reweigh.

The obligation or liability to refund an overcharge, and power to levy undercharge, involves the necessary liability or right to reweigh the goods for the due enforcement of the principal obligation or right as between the parties to any contract of consignment. As a right to reweigh goods is an accessory to the substantive right of the Company to calculate an undercharge, the same is the case with the right of a party entitled to refund of an overcharge, and therefore the Company is liable to the consignee in damages for not giving him the necessary facilities to reweigh the goods, both from the point of view of the contract express or implied, as also of the Indian Railways Act. 22 C W N 310 ; 22 C W N 902 and 16 C W N Diss. from. 100 Ind Cas 406 : AIR (Vol 14) 1927 Nag 77.

——Ss. 55 and 72 — Detention of consignment by Railway—Liability.

A Railway Company has by S. 55 power to detain goods consigned, for recovery of some other amount other than that due by the consignor on that consignment. This is not so with an ordinary bailee. When the power of detention is exercised illegally or wrongfully by the Railway, the Company is liable for illegal on wrongful detention (1913) 11 A L J 335 : 19 Ind Cas 370.

5. Rights of Railway Administration.

——S. 55, Cls. (1) and (5) – Recovery of undercharges —Methods of.

Under S. 55, recovery of undercharges may be made either by exercising the lien over the particular goods in respect of which this undercharge was made or by exercising the lien over any other goods of the consignor which may subsequently come into the possession of the railway company, or by way of a suit. All these three modes of recovery are open to the railway company and the Railway Company can exercise the right of suit even after the goods are all delivered to the consignee. AIR (Vol 29) 1942 Mad 627 : 1942 M W N 493 : (1942) 2 M L J 348 : 203 Ind Cas 228.

——S. 55 — Railway receipt — Condition allowing Railway to classify goods and re-calculate and realize difference at destination.

There can be no doubt that where in a Railway receipt, a condition exists, such as a condition entitling the Railway Company to classify and recalculate and recover the difference at the place of destination, the Railway Company is entitled to reclassify the goods and to realise the excess freight after recalculating rates. AIR (Vol 24) 1937 All 642 : 1937 A L J 834 : 1937 A W R 723 : 171 Ind Cas 937.

——S. 55– Contract by Railway with consignor to carry goods at reduced rate on responsibility of consignor — Reduced carrying capacity of wagon and consequent detaining of some goods — Goods sent at the owner's request at owner's risk—Railway if can claim higher rate.

The consignor had entered into a contract with the Railway that the latter would charge lower rates for the goods sent by the consignor at his (consignor's) responsibility. Owing to the reduced carrying capa-

city of the wagon, some of the goods were detained and at the request of the consignor to forward them at schedule rates (lower rates), the Railway sent the goods at owner's risk and subsequently demanded higher rate :

Held, that the railway might have refused the request, but as they did forward the goods, they were not entitled to demand the higher rate.

Held, also, that as the suit was one for delivery of the goods, the Court was not justified in compelling the Railway to keep the goods and to pay the price to the plaintiff merely on the ground that they had refused to deliver them unless the freight were paid at the higher rate. The proper decree would be one for the delivery of the goods to the plaintiff on payment of the lower rate. AIR (Vol 21) 1934 All 952 : 4 A W R 588 : 154 Ind Cas 227.

——S. 55—Consignment of goods — Re-weighment, right of—Refusal to re-weigh in presence of consignor—Whether refusal to give delivery.

Certain goods were sent from Station A under a Railway receipt which showed the weight of the consignment as 107 maunds on which freight was to be paid. On the goods arriving at the destination, Station B, they were re-weighed and found to be 140 maunds. The Railway informed the consignor of this and the consignor requested the Railway Company to have a fresh re-weighing in his presence. The Railway Company refused to do this. The consignor filed a suit for damages for non-delivery of the goods :

Held, that under the contract of consignment, the Railway Company were entitled to re-weigh the goods, and as the Railway Company did re-weigh, they were entitled to demand the amount due upon the re-weighment and that under S. 55, they were entitled to demand that delivery should be taken by the plaintiff on payment of the actual freight without further re-weighment.

Held also, that a refusal to allow re-weighment was not a refusal to give delivery.

Held further, that the Railway Company was not bound to re-weigh in the presence of the plaintiff. AIR (Vol 19) 1932 Cal 877 : 55 C L J 603 : 139 Ind Cas 802 (DB).

——S. 55 (5)—Levy of low freight by mistake—Right to recover undercharge—Estoppel of Railway.

Defendant No. 1 who had entered into a contract with a District Board consigned ballast from various stations of a Railway to a certain other station. Out of forty such consignments, defendant No. 1 took delivery of thirty-nine consignments on payment of a certain rate of freight. It was then discovered by a Railway auditor that an incorrect rate had been charged. The correct rate was charged on the freight consignment but defendant No. 1 refused to take delivery because they understood that even if they paid the proper rate on this consignment, the Railway proposed to retain the consignment against the undercharge on the other thirty-nine consignments under the lien which it possessed under S. 55. The Railway Company thereupon sued the defendants for the undercharge on the thirty-nine consignments :

Held, that the consignors were justified in believing that the rate charged was correct and in acting on such a belief as, for example, in making their contract with the District Board. Whatever may be the right of the Railway to sue for an undercharge in other circumstances or to retain a lien over such goods of the consignees as were in their possession, yet by their own conduct, they had deprived themselves of any right to obtain redress in the present suit. AIR (Vol 18) 1931 Lah 511 : 32 P L R 397 : 131 Ind Cas 749 (DB).

——S. 55—Reweighment.

The refusal of railway authorities to reweigh goods or note the condition or weight in their registers at the time of delivery gives no cause of action to a consignee, and if he refuses to take delivery he cannot complain that the sale of goods was necessarily delayed and consequently the goods fetched a very low price :

The mere fact that the Railway claims demurrage does not give rise to any implication that the railway consented to act as ware-housemen. 108 Ind Cas 177 : 10 L L J 1 : 29 P L R 344 : AIR (Vol 15) 1928 Lah 166 (DB).

——S. 55—Portion sufficient to satisfy demand.

Under S. 55 railway company has no power to sell an entire consignment where the sale of a portion alone would satisfy its demand. 99 Ind Cas 440 : 49 All 300 : 25 A L J 159 : AIR (Vol 14) 1927 All 220 (DB).

6. Scope.

——Ss. 55, 56—Construction.

The words 'as nearly as may be' in S. 56 imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56. AIR (Vol 22) 1935 All 601 : 1935 A L J 793 : 1935 A W R 918 : 57 A 843 : 157 Ind Cas 1080 (DB).

——S. 55—Consignee's honest attempts to take delivery—Company not allowing—Subsequent request of company to take delivery.

Nine bags of goods were consigned for despatch. When the goods arrived at their destination, it was found that two of the packages sent were not the same as had been consigned. Consignees who were also the consignors of the goods proposed that seven of the bags should be handed over to them and the two remaining bags, which did not belong to the consignment, should be left there. The station master did not agree to this arrangement. Later on higher railway officials wrote agreeing to this arrangement. Even then the station master would not agree. On two subsequent occasions the Railway Company again asked the consignors to take delivery of the seven packages. But the consignors did not comply with the request.

Held, that no hard and fast rule can be laid down for all cases. But in this case the consignors could very well say that they made two honest attempts to obtain delivery of goods and if the Railway Company retained the goods, at the time, they did so at their own risk. The consignors were entitled to recover the market value of the goods consigned and were not bound to accept such price as was fetched by the sale held at the instance of the railway administration.

Held, further, that S. 55 of the Railways Act applies to ordinary cases, but does not apply where the plaintiffs, at the request of the Railway Company themselves, wanted to remove the goods, but were not allowed to do so. 87 Ind Cas 579 : 47 All 549 : 23 A L J 398 : AIR (Vol 12) 1925 All 656.

7. Validity of notice.

See also N. 1.

——S. 55—Validity of demand.

A notice under S. 55 is not invalid merely because the sum claimable is not specified in the notice. A I R (Vol 13) 1926 Lah 651 : 8 Lah 24 : 28 P L R 449 : 97 Ind Cas 318 (DB).

8. Validity of sale.

——S. 55—Rules under S. 47 (f), R. 12 — Sale before expiry of six months.

A sale by the Railway Company of the goods consigned before expiry of six months from date of consignment amounts to illegal conversion being in contravention of R. 12. AIR (V 14) 1927 All 220 : 25 A L J 159 : 49 All 300 : 99 Ind Cas 440 (DB).

——S. 56.

——S. 56 and Rules framed under S. 47 — Railway company selling by public auction perishable goods after failing to trace consignor and consignee—Whether protected.

If a railway company sells perishable goods by public auction after trying to find out the address of the consignor and the consignee and also waiting for sometime to see if anybody turned up to take delivery of them, it is protected under S. 56 of the Railways Act and there is no breach of the rules made under S. 47 of that Act. AIR (Vol 35) 1948 Pat 378 : 26 Pat 516 (DB).

——Ss. 56, 55—Applicability — 14 days' notice, held sufficient.

The words "as nearly as may be" in S. 56, Railways Act, imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56.

The notice of 14 days was held to be a sufficient notice for a sale under S. 56. A I R (Vol 22) 1935 All 601 : 1935 A L J 793 : 1935 A W R 918 : 57 All 843 : 157 Ind Cas 1080 (DB).

——S. 56—Sale of goods, when justified.

Where a consignee refuses to take delivery of the goods because he was not allowed to make certain remarks in the delivery book about their weight and condition, the Railway Company will be justified in selling the goods after giving notice under S. 56 of the Act. A I R (Vol 18) 1931 Nag 29 : 27 N L R 230 : 130 Ind Cas 82.

——S. 56—Low price in sale.

The refusal of railway authorities to reweigh goods or note the condition or weight in their registers at the time of delivery gives no cause of action to a consignee, and if he refuses to take delivery, he cannot complain that the sale of goods was unnecessarily delayed and consequently the goods fetched a very low price :

The mere fact that the railway claimed demurrage does not give rise to any implication that the railway consented to act as warehouse-men. A I R (Vol 15) 1928 Lah 166 : 10 L L J 1 : 29 P L R 344 : 108 Ind Cas 177 (DB).

——S. 56—Limitation for suit.

Where the Railway Company has sold the goods in exercise of the powers conferred by S. 56 of the Railways Act, a suit by the consignor to recover the surplus sale proceeds from the Railway Company is governed by Art. 62 and not Art. 31. Such suit is entirely different from a suit for compensation for non-delivery of the goods. A I R (Vol 8) 1921 Mad 362 : 44 Mad 823 : 13 M L W 693 : 1921 M W N 422 : 30 M L T 21 : 41 M L J 205 : 62 Ind Cas 742 (DB).

——S. 57.

——S. 57—Effect of—Right of unpaid vendor to stop in transit— Powers of the Railway—Right to demurrage.

The rule that upon a consignor informing a carrier that he is an unpaid vendor and requesting him to stop the goods in transit, the latter is bound to do so, is modified by S. 57, which gives to the railway administration the right to ignore the notice and to make delivery to the consignee of goods. A railway administration may accept notice from the consignor of goods to stop the goods delivered in transit, or it may act under S. 57, in which case there is no stoppage in transit as defined in the Contract Act, S. 99. But if the railway administration fails to act under the provisions of the Contract Act in giving effect to the notice of stoppage in transit and likewise fail to act under the special provisions of S. 57, they will have to take the consequences upon themselves and are not entitled to claim any demurrage from the consignee, A I R (Vol 16) 1929 Sind 220 : 118 Ind Cas 748 (DB).

——S. 57—Right to demurrage—Claim by Consignee who lost the Railway receipt—Investigation.

Where the plaintiff, the consignee, who had lost the railway receipt offered to execute an indemnity bond in favour of the Company but the Station Master refused to deliver the goods until the Railway administration had satisfied itself that the plaintiff's claim was bona fide.

Held, the company was entitled to charge demurrage for the period during which the investigation into the consignee's claim was being made. A I R (Vol 9) 1922 Pat 390 : 1 Pat 15 : 2 P L T 523 : 63 Ind Cas 256 (DB).

——S. 58.

See also Railways Act, 1890, S. 75 (1).

——S. 58—Scope.

Provisions of S. 58 are of general application but in special circumstances described in S. 75, the account and description to be given under S. 58 must include a declaration as to value. AIR (Vol 23) 1936 Pat 393 : 15 Pat 394 (DB).

——Ss. 58 (1) and 78—Scope and effect—Description of consignment contemplated by — Loss of consignment—Liability—Value of goods more than that declared by consignor — Right of consignor to claim actual value.

All that S. 58 of the Railways Act contemplates is a description of such general nature as may be sufficient to determine the correct frieght chargeable. There is no statutory obligation on a consignor of a box containing miscellaneous articles to hand in a precise describing separately every article in it. The description in the forwarding note of a consignment containining miscellaneous articles like lead and colour pencils, brass nibs, sewing machine needles, and playing cards (in respect of all of which the freight payable is the same) as "stationery pencils" cannot be regarded as materially false so as to absolve the railway of liability to pay compensation for the loss of the consignment.

Where a consignor takes it upon himself specifically to value the contents of a box consigned by rail and it is lost in transit it is not open to him to claim from the railway company anything in excess of that valuation on the ground that the box really contained things of greater value. He cannot recover more than the value declared by him, though the Court may find that the box in fact contained goods of greater value. A I R (Vol 36) 1949 Mad 754: 62 L W 372 : 1949 M W N 287 : (1949) 1 M L J 538.

——S. 63.

——S. 63—Resisting entry of person beyond the units notified in compartment.

In order to prevent any danger to the health and life of passengers the Act provides in S. 63 that the limit of passengers to occupy a compartment must be exhibited in some conspicuous place inside or outside the compartment. This section combined with S. 109 confers a right upon the occupants of a compartment to resist the entry of more number of persons than is fixed for the compartment. A I R (Vol 9) 1922 Pat 8 : 1 Pat 260 : 23 Cr L J 257.

——S. 63—Compartment—Meaning of.

The word "compartment" is not used in the same meaning throughout the Act. Certain provisions of the Act would be satisfied if there be a partial partition. There are other provisions in which it should be attributed to compartments the quality of complete separation.

(Ranade J. contra). Partial partition between two would be sufficient for making them separate compartments. (1900) 24 Bom 293 (296) : 1 Bom L R 688 (DB).

——S. 66.

——S. 66 or 68 — Rules for the guidance of—Public and Railway officials — Rule 29 — Platform ticket — Sale whether unlawful.

Under rule 29, a Railway Administration has the right to exclude from platforms any person not having business on the Railway premises; such right is not repugnant to S. 66 or S. 68. Quaere—Assuming that the demand of payment for a platform ticket is unlawful, whether a suit for the recovery of the amount paid lies. 116 P L R 1911 : 36 P R 1911 : 102 P W R 1911 : 9 Ind Cas 1011 (D B).

——S. 67.

——S. 67 — Applicability — Purchase of third class ticket — Absence of third class compartments—Provision of goods waggons as Pilgrim Traffic Vehicle — Holder of third class ticket travelling in vehicle under protest — Suit for damages for breach of contract and for discomfort, etc. — If lies.

Section 67, Railways Act, operates not only in cases where there are compartments of a particular class available but there is no room in those compartments, but it also extends to cases where there is no compartment of that class at all. When a passenger who has taken a third class ticket finds that there are no third class compartments at all but only goods waggons marked as Pilgrim Traffic Vehicle, his remedy is to refuse to travel by that vehicle and ask for a refund as provided by S. 67 (2). He cannot travel by the available vehicle under protest and then claim damages for breach of contract, or discomfort and inconvenience. A I R (Vol 34) 1947 Bom 390 : I L R (1947) Bom 172 : 49 Bom L R 178.

——S. 67 — Scope.

Section 67 not only operates in the case where there are compartments of a particular class available but there is no room in those compartments, but it also extends to a case where there is no compartment of that class at all. A I R (Vol 14) 1927 Pat 352 (2) : 8 P L T 676 : 103 Ind Cas 316.

——S. 67 — Reserved accommodation — Waiver.

The benefit conferred by S. 67 i. e., "Fares shall be deemed to be accepted and tickets should be issued subject to the condition of their being room available in the train may be waived by the Railway, Company, but it cannot be taken to be waived by the mere fact that the plaintiffs had reserved a carriage as according to the rule of the Company "reserved carriages in mail trains can only be provided when the load of the train permits."

Plaintiffs had reserved a carriage from Cocanada to Madras. At Samalkot the Company refused to attach this carriage to the mail train as it was already fully loaded.

Held, that plaintiffs were only entitled to the statutory relief given by S. 67 of the Railways Act. (1907) 30 M 417 (419) (D B).

——S. 68.

——S. 68 — Fraudulent use of pass.

Where a railway servant applied for and obtained a free pass for his wife and mother and handed over this pass to another woman, who was neither his wife nor his mother, and she used it.

Held : the railway servant was guilty under Penal Code, S. 420 and not Railways Act, S. 68. A I R (Vol 12) 1925 Oudh 479 : 2 O W N 510 : 12 O L J 508 : 26 Cr L J 1164 : 88 Ind Cas 524.

——Ss. 68, 69 and 113 — Person travelling without ticket.

It is not a criminal offence to travel in a train without a pass or ticket, when there is no intent to defraud the Company, but a person so travelling is liable under S. 113 of the Railways Act to pay on demand an excess charge in the nature of a penalty. A I R (Vol 4) 1917 Cal 105 : 44 Cal 279 : 25 C L J 610 : 18 Cr L J 647 : 40 Ind Cas 295 (D B).

——Ss. 68, 112 — Travelling without ticket Cheating, attempt at — Indian Penal Code, Ss. 417 and 511 — Dishonest or fraudulent intention—Offences, if distinct — Separate sentences — Statute, construction of — General and Special Acts — Repeal by implication — General Clauses Act, S. 26 — Indian Railways Act Penal provisions, if exhaustive.

Entering into a Railway compartment and travelling without a ticket are only some of the ingredients of an offence under S. 112 of the Indian Railways Act : these acts in themselves are not penal under the section. The essence of an offence under the section is dishonest or fraudulent intention to defraud the Railway Administration of its just dues i. e., the fare payable by the passenger.

The fraudulent intention of a passenger must appear from some other act or omission than merely travelling without a ticket e. g., an attempt to free himself from liability by producing an used and irrelevant ticket.

Travelling in a Railway car, with a false and entirely irrelevant ticket with a fraudulent and dishonest intention is an offence under S. 112 (a) of the Railways Act which must be read with S. 68. Travelling without a ticket comes within the words of S. 68 and so under S. 112 (a) entering into the train and travelling without a ticket and the attempt to palm off an used ticket upon a Railway servant are not separate and distinct offences. The intention to cheat him and the Railway Administration is one and the same offence.

The element of the offence under S. 417, I, P. C., is precisely the same as that of one under S. 112 of the Indian Railways Act and a person cannot be sentenced under both the sections separately for the same offence. Facts which form the basis of a conviction and sentence under one charge, cannot also form the basis of a conviction and also a separate sentence under another charge. There cannot be cumulative sentences, though a conviction might take place on an alternative charge or even both. It is ordinarily desirable, that when in an act omission is made penal by two acts, one general and the other special, the sentence should be passed under the special Act.

The penal provisions in the Indian Railways Act are not exhaustive and there is nothing in the Act itself or any other enactment in force in India which excludes the operation of the general laws in force as offences which are not punishable under the Act.

Quaere:— Whether in this country a special penal law repeals, by implication in every case, a previously existing general law relating to an offence of the same nature? (1906) 5 C L J 47 (51, 52) : 11 C W N 100 (D B).

——S. 69.

——S. 69 — Travelling without ticket.

Before the penalty imposed by S. 113 (1) can be enforced under Sub-s. 4, there must be requisition on the passenger under S. 69, and a failure of refusal to present for examination or to deliver up his pass or ticket. A I R (Vol 13) 1926 Bom 266 : 50 Bom 215 : 28 Bom L R 443 : 94 Ind Cas 742 (D B).

——S. 71-A.

——S. 71-A — Validity of declaration — Whether can be challenged in proceedings under Payment of Wages Act.

If a declaration is made under S. 71-A of the Railways Act by the authority empowered in this behalf that a post is "essentially intermitent", the validity or otherwise of the declaration cannot be challenged in summary proceedings under the Payment of Wages Act. A I R (Vol 34) 1947 Lah 379.

—S. 72.

See also Contract Act—Ss. 151, 152 and 161.
1. Admission of loss.
2. Applicability and scope.
3. Accident.
4. Burden of proof.
5. Construction—Risk notes.
See also No. 13.
6. Damages.
See also No. 15.
7. Delay in delivery.
8. Delivery of goods.
9. Deviation from route.
10. Estoppel.
11. General liability.
12. Interpretation.
13. Loss, destruction or deterioration.
14. Loss of complete package, meaning of.
15. Misconduct.
16. Miscellaneous.
17. Notice.
18. Overcharge.
19. Re-measurment.
20. Running train, meaning of.
21. Rules.
22. Theft and robbery.
23. Validity of form.
24. Who can sue.
25. Who can be sued.
26. Wilful neglect.
See also No. 4.

1. Admission of loss.

——S. 72—Mode of transport—Burden of proof.

Where the Railway Company admits the loss, the onus of how the consignment was dealt with and its condition throughout the transit lies upon the Railway Company and their failure to enlighten the Court on the point cannot prejudice the consignor's claim. AIR (Vol 20) 1933 Pat 630 : 148 Ind Cas 396.

——S. 72—Risk note Form B.

In a suit for damages for loss of goods consigned under Risk-note B the railway company can only be made liable if it can be shown that loss was occasioned on account of wilful negligence on its part. A I R (Vol 15) 1928 Pat 242: 106 Ind Cas 529 (DB).

——S. 72—Risk-note B.

For the loss of goods carried under Risk Note B, the Railway Company is exempt from liability unless it is proved that the loss was due to wilful negligence of the Company. AIR (Vol 14) 1927 Pat 22 : 97 Ind Cas 452 (DB).

——S. 72—Risk-note B—Plea of non-delivery.

In order to make the risk note applicable it is sufficient that the plaintiff-consignor pleads loss to himself. It is not necessary for the defendant Railway to give evidence that the goods have been lost to him also. Therefore if the plaintiff admits the loss then all that the defendant has to do in the written statement is to plead the contract. He is not required to bring any evidence to support his plea. If the plaintiff is astute to plead not loss but only non-delivery, even in that case the defendant need only plead the contract and he will be relieved from the duty of calling evidence: 45 Bom 1201 not Foll. AIR (Vol 13) 1926 Pat 165: 1925 P H C C 333: 7 P L T 140: 90 Ind Cas 790 (DB).

——S. 72—Risk Note B.

In an action for the recovery of the value of goods consigned under Risk Note B, to Railway Company for transmission, plaintiff-admitted the loss but did not produce any evidence to show that the loss was occasioned by the neglect of the Railway Company. The defendant Company need not prove loss of goods consigned to it under Risk Note Form B where the plaintiff himself admits such loss. AIR (Vol 12) 1925 Cal 299 : 80 Ind Cas 426 (DB).

——S. 72—Risk Note B.

Where the plaintiff admits that the goods were lost, the defendant Railway Company is not bound to prove that the goods were lost while in its custody. A I R (Vol 12) 1925 Oudh 525 : 27 O C 331 : 85 Ind Cas 338.

——S. 72—Plea of risk note.

The object and effect of S. 72 was to limit the liability of Railway Company during the transit of goods consigned to them for carriage and to substitute the obligation of a bailee for the obligation of an insurer of such goods which prior to the passing of that Act was imposed upon them under the Common Law.

A Railway Company is not entitled to rely upon the provisions of the 'risk-note' which pro tanto exempts it from liability unless the plaintiff admits or evidence has been adduced which satisfies the Court that a loss had occurred. AIR (Vol 11) 1924 Cal 725: 51 Cal 515: 28 CWN 1001: 79 Ind Cas 426 (DB).

——S. 72 — Where plaintiff's case is not based on loss.

Where the plaintiff had expressly described his claim as one of compensation for non-delivery and the defendant had not pleaded that the goods had been lost.

Held, that the plaintiff's case would rest upon the presumption that the goods were still in the possession of the railway company. AI R (Vol 11) 1924 Pat 25 : 4 P L T 443 : 74 Ind Cas 431.

2. Applicability and scope.

——S. 72 — Section 72, Railways Act, is to be read subject to the other provisions of the Act. A I R (Vol 24) 1937 Sind 85 : 31 S L R 22 : 168 Ind Cas 76 (DB).

——S. 72 — The Railway Company cannot be compelled to carry goods on terms imposed by a proposer which are contrary to the rules of the Railway Company.

The plaintiff despatched a consignment of boots and shoes from A to E, at Railway risk. The consignment arrived at K but plaintiff could not arrange for its delivery and at his request, it was detained for a considerable time. The plaintiff then asked the Railway Company at K to have the goods re-booked from K to A. In accordance with rules and regulations, the Railway Company stated that the plaintiff should execute risk note A if the goods were to be re-booked. The plaintiff refused to execute Risk Note A and brought a suit for compensation against the Railway Company :

Held, that the plaintiff had no cause of action either under the Railways Act or under the Carriers Act. A I R (Vol 22) 1935 All 844 : 1935 A L J 991 : 1935 A W R 969 : 158 Ind Cas 526.

——S. 72—Goods falling under S. 75—Whether Railway can take risk note.

When articles declared to fall under S. 75, Railways Act exceeding Rs. 100 in value were sent without the extra percentage, the Railway can protect itself under S. 72 (2) provided the conditions falling within that sub-section are satisfied and Risk Note form X is not ultra vires. A I R (Vol 21) 1934 Lah 186 : 15 Lah 596 : 36 P L R 536 : 150 Ind Cas 709 (DB).

——S. 72—Scheme of the section.

The scheme of the section is that there is a general rule at the commencement imposing a general liability of a considerable extent upon the Indian Railways and then follows a particular rule as to exemption from the extensive provisions of the first sub-section. AIR (Vol 11) 1924 Pat 25 : 4 P L T 443 : 74 Ind Cas 431.

——Ss. 72, 47 — "Subject to the other provisions of this Act," meaning of—Rules framed under S. 47 are no provisions of the Act — Liability of Company for passengers, "luggage" — Articles of merchandise sent as luggage.

The words in S. 72 "subject to the other provisions of this Act" do not apply at all to rules under S. 47. A rule made under the Act is not a provision of the Act. The words have an obvious reference to S. 73 relating to the carriage of animals, and S. 75 relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of S. 74. When a package containing merchandise which was delivered by a passenger to the servants of a Railway Company to be carried as passenger's "luggage" was lost :

Held, that the Railway Company was bound to make good the loss : Held, also that Rule 76 of the Company's rule was inconsistent with S. 72 of the Act and did not absolve the Company from liability. (1909) 13 C W N 847 : 36 Cal 819 (822, 823) : 3 Ind Cas 470 (DB).

——Ss. 72, 54, 47—Responsibility of Railway Company as carriers—Ordinary common-law liability — Power to determine when liability shall vest—Rules framed under the Act—Reasonableness—Non-granting of final receipt, if divests responsibility.

The word "delivered" in S. 72 refers to a physical event an important element of which is that whatever is delivered passes from the physical custody of one man to the physical custody of another. It is devoid of any legal significance. Section 72 embodies the general common-law with regard to the responsibility of carriers, which is that when goods are delivered to the Railway Company to be carried, they become liable under the law, like any other bailee. Sections 47 and 54, however, empower the Railway company to make rules determining the conditions under which such liability shall vest, and particularly at what point of time it shall vest. But such rules must be consistent with the Act, i.e., reasonable, otherwise they will be void and inoperative. When plaintiff's goods were delivered at a Railway station for transmission and plaintiff had got the forwarding note registered, and the goods marked, but the Railway Company had not given him a receipt which is the last step in the process of booking and the goods were lost.

Held, that the Railway Company was liable. The rule that responsibility should only arise on the grant of such a receipt was unreasonable and therefore void. (1904) 8 C W N 725 : 31 Cal 951 (957, 958).

——S. 72, Cl. (2)—Responsibility as carriers—Applicability of total loss of goods.

Section 72, Cl. (2) does apply to cases of total loss and destruction of goods and not merely to partial loss or destruction. (1902) 7 C W N 370 : 30 C 257 (261) (DB).

——S. 72—Obligation, extent of—Carrier — Reasonable care.

Railway Companies are not carriers and there is no obligation on them to carry passengers safely. They are only bound to carry them with reasonable care and diligence. (1901) 3 Bom L R 293 : 5 C W N 449 : 11 M L J 156 : 28 Cal 401 (409, 410) : 28 I A 144 (PC).

3. Accident.

——S. 72—Fire—Burden of proof.

Where goods were destroyed by fire in transit and it was found that the railway had taken all precaution against accident as a bailee of goods should have taken.

Held, that they were absolved from any liability to make good to the plaintiff, loss or damage sustained by him.

Held, further that the railway need not prove the actual origin of the fire and show that the railway company itself was free from any negligence in the matter. AIR (Vol 14) 1927 All 774 : 49 All 884 : 25 A L J 730 : 102 Ind Cas 433 (DB).

——S. 72—Risk note B.

The use of the expression "accident" by itself involves the idea of something fortuitous and unexpected and more so when it is coupled with and preceded by the words "unforeseen event." In law "an accident" is generally intended to mean either "vis major," i.e., an inevitable casualty or the act of Providence or else an unforeseen event, misfortune, act or omission which is not the result of any negligence or misconduct of the party relying on this plea. AIR (Vol 13) 1926 Sind 9 : 20 S L R 245 : 91 Ind Cas 145.

——S. 72 — Dangerous goods — Explosion — Death — Liability of Company — Negligence — Burden of proof.

A Railway Company is not, like a common carrier, liable for not carrying safely. It is liable only for culpable negligence. In actions for damages for negligence against a Railway Company the onus is on the plaintiff to prove negligence on the part of the Railway Company. Where the father of a person killed by the fireworks carried by a passenger under his seat sued the Railway Company for damages for negligence.

Held, that the burden was on the plaintiff to prove that the plaintiff knew or ought to have known of the dangerous character of the goods and should have prevented the carriage of such goods, and not upon the Railway Company to show that they were not guilty of any negligence in not discovering their real character. (1901) 11 M L J 156 : 3 Bom L R 293: 5 C W N 449 : 28 C 401 (409, 410) : 23 I A 144 (PC).

4. Burden of proof

(a) General
(a-1) Mis-conduct.
(b) Negligence.
(c) Wilful neglect.

(a) General

——S. 72—Duty of railway company—Proof of railway receipt referring to Risk-note Form B and booking at owner's risk at lower rate of freight—Sufficiency—Due execution of Risk-note—Duty to prove to escape liability.

It is for the Railway Administration which claims exemption from liability for damage or loss of a consignment to prove an agreement of the kind referred to in S. 72 (2) of the Railways Act. The Administration must prove the execution of a special contract in a Risk-note Form B. The fact that they produced, a railway receipt which refers to a Risk-note in Form B, would merely prove the existence of such a Risk-note, but it would not relieve the Administration from proving the due execution of the Risk-note with particular reference to the conditions which have to be fulfilled under S. 72 (2). The railway receipt is mere evidence to show that certain goods were placed in the custody of the railway and that a certain sum was paid as freight. The mere fact that it refers to a Risk-note in Form B, or that it shows that the goods were sent at owner's risk and that a lower rate of freight was charged would not take away the liability of the railway company unless the company brings itself within the provisions of S. 72 (2) of the Act. The Risk-note being an exception to the ordinary responsibility of the Railway company, must be proved by the railway company to have been duly executed. AIR (Vol 37) 1950 Pat 215 : 29 Pat 170 (DB).

——S. 72 (2) (b)—Consignment of goods packed in wooden crates, covered by Risk Notes A and B and not C– Goods carried in open wagons — Destruction by fire from engine—Liability of Railway—Proof required of consignor.

Goods packed in wooden crates will not ordinarily be carried in open wagon, and the Railway Company is not expected to carry them in open wagons merely because a crane has to be used to lift them into the wagons unless it is done at the request of the consig-

nor. The company in these circumstances must get an agreement in the term of Risk Note C executed by the consignor. Otherwise, in respect of the destruction of the goods owing to the risk incidental to their being carried in open wagons, the responsibility of the company at once arises as a bailee under S. 151, Contract Act, being not limited by any agreement. In these circumstances, the railway take upon themselves the responsibility for safe carriage of the goods and the onus is on them that they are not liable for the loss of goods by fire. If the Risk Note C is not taken and the goods are carried in open wagons and then destroyed by fire from the engine in course of the transit, all that the plaintiff-consignor need prove for making the railway company liable in spite of the consignment being covered by Risk Notes A and B is (1) that the goods in question were liable to damage when carried in an open wagon ; (2) that they would have been normally carried in a covered wagon ; (3) that the damage or the destruction of the goods was due to the consignment being carried in an open wagon. In such cases it is no defence for the railway to urge and to prove that the goods were carried at the request of the sender. AIR (Vol 36) 1949 Pat 493 (DB).

——S. 72 — Loss of goods consigned—Liability of Railway Company —Nature and extent of — Negligence—Onus.

A Railway Company in India, a common carrier, is liable as an insurer, that is, the company is responsible for the safety of the goods entrusted to it in all events, except when loss or injury arises from an act of God or enemies of the State. In the absence of evidence as to special contract varying the usual liability, the burden of proving absence of negligence is on the company, since loss or damage to the goods is to be taken as prima facie proof of negligence. AIR (Vol 36) 1949 Pat 110 : 29 PLT 76 (DB).

——S. 72—Loss of goods— Absence of special contract — Liability of Railway—Burden of proof—Evidence Act, S. 106.

Under S. 72 of the Railways Act the liability of a Railway Administration for the loss of goods delivered to it for carriage is that of a bailee in the absence of a special contract. All the facts regarding how the consignment was dealt with while in the custody of the Railway are especially within their knowledge, and therefore the Railway must place before the Court all the facts in a suit against them for non-delivery of goods. It is then for the plaintiff consignor to satisfy the Court that the true inference from these facts is that the Railway did not exercise the care and skill required of a bailee. AIR (Vol 35) 1948 Sind 26 : ILR (1947) Kar 144.

——Ss. 72 and 74—Burden of proof—Loss of goods—Suit for compensation— Onus—Contract Act, S. 151.

The responsibility of a Railway administration is that of a bailee under S. 151, Contract Act. Where goods are consigned at Railway risk, the consignor paying increased charges, the onus is on the Railway administration to prove that they took as much care of the goods bailed as a man of ordinary prudence would take of his own goods. AIR (Vol 34) 1947 Bom 169 : 48 Bom L R 698 : 231 Ind Cas 367.

——S. 72—Risk Note—Execution of—Proof.

The fact that the letter H is endorsed on the Railway receipts and that the goods were booked at the lower rate is not sufficient to prove that the goods were consigned under a Risk Note. The execution of the Risk Note must be proved by evidence. A I R (Vol 31) 1944 Cal 50 : ILR (1943) 1 Cal 397 : 211 Ind Cas 270.

——S. 72—Risk-Notes Forms A and H—Case of non-delivery of consignments—Liability of Railway Company, if can be assumed—Onus.

Even in the case of the non-delivery of the consignment, it cannot be assumed that the Railway Company is liable to pay damages to the consignor. It is true that the onus in a case of non-delivery of consignment lies on the Railway Company in the first instance to disclose how the consigment was dealt with throughout the time it was in its possession or control and if it is found upon the evidence adduced that there was misconduct on the part of its servants, Railway Company would be liable to damages without any further evidence on behalf of the consignor. If it is found that there was no misconduct on the part of its servants, the burden of proving such misconduct shall then shift on to the consignor. A I R (Vol 26) 1939 All 748 : 1939 A L J 905 : 1939 A W R 752 : 185 Ind Cas 435.

——S. 72—Railways Act, 1890, S. 72— Risk Notes A and B—Due execution, absence of—Burden of proof.

Where a consignor of goods for carriage to a railway Administration brings a suit for damages on the railway receipt and the receipt specifically mentions the existence of risk notes in respect of the transaction, the burden of proof is on the consignor to prove that the risk notes had not been signed by the plaintiff or with his authority. (1934) 143 Ind Cas 489 (DB).

——Ss. 72, 75 —Loss of goods — Suit for damages — Excepted articles.

Where a person seeks to recover damages as price of goods sent at the ordinary Railway parcel rate and lost while in custody of the Railway Administration, he must prove first that he entrusted the parcel to the Railway Administration and that it did not contain any of the excepted articles mentioned in the Second Schedule, exceeding Rs. 100 in value. It is not for the Railway Administration to prove the contrary. AIR (Vol 19) 1932 Cal 3 : 58 C 989 : 35 C W N 452 : 134 Ind Cas 886 (DB).

——S. 72 - Journey.

It is not the duty of a railway company to give evidence regarding a portion of journey which was uneventful especially when such details are not specifically asked for by the plaintiff. A I R (Vol 17) 1930 Lah 557.

——S. 72—Theft.

Unless there is direct evidence adduced in a particular case the Court is not in a position to decide that thefts are of frequent occurrence in a particular railway nor is it entitled to take judicial notice of the thefts merely from reported cases. AIR (Vol 17) 1930 Pat 283 : 11 P L T 161 : 124 Ind Cas 833 (DB).

——S. 72 (2)—Limits of note—Risk note Form B.

The burden lies on the railway company seeking the advantage of the guarantee, that they must be held harmless for certain things, to bring themselves within the language of the guarantee. AIR (Vol 15) 1928 Cal 65 : 55 Cal 132 : 46 C L J 428 : 32 C W N 76 : 106 Ind Cas 252 (DB).

——S. 72—Risk-note B New (Form)— Evidence as to how consignment was dealt with.

In view of the proviso (inserted in the new form of Risk note B) the Railway Administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control. If the company discloses to the consignor how the consignment was dealt with by it and if the material placed before is satisfactory, it is not necessary for the company to give evidence before the consignor is called upon to prove misconduct.

Failure to make a disclosure as to how the consignment was dealt with necessitates the giving of evidence in regard to the manner in which the consignment was dealt with by the company throughout the time it was in its possession or control. AIR (Vol 15) 1928 Nag 340 : 111 Ind Cas 535.

——S. 72 — Execution of note — Risk-note B is an exception to general liability.

Jwala Prasad, Ag. C. J.— The agreement absolving the railway company from the liability under certain circumstances set forth in the Risk-note B is an exception to the general liability of the railway company as a bailee under Ss. 151, 152 and 161 of the Contract Act, and therefore the risk note must be proved by the railway company to have been duly executed. It must also be proved that the circumstances under which the exemption from the ordinary responsibility is claimed exist in the case. A I R (Vol 14) 1927 Pat 193 : 6 Pat 189 : 8 P L T 385 : 102 Ind Cas 403 (DB).

——S. 72 — Where a contract under Risk-note B has been entered into, the burden of proof is on the plaintiff to show that the loss of the goods is due to one of the exceptions mentioned under which the company is liable.

Risk-note B is a special contract complete in itself and the plaintiff cannot maintain an action under the general law ignoring the Risk-note in cases of non-delivery.

Where in a case, the company in its statement alleged theft from a running train to escape liability, Held, the plea was a specific form of theft and the initial onus which lies on the plaintiff to prove theft is not displaced by such a plea. AIR (Vol 13) 1926 Pat 148 : 90 Ind Cas 812 : 5 Pat 118 : 7 P L T 561 : 1925 P H C C 305 (DB).

——S. 72—Risk Note A.

The burden is on the plaintiff to show that the consignor was compelled by force, fraud or misrepresentation to enter into risk note form A when as a matter of fact the goods were properly packed and not damaged. AIR (Vol 12) 1925 Nag 333 : 87 Ind Cas 1031.

——S. 72—Facts to be proved.

The term 'loss' denotes a fact, not a cause of action. A valid cause of action against a Railway Company in India for damages for non-delivery of goods consigned to it for carriage must be based either on contract or on tort and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes be found, sometimes defeat such a cause of action. But a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company, or that they are "lost". It does not therefore necessarily follow that by proving the non delivery of such goods the non-delivery or mis-delivery of goods may be due to "loss" or it may be due to other causes. AIR (Vol 11) 1924 Cal 725 : 79 Ind Cas 126 : 51 Cal 615 : 28 C W N 1001 (DB).

——S. 72 — In a suit against a Railway Company for compensation for loss of goods consigned under a special contract embodied in a risk note, the onus is upon the plaintiffs to establish how the loss or deterioration was caused. AIR (Vol 11) 1924 Mad 388 : 75 Ind Cas 260 : 18 M L W 322 : 1923 M W N 731 (DB).

——Ss. 72 and 80 — Duty of Railway to which goods are delivered for carriage—Bailee.

The duty of a railway when goods have been delivered for carriage, is that of a bailee as defined in Ss. 151, 152 and 161, Contract Act. When a thing is injured or lost while in the charge of bailee, the burden of proving that he has exercised ordinary care is upon the bailee because he has special knowledge of the facts. Where the plaintiff alleged and proved the loss of goods, the burden of proof shifted on to the defendant Railway to establish that they did discharge statutory duty under S. 72 of the Railways Act read with Ss. 151 and 152 of the Contract Act. Section 80 of Railways Act while it gives an option to a plaintiff to sue one or other of two Railway Administrations in cases where the goods have been booked through does not surely mean that where the plaintiff has brought the suit against both Railway Administrations, he is entitled to a decree against that one of them also which has satisfied the Court that the loss accruing to the plaintiff was not due to its negligence AIR (Vol 7) 1920 Oudh 70: 2 U P L R (J C) 109 : 23 O C 96 : 7 O L J 250 : 56 Ind Cas 714.

——S. 72—Liability — Loss due to vis Major.

The liability of a Railway Administration for loss of goods entrusted to it for carriage is the same as that of a bailee. A plaintiff suing a Railway Company for damages for non delivery of goods consigned to it for carriage need not prove how the loss occurred. The Company must show circumstances which exempt it from liability. Plaintiff made over to Railway Company certain goods for despatch. The Railway Company loaded and despatched them in the ordinary course of business that very day, without unnecessary delay. Part of the distance the goods had to be carried over a river on flats where the goods were lost by the sinking of flats by a cyclone. The Railway Company was not liable, the cause of the loss being an act of God and not the negligence of the Company. AIR (Vol 5) 1918 Cal 892 : 25 C L J 37 : 38 Ind Cas 702 (DB).

(a-1) Misconduct.

——S. 72 — Risk Notes A and H — Non-delivery of goods — Obligation of railway to disclose how consignment was dealt with while in its possession — When ceases to operate—Looting of goods by riotous mob—Obligation for disclosure not properly fulfilled—Right and duty of consignor.

Goods were booked by the plaintiff for carriage by a railway at a special reduced rate under Risk Notes "A" and "H". The Railway Administration which failed to deliver the goods, intimated the plaintiff that they were looted by an unruly mob over which they had no control and they could not, therefore, entertain any claim for compensation. The Risk Note in suit, which relieved the Railway Administration from all liability for any loss or damage to the consignment except upon proof that such loss or damage arose from the misconduct on its part or its servants, provided that in cases of (a) non-delivery and (b) pilferage, the Railway Administration was bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor was called upon to prove misconduct, but that, if misconduct on the part of the Railway Administration or its servants could not be fairly inferred from such evidence, the burden of proving such misconduct should lie upon the consignor.

Held, that under the suit Risk Note, in all cases other than where the loss was caused by misconduct all liability for any negligence was wholly excluded, but where the loss was caused by misconduct the statutory standard of duty imposed by S. 72 of the Railways Act viz., the duty to take the care of a bailee, the same care as a reasonable man would take of his own goods, was revived. It followed that the railway then would not necessarily be automatically liable in all cases where misconduct of its servants had been established but only when the case was also one where the railway would be liable under the statutory duty to take care of an ordinary bailee on an application of the general principles of law relating to liability in torts and for negligence, and not otherwise.

Held, further, that as under the provisions contained in the provisos of the Risk Note the duty of disclosure as to how the consignment was dealt with

ceased the moment the goods ceased to be under the control of the Railway, the contractual obligation for disclosure in the present case ceased to have any operation at all from the moment the goods were looted by a riotous mob under circumstances out of control of the Railway. The consequence of this was that the onus of proving misconduct from the moment the looting took place was on the plaintiff in so far as any facts were sought to be relied on which occurred after the looting took place. Any dispute as to whether the contractual obligation for disclosure had been properly fulfilled that is to say, whether the Railway company had furnished sufficient information, was a matter to be decided judicially as an entirely separate matter to the suit itself. If the plaintiff was not satisfied with the disclosure made, it was for him to say so and by a special application to the Court to call on the administration to fulfil their obligation. This applied not only if he was not satisfied from the information furnished in correspondence before suit but also if he was not satisfied from the evidence furnished by the Railway in the suit itself. After the Railway Administration, after being called upon to give particular evidence gives such evidence, as they think sufficient by way of disclosure, if the plaintiff was not satisfied with that evidence as sufficient, he had a right to ask the Court to decide the point whether the Railway had fulfilled its obligation of disclosure at that stage before he considered whether he would call any evidence at all or not. It was not open to a consignor who did not choose to avail himself of the benefit of this special obligation for disclosure on the part of the Railway, when he found that something had been omitted which he would like to have in evidence from the Railway than to seek recourse to rules of a presumption under the Evidence Act. In a case where the Risk Note was not properly enforced and the Railway was not asked to give its evidence first, the plaintiff was not entitled to be treated as being in a more favourable position than he would otherwise have been, simply because he had not himself chosen to enforce his rights. (1950) 54 Cal W N (2 D R) 35 (DB).

——S. 72—Risk Note B— "Misconduct" of Railway servants—Burden of proof — Duty of Railway Administration to adduce evidence regarding its dealing with consignment while in its possession.

By virtue of S. 72, Railways Act, the responsibility of a railway as a bailee can be limited by agreement contained in the Risk Notes. Under Risk Note "B", a special agreement is made between the Railway and the owner of the goods limiting the responsibility of a bailee. The consignor in consideration of a special reduced rate agrees to hold the railway Administration "free from all responsibility for any loss, destruction or deterioration of or damage to the consignment from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage arose from misconduct of the railway Administration's servants". Under the proviso to the Risk Note "B" in case of non delivery of the whole of the consignment or of the whole of one or more packages forming part of the consignment the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence, the burden of such misconduct shall be upon the consignor. The proviso to the Risk Note "B" means that the railway company should disclose to the consignor before a suit is filed as to how the consignment was dealt with and that after the matter comes into Court, if necessary, the railway must give evidence as to the nature of its dealings with the consignment while under its control, before the consignor is called upon to prove misconduct. If the consignor is not satisfied that the disclosure made by the railway has been adequate or accurate, then the matter must be judicially decided and the railway administration should be the first to submit their evidence at the trial. If misconduct can be fairly inferred from such evidence, the consignor is absolved from his original burden of proof. If any material evidence is withheld, the railway may expose itself to the presumption under S. 114 (g), Evidence Act. If the railway fails to make the requisite disclosure or to adduce the requisite evidence, the railway must be made liable for the goods and is not entitled to invoke the protection or immunity on the basis of the Risk Note "B". If no evidence is adduced with regard to the railway's dealing with the entire consignment, there is a breach of the contractual obligation on the part of the railway to adduce the requisite evidence. The Railway is not entitled to call upon the plaintiff to allege or prove misconduct on the part of the Railway Administration or its servants. Really the stage is not reached where the question of misconduct arises and the Risk Note does not come into play and the railway must pay compensation for the non-delivery of the goods consigned. AIR (Vol 36) 1949 Cal 380.

——S. 72—Risk notes A & B— Execution of both — Effect of—Burden of proving misconduct.

The effect of executing Risk Notes A & B is that the plaintiff can recover only upon proving misconduct on the part of the Railway Administration's servants and the burden of proof thus lies on the plaintiff. But that does not absolve the Railway Administration from the liability to disclose in what way the consignment was dealt with if for purpose of sustaining the burden the plaintiff requires such disclosure to be made. If the Railway Administration is to be absolved entirely from making any disclosure as to the way the consignment was dealt with, simply because the plaintiff had agreed to execute Risk Note A then there would be no point in executing Risk Note B along with it. In view of Risk Note B the liability of the Railway Administration to make a disclosure of the way in which the consignment was dealt with would still remain but the Railway Administration would not be under the necessity to make such disclosure unless the plaintiff specifically required it. AIR (Vol 36) 1949 Nag 246 : ILR (1949) Nag 116 : 1948 NLJ 530.

——S. 72— Risk Note B, proviso — Applicability — Claim for non-delivery of goods— Claimant admitting defective package by executing Risk Note A — Proof required.

If a claimant for non-delivery of goods consigned under Risk Note B makes no attempt to show that the package was packed in accordance with the instructions laid down in the Tariff, or that there were no such instructions, he is not entitled to claim that the provisions of the proviso to that Risk Note requiring the Railway Company to make the necessary disclosure are applicable. Further where the claimant has admitted by executing Risk Note A that the package is defective and has omitted to show that in spite of the admitted defects the consignment was packed in accordance with the instructions laid down in the Tariff or to show that no instructions have been laid down, the proviso cannot be applied. Where the claimant is not entitled to take refuge under the proviso to Risk Note B, the burden of proof is on him to show that the loss or damage arose from misconduct on the the part of the Railway Administration or its servants. AIR (Vol 35) 1948 Cal 300.

——S. 72—Risk Notes A and Z— Liability for shortage due to pilferage—Facts to be shown by Railway company before claimant is called upon to prove misconduct of the Railway administration or its servants.

Where in a consignment booked on Risk Notes A and Z there is a shortage and the Court is unable from the evidence on record to say that the consignment was not properly packed in accordance with the requirements of the Tariff, it is entitled to assume that the proviso in Risk Note Z applies. In such a case the Railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. In such a case the Railway administration ought to lead evidence first and show how the consignment had been dealt with and the Court should then consider whether from the evidence it could be fairly inferred that the loss was due to misconduct of the Railway administration or its servants. AIR (Vol 35) 1948 Cal 168.

——S. 72—Risk-note Z—Loss of consignment — Misconduct—Burden of proof— Non-production of evidence—Inference—Plaintiff not calling upon defendant to produce—Effect.

In a suit for damages against a railway company for loss of consignment booked under a risk-note in Form Z it is for the defendant railway to decide whether it has produced all the evidence which it desired to produce in order to avoid an adverse inference of misconduct. The mere fact that the plaintiff did not call upon the defendant to produce this evidence does not justify the Court in refusing to draw an inference adverse to the defendant from the non-production of such evidence by the defendant. AIR (Vol 85) 1948 Pat 237 (DB).

——S. 72—Risk Note A — Misconduct— Burden of proof—Defective packing—Consignor, whether can deny.

In a case covered by Risk Note A the entire onus to prove misconduct lies on the plaintiff-consignor, and there is no provision, as there is in Risk Note B, that the Railway Administration must in the first instance disclose how the consignment has been dealt with throughout the journey before the plaintiff is called upon to prove misconduct. Again, ones Risk Note A has been executed it is no longer open to the consignor to assert that the packing was not defective. By signing the Risk Note he has admitted the defective packing. AIR (Vol 35) 1948 Pat 48.

——S. 72—Risk Note Z—Case covered by proviso to Risk Note—Misconduct—Burden of proof— Proper procedure to be followed.

In a case falling under the proviso to Risk Note Z, it is for the Railway Administration to make the disclosures referred to in the proviso before the plaintiff-consignor could be called upon to prove misconduct of the Railway Administration's servants. The procedure to be followed is this. The Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him, and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosures made by them, or he may in his turn affirmatively lead evidence which establishes miscouduct. That is one possible course. If on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure, or evidence. If he does so, then it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso. If the Court holds that his demand for further proof is not justifiable, then of course the Railway Administration need not disclose anything more. and there can be no inference against them from that fact. The plaintiff still has to discharge his burden. But if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose the further particulars called for, then the presumption under S. 114 (g), Evidence Act, will come into operation, and the plaintiff may call upon the Court, to draw an inference of misconduct upon the basis of that presumption alone. But, if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed.

There is no onus on the Court to see that the parties follow the proper procedure. It is the business of the plaintiff to ascertain the law and if he fails to conduct his case properly and does not call upon the Railway Administration in the lower Court to furnish material facts relating to the details of the carriage of the goods to enable him to make out his case of misconduct, the High Court will not order a remand so as to give him a further opportunity to do so. AIR (Vol 35) 1948 Pat 45: 1948 PWN 36.

——S. 72—Risk Notes A and B—Misconduct—Burden of proof—Failure to disclose dealings with consignment—Inference.

Under S. 72, Railways Act, the responsibility of a railway administration as carrier, is that of a bailee under Ss. 152 and 161 of the Contract Act: this responsibility can be limited by agreements contained in risk notes. In the case of risk notes in forms A and B, the liability of the railway arises only upon the misconduct of the railway Administration. While the consignor (plaintiff) has to prove misconduct, the railway has the burden to disclose to the consignor the dealings of the consignment throughout the transport up to the delivery. If from such disclosure no misconduct is inferable, then the consignor has to prove misconduct as being the cause of the loss. Where the Railway Administration fails to make a full disclosure, the consignor is entitled to an inference in his favour and adverse to the Railway Administration on the principle of Ill. (g) to S. 114 Evidence Act. AIR (Vol 34) 1947 Pat 84: 13 BR 428: 1946 PWN 148: 230 Ind Cas 288.

——S. 72—Risk Notes A and B—"Misconduct"—What is—Onus of proof.

In the case of consignments covered by risk notes A and B, there is no liability on the part of the railway administration without a finding of misconduct on the part of its servants. The onus of proof is on the party alleging misconduct. Knowledge on the part of the railway administration that an ac t of its servants was likely to cause injury is not sufficient to constitute misconduct. Misconduct is not necessarily established by proving even culpable negligence. It must be shown that the servants were actually responsible for the guilt of wrongful act. AIR (Vol 34) 1947 Pat 81: 13 BR 421: (1946) PWN 137: 230 Ind Cas 274.

——S. 72—Loss caused by misconduct—Burden lies on plaintiff to prove misconduct.

In a suit against a railway to recover damages for loss caused to the plaintiff by the destruction of his goods in transit on the allegation of misconduct on the part of the railway, the burden is cast upon the plaintiff to prove misconduct; it is not for the railway to disprove it. AIR (Vol 33) 1946 Cal. 249: ILR (1944) 2 Cal 487: 48 Cal WN 554 (DB),

——S. 72—Risk Note H—Consignment of ata loaded in watertight wagon and securely sealed— Wagon

detained due to incessant rain and sinkage of line—Contents found damaged by wet—Misconduct, held not proved by consignee.

A consignment of 137 bags of ata was booked at Cawnpure Central Goods shed, East Indian Railway for Motihari on 9th August 1941, under risk Notes in Forms A and H. The B. N. W. Ry. Company took charge of the consignment on 22nd August 1941, in a sound condition under a clear receipt loaded in a wagon which was examined and found fit to run and whose flap doors had been securely closed and sealed. The wagon containing the consignment in question reached Chapra Railway Station on 26th August 1941. On that very date, it reached Dighwara Railway Station where it met heavy and incessant rains, as a result of which further running of the train was stopped, and the train with the wagon containing the consignment, was detained at Dighwara until 6th September 1941. This was due to the fact that there was sinkage of Railway line owing to heavy and incessant rains. The wagon reached Motihari Railway Station on 7th September 1941. The seals and rivets of the wagon were found intact; but sixty bags of ata were found damaged by wet. The plaintiff brought a suit against the Railway Company for the recovery of compensation on account of damage done to the consignment:

Held, that the misconduct had to be proved by the plaintiff. The inference of misconduct had to be raised from the facts and circumstances proved by evidence. The plaintiff had failed to discharge the burden of proof which lay upon him and the suit must, therefore, be dismissed. AIR (Vol 32) 1945 Pat 159: 11 BR 414: 219 Ind Cas 431.

——S. 72—Execution of Risk 'Note H — Damage to consignment—Burden of proof.

Where a consignor institutes a suit against a Railway Company for damages on account of the damage caused to his consignment during the transit and where a Risk Note in Form H is executed in respect of the goods consigned, the consignor should prove not only that the wagon was found defective at the arrival station but also that it was on account of the misconduct of the servants of the railway company that it was or became defective. AIR (Vol 26) 1939 Cal 377: 189 Ind Cas 56.

——S. 72—Consignor executing Risk Note A—Railway, when liable—Onus—Delay—Whether misconduct.

When the consignor has executed Risk Note A, the liability of the Railway Company is limited by the terms of the contract which provide that the Railway administration shall not be liable for any loss except upon proof that the loss arose from misconduct on the part of the Railway administration servants. The burden of proving such misconduct is admittedly upon the plaintiff. Delay which is not unreasonable on the part of the Railway Company to any consignment is no indication of misconduct. AIR (Vol 22) 1935 Cal 811: 159 Ind Cas 907.

——S. 72—Risk Note H — "Misconduct"—Damage by leakage of rainwater through holes in waggon—Liability—Burden of proof.

Where a person sues a Railway Company for compensation for damages caused to goods by rainwater leaking through holes in the waggons, he must establish by positive evidence that it was owing to the defective state of the waggon in which the goods were loaded that the injury was caused. By merely proving that when the waggon reached its destination it was found in a defective state, he does not discharge the onus which lies heavily upon him to prove misconduct by the servants of the Railway Company. The principle applicable to cases where there is a loss of a portion of a consignment in transit does not apply to a case of this nature. AIR (Vol 20) 1933 All 460: 1933 ALJ 995: 144 Ind Cas 304.

——S. 72—Risk Notes A and B—Misconduct—Onus of proof.

In the case of Risk Notes A and B, the onus of proving misconduct on the part of the Railway Administration is on the party alleging it and when misconduct on the part of the servants is alleged it must be shown that the servants were actually responsible for the guilt of wrongful act: knowledge on the part of the Railway Administration or of their servant that an act is likely to cause injury is not sufficient. AIR (Vol 20) 1933 Cal 742: 57 C LJ 281: 60 C 996: 147 Ind Cas 752.

——S. 72—Goods loaded in water-tight wagons—Damage—Burden of proof—"Water-tight" meaning of.

Where goods are loaded in a water-tight waggon, it is for the consignor in order to succeed to prove that the waggon was not as a matter of fact water-tight to the knowledge of the company's servants, before despatch of the goods. On proof of this, misconduct can reasonably be inferred. The company's servants are not bound to provide any water-proof sheets in water-tight waggons.

The term "water-tight" is used as descriptive of a type of waggon and is not to be understood as a guarantee that it is actually water-tight, although it is supposed to be so. AIR (Vol 20) 1933 Nag 1: 144 Ind Cas 204.

——S. 72—Interpretation—"Misconduct", meaning of—Owner of goods to prove misconduct on the part of the Company—Quantum of proof.

The word "misconduct" denotes any unbusiness-like conduct, and includes negligence; or want of proper care which a bailee is to take under Sec. 152 of the Contract Act.

The word "misconduct" as used in the risk note B, is wide enough to include wrongful commission and omission, intentional or unintentional, of any act, which the Railway Company wrongfully did, or, which it wrongfully neglected to do, or to put it in another way, did what it should not have done, and did not do what it should have done. The immunity which the risk note B, brings to the Railway Company is by shifting the burden of proof. In the case of goods damaged in possession of the Railway Company covered by a risk note, the owner of the goods is to prove, that the injury to the goods was caused by the misconduct of the Railway Company. A plaintiff claiming damages on the account of damage caused to his bags of beris by rainwater leaking through the holes of the wagon must establish by positive evidence, that it was owing to the defective state of the wagon, in which the goods were loaded that the injury was caused By merely proving that when the wagon reached its destination, it was found in a defective state, he does not discharge the onus, which lies heavily upon him to prove misconduct by the servants of the Railway Company. AIR (Vol 17) 1930 Cal 815: 52 C LJ 235: 35 CWN 133 (DB).

——S. 72—The explanation of the loss is often within the exclusive knowledge of the railway company, and to compel the trader to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he undertakes in choosing to send the goods under a risk-note and at reduced rate. AIR (Vol 15) 1928 Lah 837: 10 Lah 329: 111 Ind Cas 523 (DB).

——S. 72—Risk Note B.—Theft—Mere proof of theft insufficient.

Even according to the risk-note B in new form, the onus of proving misconduct in a suit for damages for

goods stolen from a carriage lies, as it always has lain, on the consignor. But he has this advantage that he can, if he wishes, have the company's servant who dealt with the consignment put into the witness-box for cross-examination and may himself, if he can, prove his case from the examination or cross-examination of these witnesses, and the Court has then, from the evidence primarily and from any evidence called by the consignor, to examine whether misconduct can fairly be inferred or not. Obviously evidence as to how the consignment was dealt with does not mean evidence as to how the stolen goods were stolen, nor does the fact of theft ipso facto constitute proof of misconduct. Something more has to be shown namely, that responsible care and caution was not being used by the company or by their staff, or that the staff was grossly insufficient for its purpose, so insufficient as to import negligence in the administration, or that as a matter of fact was negligent and was not doing its proper duty. A I R 1922 Bom 46, Not foll. AIR (Vol 14) 1927 Mad 908: 53 MLJ 407: 26 M L W 355: 105 Ind Cas 299.

(b) Negligence.

——S. 72—Loss or damage—Inference—Disproof of negligence—Onus.

Loss or damage to goods entrusted to a railway administration is prima facie evidence of negligence; and the burden of disproving negligence lies on the railway administration in the absence of a special contract to the contrary. AIR (Vol 37) 1950 Pat 215 : 29 Pat 170 (DB).

——S. 72—Non-delivery of consignment — Presumption—Onus of rebuttal—Liability for damages.

The non-delivery by a Railway Company of a consignment of goods is prima facie evidence of negligence, and it is for the company to offer proof to rebut this presumption. When the Railway Company does not give reliable evidence to prove the existence of circumstances exonerating it from liability, it must be held liable for damages for non-delivery of the consignment. AIR (Vol 35) 1948 Pat 345: 27 Pat 151: 29 P L T 451 (DB).

——S. 72—Risk notes A and B—Whether negligence amounts to misconduct, question of law.

The question whether there has been negligence of a character which may amount to misconduct involves a determination of the question of principles of law and it cannot, therefore, be always a question of fact. AIR (Vol 34) 1947 Pat 84 : 1946 P W N 148.

——S. 72—Hemp stored within 45 feet of line — No protection against sparks from passing engines—No arrangement for extinguishing fire—Negligence.

Hemp was stored within 30 or 45 feet of running line; no shield was provided to prevent the sparks from passing engines alighting on combustible materials stored in the shed, and so far as appliances for extinguishing fires were concerned, there was half a dozen iron water buckets, which were empty at the time when the plaintiff's bales caught fire :

Held, that the Railway Company was grossly negligent in failing to make adequate and reasonable provision for the protection of the goods which had been delivered to it by the plaintiffs and accepted by them for transportation. A I R (Vol 23) 1936 All 69 : 1935 A W R 1389 : 1936 A L J 387 : 58 All 576 : 160 Ind Cas 703 (DB).

——S. 72—'Defective package'—Meaning.

'Defective package' does not necessarily mean packing not according to conditions prescribed by the Railway. 'Defective' means not perfect and packing may be defective in the sense that the goods may be liable to damage, leakage or wastage. A I R (Vol 23) 1936 Mad 508 : 59 Mad 789 : 43 L W 638 : 70 M L J 608 : 1936 M W N 594 : 163 Ind Cas 493.

——Ss. 72, 76—Railway Company, whether should prove only reasonable care of the goods—Standard of care required.

It would be enhancing the burden of proof upon a defendant Railway Company to an absurd extent if it has to prove not only that it has taken every reasonable care but also that it knew how the loss had happened. A bailee Railway Company will be bound to place before the Court all material witnesses who were on the spot, but this does not discharge the plaintiff from proving the want of due diligence or the negligence of the defendant or his servants and S. 76 does no more than take away from the plaintiff a burden which in any case, lies upon the defendant under S. 106, Evidence Act, namely, to prove facts which are within his special knowledge and adds no new burden on the latter; it is for the defendant to place all material evidence that may be available before the Court, and if there is failure on the defendant's part in this respect, the plaintiff may ask the Court to presume that if produced, such material would have gone against the defendant, and upon such materials as may be produced by the defendant, the plaintiff has to show that there was want of diligence or that there was negligence on the part of the latter or his servants or agents. AIR (Vol 21) 1934 Cal 151 : 37 C W N 1109 : 58 C L J 98 : 150 Ind Cas 189.

——S. 72—Wagon not locked — Company, whether negligent.

The Railway Company, held not proved to be negligent by reason of the fact that there was not an ordinary lock on wagon. AIR (Vol 21) 1934 Lah 186 : 36 P L R 536 : 15 Lah 596 : 150 Ind Cas 709 (DB).

——S. 72—Goods destroyed by fire—Liability.

The responsibility of a Railway Company under S. 72 is that of a bailee under Ss. 151, 152 and 161 of the Contract Act. The question whether the goods were actually delivered or not is a question of fact. Where the bags of biri leaves, kept in open, were destroyed probably by somebody throwing a burning cigar on them :

Held, that the Company were not negligent and hence not liable in damages. AIR (Vol 19) 1932 Cal 257 : 35 C W N 1242 : 137 Ind Cas 445.

——S. 72—Failure to take best steps in emergency.

"Good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency .. .... In a moment of extreme peril and difficulty, you are not to expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not, in the circumstances, to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If, in a sudden emergency, a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best." AIR (Vol 19) 1932 Sind 123 : 26 S L R 327 : 139 Ind Cas 605.

——S. 72—Shifting onus—Negligence.

In a suit for damages by way of compensation for loss to goods occasioned by negligence of the Railway Company though prima facie no burden lies on the Railway Company to prove that there was no negligence on their part, since ordinary damages are a presumptive evidence of negligence, once evidence is led to show that goods were carried with negligence the burden shifts on the Railway Company to rebut the presumption. AIR (Vol 16) 1929 Cal 654 : 49 C L J 551.

——S. 72—Company pleading theft in a Railway train.

Where the Railway Company alleges theft from a running train, but fails to prove the allegation, the admission is not of theft at large but of a specific form of theft; and in any case the onus still lies on the plaintiff to prove neglect or theft by the servants of the Company. AIR (Vol 15) 1928 Lah 299 : 29 P L R 633 : 106 Ind Cas 226.

——S. 72—In the absence of a valid risk-note damage being proved, it is for the railway to account for it and show that it was not due to any negligence on their part. AIR (Vol 15) 1928 Lah 166 : 10 L L J 1 : 29 P L R 344 : 108 Ind Cas 177 (DB).

——S 72—Negligence of Railway—Burden of proof.

When goods are consigned to a Railway for delivery, and damage has been caused to them in transit, the burden is always on the plaintiff, the consignor, to prove that the damage was caused by the negligence of the bailee or his servants. In doing so, it is open to the plaintiff to ask the Court to draw a presumption against the bailee for failure to call material witnesses who had to deal with the goods while in his custody. But when such evidence is led, it is for the Court to decide whether an inference can be drawn in favour of the plaintiff or not, in fit cases it being open to the Court to draw a presumption of negligence from the fact of loss or damage to the goods, if there is no evidence to explain the circumstances under which the loss or damage was caused. Whether in any particular case the Court will infer negligence must necessarily depend upon the facts of each case AIR (Vol 19) 1932 Sind 123 : 26 S L R 327 : 139 Ind Cas 605.

——S. 72—Fire.

Where goods were destroyed by fire in transit and it was found that the railway had taken all precautions against accident as a bailee of goods should have taken.

Held, that they were absolved from any liability to make good to the plaintiff, loss or damage sustained by him.

Held, further, that the railway need not prove the actual origin of the fire and show that the railway company itself was free from any negligence in the matter. AIR (Vol 14) 1927 All 774 : 49 All 884 : 25 A L J 730 : 102 Ind Cas 433 (DB).

——S. 72—Risk Note "B"—Company unable to produce Risk note.

Where the railway receipt specially referred to the risk-note form B and the goods were booked and despatched in pursuance of that contract, but the Railway could not produce the risk-note signed by plaintiff consignor in Court.

Held, that even then the plaintiff must prove that the loss of goods was caused by negligence of the Railway Company. AIR (Vol 12) 1925 Cal 915 : 86 Ind Cas 558.

——S. 72 — Risk-note B — Robbery from running train.

As robbery from a running train is an exception to wilful neglect, the onus is on the plaintiff to prove neglect or theft by railway servants, before any question is reached of robbery from a running train, though defendant attempts to prove robbery from a running train and assumes that onus at the trial. AIR (Vol 12) 1925 Mad 133 : 79 Ind Cas 137.

——S. 72 — Loss by fire — Goods delivered to be carried—Liability of Company—Negligence.

Held, that the plaintiff's goods were "delivered to be carried" within S. 72 of the Railways Act as soon as they were taken into the goods shed of the Railway station, and that there was negligence on the part of the Railway Company, inasmuch as they did not do their duty in taking all measures for the protection of goods shed when the risk of fire was imminent or had actually occurred. The liability of a Railway Company in respect of the goods is that of a bailee under S. 151, Contract Act, unless modified by contract approved by Government. A I R (Vol 5) 1918 Bom 26 : 21 Bom L R 406 : 51 Ind Cas 309 (DB).

——S. 72 - Goods delivered for carriage—Loss—Liability—Onus.

A railway is responsible for the loss or destruction of goods delivered for carriage in the same measure as a bailee. The Railway is not in the position of an insurer or common carrier. Where goods are not delivered to the consignee at the place of destination, the onus lies upon the Railway to prove circumstances exempting it from liability for negligence. A I R (Vol 5) 1918 Cal 892 : 21 C W N 1125 : 43 Ind Cas 263 (DB).

——S. 72—Consignment under Risk Note Form H—Loss—Wilful neglect—Sale of goods—Liability.

Certain perishable goods consigned under Risk Note, Form H, from a station on B. B. and C. I. Railway to a station on G. I. P. Railway were carried by the fomer Company to a junction station and put in an empty wagon of the latter Company. Not having been retranshipped at another station, they were carried to a wrong station and remained there unnoticed, but when they were ultimately sent to the proper destination they were in a stinking condition and so they were sold by public auction without notice to the consignors or their agents. On a suit by the plaintiffs, held that the Railway Authorities were not guilty of wilful neglect resulting in a loss of the complete consignment within the meaning of the risk note. AIR (Vol 3) 1916 All 256 : 14 ALJ 396 : 35 Ind Cas 265.

——S. 72 — Carriage overshooting the platform—Measure of damages. See (1904) 6 Bom LR 673 (680); See also (1907) 17 MLJ 347 (351, 352): 9 Bom LR 671: 31 Bom 381 : 2 M L T 435 : 6 C L J 5 : 4 A L J 461 : 11 C W N 721 : 34 I A 115 (PC).

(c) Wilful neglect.

——S. 72—Loss of Risk-Note—Liability of Railway.

In a suit against a Railway where the Risk Note was lost and the District Judge did not find who executed the Risk Note and whether the person executing was the duly authorised agent of the consignors:

Held, that there was no liability on the plaintiffs to establish the defendant's wilful neglect and the case must be decided under the ordinary law. A I R (Vol 19) 1932 Lah 136 : 33 P L R 100 : 134 Ind Cas 300 (DB).

——S. 72—Risk-note B.

Wilful neglect on the part of the railway servants must be proved by the party alleging it. AIR (Vol 16) 1929 Lah 551: 111 Ind Cas 795: 10 Lah 261: 30 PLR 671 (DB).

——S. 72—Non-delivery.

Where a Railway Company is sued for compensation for non-delivery of goods and the plaintiff does not admit loss of goods, the railway must first prove loss of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the railway or its servants, etc., according to the terms of the risk-note. A I R (Vol 15) 1928 Lah 774 : 112 Ind Cas 736 : 10 Lah 360 : 30 P L R 541 (DB).

——S. 72—Non-delivery.

Where a Railway Company was sued for damages for loss caused by non-delivery of plaintiff's goods and plaintiff did not admit that the goods were lost to the Railway Company :

Held, that the initial burden lay on the Railway Company to show that it had earned the protection of the risk-notes, by proving loss of goods to it and that on proof of loss by the Company the burden would shift on to plaintiff to show wilful neglect on the part of the Company. AIR (Vol 15) 1928 Nag 305: 111 Ind Cas 759 : 24 N L R 104.

——S. 72 — Loss — Obligation of Railway to supply information.

Although it may be said that in enquity the Railway Company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent under the law upon them to do so and they are not obliged to go out of their way to assist the opposite party in proving wilful neglect. The obligation is confined to suits brought in Small Cause Court :

Per Jhaveri, J.—The obligation is not only confined to suits brought in Small Cause Courts but it applies to suits in all the Courts. A I R (Vol 14) 1927 Bom 638 : 106 Ind Cas 42 : 29 Bom L R 1460 (DB).

——S. 72—Risk-note B.

A Railway Company relying on Risk-note B must admit loss in their pleadings in order to shift the onus upon the plaintiff to prove that that loss was due to wilful neglect by or on behalf of the Company. AIR (Vol 14) 1927 Pat 193 : 102 Ind Cas 403 : 6 Pat 189 : 8 P L T 385 (DB).

——S. 72 — Burden of proving loss through wilful neglect of Railway Company is on the plaintiff in a case of risk-note form 'B'. AIR (Vol 13) 1926 Lah 40: 90 Ind Cas 1054 : 7 L L J 588 : 26 P L R 819.

——S. 72—Risk Note B.

When Risk Note form B exists plaintiff must prove that loss of goods was due to wilful neglect by the Company or its servants. AIR (Vol 12) 1925 Cal 306 : 78 Ind Cas 449.

——S. 72—Risk-note form B.

Where a consignment is made under a Risk Note form "B" the burden lies on the consignor to prove that the loss was due to the wilful neglect of the Railway Company or its servants. AIR (Vol 12) 1925 Mad 949 : 22 M L W 707 : 85 Ind Cas 1003.

——S. 72 — Non-possession—Risk-note B—Evidence as to the loss of goods.

The company to whom the goods are delivered must give prima facie or formal evidence that so far as they know, the company or its servants, through whose hands the goods passed are not keeping back the goods. For this purpose, they must tender their servants for cross-examination and it is for the consignor, if he can, to prove by the cross-examination, wilful neglect or theft by the Railway servants. AIR (Vol 12) 1925 Mad 745 : 21 M L W 728:1925 M W N 186 : 48 M L J 400 : 87 Ind Cas 79.

——S. 72—Risk-note B.

When the loss is probably due to wilful neglect it is not necessary to show that there is no other possible explanation for the loss. It is enough if the facts proved strongly preponderate in favour of the theory which fixes the company with liability. AIR (Vol 12) 1925 Mad 745 : 21 M L W 728 : 1925 MWN 186 : 48 M L J 400 : 87 Ind Cas 79.

——S. 72—Risk-note B.

Risk-note B absolves the Railway Company from a claim for damages unless the consignee can prove that the loss was caused by the wilful negligence of the Railway Administration or the wilful negligence of or theft by its servants. The burden of proof in such a case lies on the consignee. AIR (Vol 12) 1925 Oudh 595 : 85 Ind Cas 815.

——S. 72—Risk note B.

When the plaintiff signs the Risk-note Form B and admits loss of goods, the onus of proving wilful neglect on the part of the defendant railway or theft by or wilful neglect of its servants, transport agents or carriers is shifted on to the plaintiffs from the defendant Company. AIR (Vol 11) 1924 Pat 812 : 75 Ind Cas 26.

——S. 72—Signature - Risk-note B.

Where the consignor signs the Risk-note form B the onus is upon him to prove wilful neglect or theft by Railway servants and it is not sufficient to prove that the loss must have occurred while the bags were in its custody, and if a man comes forward and delivers goods for carriage and signs a risk note, it cannot afterwards be complained by the owner of the goods that the man had no authority to sign the risk-note. AIR (Vol 10) 1923 Pat 325 : 4 P L T 185 : 79 Ind Cas 571.

——S. 72 — Quantum of evidence — Risk-note B — Initial evidence as to loss—Applicability of Risk-note to mere non-delivery.

Upon the special contract under Risk-note B the burden of proof lies in the first instance upon the defendants companies, that is to say, they must first prove that there was such loss as is contemplated by the first part of the risk-note, and when they have done so, the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglecte of the defendants or their servants as provided in the latter part. The risk-note will apply not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever; by merely suing for compensation for non-delivery the plaintiff cannot take the case out of the risk note.

Where the plaintiff admits in his plaint that the goods have been lost and as the defendant does not in any way repudiate the contract but on the contrary sets up the risk-note in defence.

Held, no presumption can arise that the goods are still in his possession simply because he says that he cannot give any account of the manner in which they have disappeared. When the question is whether the plaintiff has satisfied the burden which rests upon him to show that the loss has been caused by the wilful neglect of the defendants company, the quantum of evidence required for this purpose must necessarily vary according to the nature of the goods. AIR (Vol 10) 1923 Pat 285 : 4 P L T 173 : 1923 P H C C 82 : 1 Pat L R 169 : 2 Pat 442 : 72 Ind Cas 440 (DB).

——S. 72 — Risk-note H — Prima facie evidence of suspicion - Shifting of onus.

In a case of bales booked from a station on one Railway to another place over a different railway if the bales are packed in a waggon sealed at the sending station where the loaded van remained in the station for nearly 34 hours there is a legitimate inference that the waggon was broken open at the sending place where the goods could be disposed of without exciting any suspicion; and even if it occurred after the waggon left the station of despatch, that either some of the company servants were concerned in the theft or the theft occurred owing to the company's servants' wilful neglect. There being a prima facie case against the railway, it is for the railway company to offer some reasonable explanation in order to escape liability. AIR (Vol 9) 1922 Bom 46 : 24 Bom L R 272 : 47 Bom 155 : 67 Ind Cas 162 (DB).

——S. 72—Risk-note B.

The burden of proving wilful neglect or theft by the Railway Administration or its servants lies on the plaintiff. The responsibility of a Railway Company is limited under Section 72 (2) of the Railways Act in accordance with the terms of the Risk-note (B). AIR (Vol 9) 1922 Oudh 170 : 8 O L J 588 : 65 Ind Cas 342.

——S. 72—Pleadings.

The railway company under the risk-note is liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport

agents or carriers employed by them. The plaintiff therefore in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the railway must set forth all the particulars constituting the wilful neglect or default of the railway company which occasioned the loss or deterioration as is required by Order 6, Rule 4 of the C. P. Code. The onus of proving wilful neglect and default of the Railway Company and thereby fixing liability upon it must necessarily be upon the plaintiff. AIR (Vol 9) 1922 Pat 17: 3 Pat L T 222 : 67 Ind Cas 664.

——**S. 72 (2) — Risk Note B—Liability of railway — Onus of proof.**

Where goods are booked for conveyance by a railway under Risk Note, Form B, in consideration of a special reduced rate, the consignor cannot make the Company liable for loss except on proof of theft or wilful neglect of railway servants, the onus of proving which is on him. AIR (Vol 16) 1919 Bom 126: 43 Bom 769 : 21 Bom L R 779 : 52 Ind Cas 516 (DB);

See also AIR (Vol 6) 1919 Pat 42:(1919) Pat H C C 150 : 49 Ind Cas 498;

17 C W N 635 (Note) : 19 Ind Cas 242.

But see 15 PLR 1909: 113 P R 1908:4 Ind Cas 907.

——**Ss. 72 (2) and 76—Risk Note, Form B—Proof of negligence — Onus — Contract Act, Ss. 151, 152 and 161.**

In a suit for compensation for the loss of goods consigned under a risk note in form B, the defendant Railway Company would not be liable if the plaintiff fails to prove that the loss was due to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants. The case would be guided by the terms of the special contract embodied in the Risk Note, Form "B" and not by Ss. 151, 152 and 161 of the Contract Act or the other provisions of the Railways Act. AIR (Vol 6) 1919 Cal 975 : 22 C W N 622 : 44 Ind Cas 691 (DB);

See also (1912) 16 C W N 766 : 15 Ind Cas 56.

——**S. 72, Cl. (a) and (b) — Goods consigned under Risk Note Form H — Loss of goods — Onus of proving negligence.**

Where goods are consigned to a Railway under Risk Note, Form H, the Railway is not liable for the loss of goods unless the loss was caused by theft by one or more of the Railway servants or by their wilful neglect and the consignor must prove wilful neglect since he has entered into a special form of contract. Whether the expression "robbery from a running train" in Risk Note, Form H, means anything more than an ordinary theft is doubtful. AIR (Vol 4) 1917 All 338 : 39 All 418; 15 A L J 321 : 39 Ind Cas 130 (DB); See also AIR (Vol 1) 1914 Cal 761: 19 C L J 142: 41 Cal 576 : 19 C W N 95 : 22 Ind Cas 679.

5. Construction—Risk notes.

See also Note 13.

(a) General.

(a-1) Attestation.

(b) Risk note and Railway receipt not of the same date—Effect of.

(c) Risk note in force before and after 1924 —Distinction.

(d) Signature on risk note — Effect of.

(a) General.

——**S. 72—Risk Note A — Short delivery not due to defective condition of packing—Bags cut through flap door gaps — Railway, if protected.**

For the purpose of Risk Note A, shortage in weight of goods is no doubt a condition in which the goods are delivered. It does not follow however that once Risk Note A has been executed every case of short delivery will be covered by the saving clause which protects the Railway Administration. Something more is necessary before the saving clause can have operation. It must appear prima facie that the loss which actually occurred was in some way connected with the defective condition of the packing. Where the shortage is not due to wastage on account of the bad condition of the bags but due to the fact that they had been cut through the flap door gaps, the special protection afforded by the saving clause in Risk Note A is not available to the Railway Administration. AIR (Vol 37) 1950 Cal 394.

——**S. 72 — Risk Note B, proviso (b) — Applicability — Need for proof of proper package — Consignor executing both Risk Notes A and B — Duty of Railway Administration to disclose how consignment was dealt with.**

Before a case can be considered to be within the proviso (b) of the Risk Note B, the package from which pilferage has taken place must be shown to be properly packed.

Where the consignor has executed Risk Note A in addition to Risk Note B, the Court is bound to take into consideration the circumstance that by the execution of the Risk Note A the consignor was admitting defective packing. If the Court finds that the articles were not properly packed, the Railway Administration is under the duty to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control. The result therefore is that there is no scope for making the presumption against the Railway Administration, because of non-disclosure by them, that there was misconduct on their part or their servants. AIR (Vol 36) 1949 Cal 679.

——S. 72—Risk Note C—Exemption from liability — Extends to loss caused by negligence or misconduct of servants but is limited to loss to consignment by open wagons. See AIR (Vol 33) 1946 Cal 249: 81 CLJ 377.

——S. 72—Risk Note—Effect of—Misconduct—What amounts to. See AIR (Vol 33) 1946 Cal 249 : 81 CLJ 377.

——**S. 72 (2) (b)— Risk Note B proviso — Construction of — Obligation of Railway Company as to disclosure — Breach of contractual obligation as to disclosure — When can be said to arise — Misconduct, inference as to.**

The first portion of the proviso to Risk Note B in the form approved by the Governor-General in Council under S. 72 (2) (b), lays an obligation of disclosure on the Railway Administration, while the second portion of the proviso assumes that the obligation of disclosure, including the giving of the necessary evidence, has been discharged, and impliedly directs consideration of the material so disclosed before the consignor is relegated to the original burden of proof of misconduct laid upon him ; if such consideration leads to the fair inference of misconduct, the Railway Administration will be liable; otherwise, the proviso will cease to operate, and the consignor will be relegated to his original burden of proof of misconduct. The obligation under the first proviso arises at once upon the occurrence of either of cases (a) or (b) contemplated by the proviso, and is not confined to the stage of litigation. One object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the Railway Administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but if the consignor is not satisfied that the disclosure has been adequate, the dispute

must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, evidence before a Court of Law is contemplated and the Railway Administration should submit their evidence first at the trial. At the close of the evidence for the administration, two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure but is whether they have discharged their obligation of disclosure and in regard to this, the terms of the Risk Note require a step in procedure which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, that is for him to say so, and to call on the administration to fulfil their obligation under the contract, and the administration should then have the opportunity to meet the demands of the consignor before their case is closed ; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure. The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the administration; if so, the consignor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair in erence of misconduct keeping in mind the provisions of S. 114, Evidence Act. AIR (Vol 24) 1937 P C 152: 3 B R 461 : 41 C W N 837 : 46 L W 180 : ILR (1937) Bom 375 : 31 S L R 326 : 39 Bom L R 946 : 1937 M W N 904 : 1937 O W N 1045 : 18 P L T 767 : 64 I A 176 : 1937-2 M L J 689 : 1937 A L J 1117 : 1937 A W R 1159 : 168 Ind Cas 1.

——S. 72—Risk Note H—"Deterioration"— Meaning and extent.

Per Din Mohammad J.— The words "deterioration from any cause whatever" include depreciation in value on account of detention or delay in delivery.

But it is only where the consignor successfully establishes any such misconduct on the part of the servants of the Railway Administration, as would be sufficient to mulct them in damages in spite of the Risk Note, that he is entitled to damages.

Per Bhide J. — The word "deterioration" in the Risk Note must have the same meaning as that in S. 72, Railways Act, and in Ss. 151-152 and 161, Contract Act. Consequently, the word "deterioration" as used in the Risk Note H, does not cover depreciation of value due to fall in the market price. AIR (Vol 22) 1935 Lah 492 : 16 Lah 280 : 37 P L R 579 : 159 Ind Cas 72 (DB).

——S. 72 — The word 'rate' mentioned in Risk Note B means the charge per maund for the minimum quantity. AIR (Vol 20) 1933 All 854 : 1933 A L J 901: 148 Ind Cas 419.

——S. 72—Deterioration.

The words "deterioration" in the risk-note is wide enough to include depreciation in value on account of a fall in the price of the goods. The meaning of the word "deterioration" in S. 161 which imposes liability on railway company is the same as in the risk-note form B, which lays down special conditions under which the railway company is protected: A.I.R. 1925 Nag. 350, not, Foll. AIR (Vol 17) 1930 All 132 : 1930 A L J 297 : 121 Ind Cas 828 (DB).

——S. 72—Risk-note H.

The words "from any cause whatever" cover incidents which happen as a result of the waggon going sick, and, therefore, the railway company is exempted from liability for loss or damages arising therefrom : AIR (Vol 14) 1927 Nag 347 : 104 Ind Cas 647.

——S. 72—Risk-note B—Railway strike.

Where a risk-note in terms provides that the company shall be liable for wilful neglect either on their own part or on the part of their servants, the refusal of railway servants to work in breach of their contract, is evidence of wilful neglect on their part and consequently on the part of railway. A I R (Vol 14) 1927 Pat 337 : 6 Pat 369 : 103 Ind Cas 655 (DB).

——S. 72—The term "fire" in Risk-note form H is not to be construed ejusdem generis with "any unforeseen event or accident." AIR (Vol 13) 1926 Bom 390 : 50 Bom 284 : 28 Bom L R 718 : 96 Ind Cas 293 (DB).

——S. 72—Risk-note H.

The words "before during and after transit" clearly mean the entire period from the time the delivery is taken by the railway company to the time delivery is made by the railway company to the consignee, so the liability of the company covers that period. AIR (Vol 13) 1926 Bom 390 : 28 Bom L R 718 · 50 Bom 284 : 96 Ind Cas 293 (DB).

——S. 72—Risk-note H.

The contract under Risk-note H forms a complete special contract, between the consignor and the Railway covering the whole period during which the goods remain with the railway. A I R (Vol 13) 1926 Lah 614 : 94 Ind Cas 173.

——S. 72—Risk-notes B and H.

The intention of the Risk-notes is clearly to protect the Railway Company from loss of any kind arising out of fire whether that fire is caused accidentally or through the 'wilful neglect' of the Railway Company's servants. AIR (Vol 13) 1926 Lah 341 : 7 Lah 319 : 27 P L R 507 : 98 Ind Cas 329 (DB).

——S. 72—The person sending and the person delivering the goods to the Railway Administration need not be necessarily the same, and so execution of Risk-note by the person delivering the goods is sufficient to bind the sender by the contract. AIR (Vol 13) 1926 Pat 336 : 5 Pat 221 : 98 Ind Cas 206 (DB).

——S. 72 –Risk-note—Package.

The word "package" seems to mean both that which is packed, and that in which it is packed, its covering or receptacle. AIR (Vol 10) 1923 Pat 487 : 4 P L T 392 : 72 Ind Cas 133. (DB)

——S. 72, Cl. (2) (b) –Risk Note Form B –Contract in — Public policy—Short delivery of goods—Railway Company's liability.

The agreement known as "Risk Note, Form B" is not contrary to public policy and absolves a Railway Company from all liability for short delivery of goods. But it is liable for the loss of a whole consignment or of one or more complete packages of consignment. 17 C W N 529 : 18 Ind Cas 216 (DB).

——Ss 72 (2) (b)—Risk note, Form B — Liability of railway.

An agreement in risk note, form B executed by a consignor of goods, relieves the Railway from liability in respect of any claim for compensation, no matter how the loss, destruction, deterioration, or damage was caused, and the mere fact that such loss was due to the goods being negligently loaded in open wagons does not entitle the consignee to claim compensation from the railway. The railway is in such cases relieved of all responsibility quite irrespective of the alleged nature of the negligence, or it would seem wilful misconduct on the part of the railway or its servants which caused such damage. (1909) 10 P L R 74 (77, 78) : 1909 P W R 73 : 1909 P R 50 : 2 Ind Cas 94.

——Ss. 72 and 76—Liability of Risk note, construction — Consignor bound by ordinary train arrangements—"During transit ' meaning of.

A consignor by Railway, whether he enquires or not, is bound not only by the ordinary route but also by the ordinary train arrangements and hours of arrival according to which they profess to carry.

A Risk Note contained a clause that the company will not be liable for loss "before, during or after transit."

Held, that the clause covered the whole period from the time the goods were delivered to the Company up to the time of redelivery to the consignee. The plaintiff consigned goods to K. Goods were taken to K and thence to C and brought back to K owing to some train arrangements. The goods were damaged while at C. The finding was that the goods were carried by usual route.

Held, that the Company was not liable, the loss having occurred during transit. 33 M 120 (121, 122): 6 M L T 292 : (1909) 3 Ind Cas 931 (DB).

——S. 72—"Risk Note"—Goods lost in transit — Exemption from liability—Onus of proof.

Where goods are carried by a Railway Company under the terms of a "Risk Note" by which the Railway Company is not liable for any loss, destruction or deterioration of, or damage to, the goods before, during, or after transit the Railway Company is not liable for failure to deliver the goods if they are lost in transit. If the consignor should assert that the goods were not lost but were delivered to a wrong person, the onus lay upon him to prove his case. The onus is on the plaintiff (consignor) to show that the circumstances under which the goods disappeared were not such as to amount to 'loss" within the meaning of the "Risk Note." The Railway Company is not bound to show by affirmative evidence that it has lost the goods. (1903) 14 M L J 396 (399, 400) (DB).

(a-1) Attestation.

——S. 72—Risk-note H.

The attestation of risk-note H by two witnesses, although contemplated in the form as approved by the Governor-General in Council, is not an essential part of the form. AIR (Vol 15) 1928 P C 24: 54 M L J 167 : 52 Bom 169 : 55 I A 67: 47 C L J 214 : 30 Bom L R 275: 9 P L T 171: 5 O W N 219: 32 C W N 544: 27 M L W 667 : 26 A L J 545 : 1928 M W N 938 : 107 Ind Cas 124.

——S. 72—"Risk-note H".

The mere fact, that the form provides a place to enable two witnesses to attest the signature of the sender does not amount to enacting that the document is invalid, unless it is attested by two witnesses. AIR (Vol 13) 1926 Bom 390 : 50 Bom 284 : 28 Bom L R 718 : 96 Ind Cas 293 (DB).

——S. 72—Not essential.

Section 72 requires that an agreement limiting the responsibility of the Railway shall be in writing. To sign a blank paper on which an agreement is afterwards written is not the same thing as executing an agreement in writing. Neither is it sufficient to sign a printed form in which no details relating to the particular consignment are recorded. Section 72 does not require that it shall be attested though the agreement provides a space for the signature of attesting witnesses. AIR (Vol 11) 1924 All 692 : 46 All 649 : 22 A L J 645 : 5 L R A Civ. 396 : 81 Ind Cas 1 (DB).

(b) Risk note and railway receipt not of the same date—Effect of.

——S. 72—Risk-note and Railway receipt not of the same date.

Where consignment under risk-note form B and goods consignment note bear a different date from the railway receipt for the consignment, the risk note is not vitiated. AIR (Vol 17) 1930 Bom 45 : 54 Bom 90 : 31 Bom L R 1297 : 122 Ind Cas 849 (DB).

——S. 72—Risk-note—Contents of.

The risk notes, forwarding order and the Railway receipt need not bear the same date; if it is established that they refer to a particular consignment in question, the Railway Company is protected. AIR 1928 Lah 162, Diss. from. AIR (Vol 17) 1930 Cal 815 : 52 C L J 235 : 35 C W N 133 (DB).

——S. 72—Risk-note and Railway receipt not of the same date.

So long as it is established that the Risk-notes, the Forwarding Note and railway receipt refer to the consignment in question the Company is amply protected, though Risk-notes, the forwarding order and railway receipt do not bear one and "the same date" as stated in the approved form of Risk notes A and B. AIR 1928 Lah 162, Diss. from. AIR (Vol 16) 1929 Cal 482 : 56 Cal 1060 : 121 Ind Cas 319 (DB).

——S. 72 — Where dates of note and Ry. Receipt do not correspond.

According to Risk-note B, as approved by the Governer-General in Council the forwarding note, the railway receipt and the Risk-note must all be executed on the same date, and so where there is no proof that they were executed on the same date, the Risk-note for goods consigned is not in the approved form and it cannot afford immunity to the railway from its liability as a bailee, in case the goods are lost. AIR (Vol 15) 1928 Lah 162 : 10 L L J 202 : 29 P L R 374 : 108 Ind Cas 189.

(c) Risk note in force before and after 1924—Distinction.

——S. 72—Risk notes in force before and after 1924—Distinction between.

The difference between the Risk Notes in force before and after 1924 is that in the previous one, the Railway Administration was entirely absolved from responsibility for loss in case of fire, robbery from a running train or any other unforeseen event or accident; but in other cases, it was liable only if the loss was brought about by the wilful neglect of the employees of the administration. In the form now in force, the words 'wilful neglect' have been changed into 'misconduct' and the Railway Administration is liable in case of loss by fire also provided that it is due to the misconduct of their officials. In cases other than loss by fire or robbery, a duty is cast upon the Railway Administration to give evidence as to how they dealt with the consignment. AIR (Vol 24) 1937 Pat 289 : 1937 P W N 71: 3 B R 554 : 169 Ind Cas 354.

(d) Signature on risk note—Effect of.

——S. 72—Risk notes A and Z—Both executed—Liability of Railway Administration—Extent.

Where both Risk Notes A and Z have been executed by the consignor, it is open to the Railway Administration to take advantage of either, and if under Risk Note A it can be shown that the Railway Administration has escaped liability, then the consignor's suit must be dismissed even if under Risk Note Z it might be held that liability has not been fully taken away. AIR (Vol 35) 1948 Pat 45 : 1948 P W N 36.

——S. 72 (2)—Signature on risk note—Effect of.

A person delivering goods on behalf of Moolji Sicka & Co., signed the risk notes with the addition of words "for M. S.".

Held, that this did not in any way take away the effect of the execution of the document by the person delivering goods. AIR (Vol 17) 1930 Cal 815 : 52 C L J 235 : 35 C W N 133 (DB).

——S. 72—Proof of.

Where the railway receipt upon which a suit for damages against Railway Co., is based refers to the risk-note the Railway Co., need no longer prove its execution and therefore the plaintiff-consignor must prove that he had sent an unauthorised person to

obtain it for him and that he was not bound by his own conduct in doing so. AIR (Vol 16) 1929 Lah 887: 114 Ind Cas 51 (DB).

——S. 72—Authority.

Where a person has full authority to sign the name of a firm it is unnecessary that he should purport to sign it as against. AIR (Vol 15) 1928 P C 24 : 54 M L J 167 : 52 Bom 169 : 55 I A 67 : 47 C L J 214 : 30 Bom L R 275 : 9 P L T 171 : 5 O W N 219 : 32 C W N 544 : 27 M L W 667 : 26 A L J 545 : 1928 M W N 938 : 107 Ind Cas 124.

——S. 72—Illiterate person.

If a person being illiterate signs a contract thinking it to be of a different character altogether from what it is in fact, or if any misrepresentation is made to him as to what he is signing, then no doubt the signature will not be binding on him, but it is quite wrong to suppose that it is the legal duty of a Railway Company to see whether the person delivering the goods is ignorant or not, or to see that he reads and understands before he signs.

If a consignor who can read sends an illiterate person to deliver goods to a Railway administration and that person signs the contract, the contract so signed by that person is binding on the consignor as though he has signed it himself.

It is for the sender if he is not satisfied of his competence to give him instructions or assistance. It is quite wrong to treat a Railway Company in a case of this kind as though it were dealing with a pardanashin woman and taking a transfer of her estate, or as a person in a fiduciary relation to the consignor of the goods. A I R (Vol 15) 1928 Cal 170 : 55 Cal 142 : 47 C L J 32 : 32 C W N 53 : 106 Ind Cas 247 (DB).

——S. 72—Sufficiency of.

When a person tenders the goods to the Railway Company, he has, so far as any question of contract with the railway for carriage is concerned, power under the statute to sign the risk-note so as to bind the consignor.

Where a person signs not merely his own name but his own name with the addition of agent for a company then the risk-note is signed by the person delivering the goods within the meaning of the section. A I R (Vol 15) 1928 Cal 170: 55 Cal 142: 47 C L J 32: 32 C W N 53: 106 Ind Cas 247 (DB).

——S. 72 — The requirements of the section are sufficiently complied with if it is proved that the executor signed the Risk-note on behalf of the consignor and has authority to so sign. A I R (Vol 15) 1928 Lah 899: 30 P L R 626: 10 Lah 537: 114 Ind Cas 56 (DB).

——S. 72—A Risk-note signed by a person other than the one who consigned or delivered the goods to the Railway is invalid. A I R (Vol 15) 1928 Lah 166 : 10 L L J 1 : 29 P L R 344 : 108 Ind Cas 177 (DB).

——S. 72—Agent.

Signature on Risk-note of an authorised representative of the consignor in regard to the business of consigning goods, clearly binds the consignor; and that fact that he also attested the document does not affect its validity. 20 C W N 685 Diss.

In the Risk-note, Form H, the scoring of the word "witness" above the signature of the consignor's agent makes no real difference in the validity or the effect of the document as originally executed. A I R (Vol 13) 1926 Bom 390 : 28 Bom L R 718 ; 50 Bom 284 : 98 Ind Cas 293 (DB).

——S. 72—According to S. 72, sub-S. 2, the Risk-note should be signed by or on behalf of the person sending or delivering goods to the Railway Administration. Therefore the signature of the person who delivers the goods to Railway would be quite sufficient. A I R (Vol 12) 1925 All 675 : 6 L R A Civ. 519 : 89 Ind Cas 497 (DB.)

——S. 72—A Railway Company is protected by risk note signed either by the person sending goods or by persons delivering goods to the Company. A I R (Vol 12) 1925 Cal 308 : 80 Ind Cas 705 (DB).

——S. 72—Signing in another person's name.

The Act provides for the signing of the agreement by the person actually delivering the package to the Railway Administration. The consignor and the consignee would be bound by such signature. If the person actually delivering the package to the Railway had not signed his own name but had signed the name of some Company, it might be argued that it was the duty of the Railway Administration to discover whether the person signing name of somebody else on the Risk Note had the authority or not to sign as an agent. But where this is not the case the Risk Note signed by the person delivering the package will bind the consignor and the consignee. A I R (Vol 12) 1925 Oudh 595 : 85 Ind Cas 815.

——S. 72 — Risk Note by consignor's servant is binding.

A consignor of goods is bound by a risk note signed by a person who actually delivered the goods to the Railway Company. A I R (Vol 11) 1924 Pat 315 : 73 Ind Cas 642.

——S. 72 (2) — Improper signing of a Risk Note company not free from liability only.

The signing of the name of the principal by the agent without signing his name as agent in a risk note is not 'signing' and therefore the Company is not free from liability. Provisions of S. 72 must be very scrupulously observed. A I R (Vol 4) 1917 Cal 790 : 20 C W N 685 : 32 Ind Cas 393 (DB).

6. Damages.

See also N. 15.

——S. 72—Non-delivery of parcel — Suit to recover damages — Value at possible date of delivery and not at date of suit should be considered.

In a suit brought to recover domages for non-delivery of a parcel consigned to a railway, the date of the suit is not the point of time which can be looked to for determining the value of the parcel. The Court has rather to see what would have been its value had it been delivered at the destination in the ordinary course. AIR (Vol 33) 1946 All 198 : 1945 All L J 543 : 1946 Oudh W N (H C) 18 : 224 Ind Cas 108 (DB).

——S. 72—Risk Note "H" — Liability of Railway — Onus.

Where goods are consigned under Risk Note "H", the consignor cannot recover damages for deterioration of goods unless he proves misconduct by some servant of the Railway.

In order to claim damages for deterioration of the perishable goods consigned, it is not enough for the consignor to prove that the deterioration was due to delay because of misconduct in transit for want of good care on the part of a Railway servant. It is further necessary for him to prove that the damage to the consignment was due to such misconduct. AIR (Vol 31) 1944 Cal 50 : I L R (1943) 1 Cal 397 : 211 Ind Cas 270.

——S. 72—'Misconduct,' what is—Failure to give delivery of fruit consignment to consignee in time, due to dislocation of station working owing to labour strike—Fruits deteriorated—Suit for damages.

Misconduct is something opposed to accident or negligence; it is the intentional doing of something which the doer knows to be wrong and which he does recklessly not caring what the result may be.

The baskets of oranges were loaded at Nagpur on 15th December 1936 and arrived at their destination, Kharagpur, on 24th December 1936. Owing to dislocation of the station working due to a labour strike, delivery was not offered to the consignee until 31st December 1936, when the fruit had deteriorated.

The plaintiff consignor brought a suit for damages against the Railway Company. The Risk Note signed by the consignor exonerated the Railway for any loss "except upon proof that such loss arose from misconduct on the part of the Railway Administration's servauts" :

Held, that there was negligence on the part of the Railway Company but not positive misconduct; it was a fault of omission, not of commission. Hence, by signing the Risk Note, the consignor deprived himself of the remedy for damages he otherwise would have had. AIR (Vol 27) 1940 Nag 238 : 1940 N L J 171 : 188 Ind Cas 536.

——S. 72 — Risk Note A—Goods defectively packed — Damage by wet — Consignor, whether entitled to damages.

Where some of the goods which were packed defectively and were sent under Risk Note A, are damaged by wet and it is not proved that the goods got wet owing to the misconduct of the Railway, the consignor, having regard to the implications of Risk Note A, is not entitled to any damage. AIR (Vol 22) 1935 Cal 809 : 159 Ind Cas 886.

——S. 72—Risk Note A—Damages—Measure of.

The measure of damages is to be assessed on the basis of the valuation at the place of destination and at the place where the goods were booked. AIR (Vol 21) 1934 Cal 834 : 59 C L J 467 : 153 Ind Cas 867.

——S. 72 Deterioration of goods — Plaintiff refusing to take delivery and stopping Railway Company from selling them even after 2½ months — Claim for value of goods.

Plaintiffs not only refused to take delivery but they even prevented the Railway Company from selling the goods and realising what might be obtained by selling the goods. They knew that the goods were liable to progressive damage but objected to their sale even after two and half months :

Held, that the plaintiffs were not entitled to the value of the goods on the basis that they were totally lost as they did not prove actually what was the degree of the deterioration. AIR (Vol 21) 1934 Cal 834 : 59 C L J 467 : 153 Ind Cas 867.

——S. 72—Deterioration of goods — Refusal to take delivery—Damages—Interest on damages.

The consignee of goods claiming damages for deterioration is not entitled to refuse to take delivery but should take delivery and sue for the loss, and where, owing to his failure to take delivery, no evidence exists regarding the amount and extent of damage, he cannot recover any compensation. It is only by showing special circumstances that he can be given an award of interest on damages. (1934) 148 Ind Cas 489 (Lah).

——S. 72 — Risk Note B — Discrepancy in number between Railway receipt and consignment—Right of consignee to demand open delivery—Damages.

Risk Note B protects the Railway Administration against claim for damages "arising out of loss or destruction or deterioration or by damages to the goods" and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves but by some act of the Railway Administration or its employees not affecting the condition of the consignment or the goods consigned, for instance, when wrong numbers are given in the Railway receipt.

Where a Railway receipt showed that the number of the consignment was No. 23 but on going to take delivery, the Railway authorities tendered a consignment bearing No. 93, and though the consignee was prepared to take and claimed open delivery, such delivery was not given until after the expiry of 11 days during which period the price of the goods went down :

Held, (i) the plaintiff was within his rights in insisting on the consignment bearing the same number as given in the receipt being delivered to him or in the alternative, on permission being given to him, to examine the contents before taking delivery of the goods so as to give a discharge to the Railway Administration ;

(ii) that there was unreasonable delay in delivery and the consignee was entitled to recover damages. A I R (Vol 20) 1933 All 477 : 1933 A L J 966 : 55 All 625 : 144 Ind Cas 113.

——S. 72—Suit for damages—Advantage of reduced rate.

Person claiming damages from Railway Company, for damage to his goods, cannot retain to himself, the advantage of the reduced rate, and repudiate the consideration for it, the risk note executed by the person, who delivered the goods to the Railway as being unauthorised. AIR (Vol 17) 1930 Cal 815 : 52 C L J 235 : 35 C W N 133 (DB).

——S. 72—Conversion—Refusal to deliver.

Ordinarily a refusal to deliver goods amounts to a conversion though a qualified, reasonable and justifiable refusal may not :

62 bags out of 64 bags of sugar of plaintiff's consignment arrived but he was repeatedly refused delivery. As the market rate was falling, he served the railway company with a notice claiming the value of the consignment from the railway. But after the receipt of the notice the railway notified plaintiff that 62 bags of his were lying undelivered at his risk incurring demurrage charges and if they were not removed within ten days the consignment would be auctioned as unclaimed property. Bags were accordingly auctioned and the plaintiff sued the company for the value of sugar and interest.

Held, that plaintiff was entitled to the claim as the company had no right of any kind to refuse delivery to the plaintiff. AIR (Vol 15) 1928 Lah 804 : 10 Lah 414 : 30 P L R 553 : 115 Ind Cas 473 (DB).

——S. 72—Shortage in goods suspected—Open delivery—Rights of parties.

There is no obligation on a carrier of goods to give open or examined delivery of his consignee but where before taking delivery of his parcel from the carrier, the consignee suspects that a part of the contents are either damaged or lost, it is not unreasonable for him to demand that open or examined delivery may be given to him. It facilitates the subsequent inquiry as to any claim for damages preferred against the carrier, and avoids unnecessary evidence being called at the trial. Though, on the one hand, the refusal of the carrier to give open delivery affords no cause of action against him, on the other hand, the refusal of the consignee to take delivery of the parcel unless open delivery was given to him, does not disentitle him to his claim for damages for the portion of the goods actually lost or damaged while in the custody of carrier, though he may not recover the loss which is the direct result of his refusal to take delivery of the remaining goods. AIR (Vol 13) 1926 Sind 102 : 91 Ind Cas 437.

——S. 72—Special damage.

In absence of intimation that goods should reach by particular date, no right to special damages exists on the ground of non-realisation of special profit but only a right to ordinary damages exists. AIR (Vol 11) 1924 Nag 425 : 80 Ind Cas 1.

7. Delay in delivery.

——S. 72—Damages—Seal of wagon broken — Suspecting theft, wagons removed to proper shed — Delay resulting—Railway, whether responsible.

The detention of the goods by the Company for 23 hours at a junction was in order to prevent any possible theft and it was done by Railway servants in the discharge of their duty to prevent theft. It was

found that a wire had been cut and they suspected that a theft had taken place or that theft might take place unless proper steps were taken and they removed the wagons to the proper shed and properly sealed the wagon again :

Held that the Railway was not responsible for the delay caused by such detention. A I R (Vol 22) 1935 Cal 809 : 159 Ind Cas 886.

——S. 72—Address of consignee not written legibly —Delay—Liability of Railway.

It is the duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty and the goods are thereby lost or delayed, the Company cannot be held responsible for the same. A I R (Vol 21) 1934 Cal 508 : 38 C W N 352 : 61 Cal 293 : 149 Ind Cas 1229 (DB).

——S. 72—Risk-note A.

Risk-note A confers, exemption from liability only in respect of the "condition" of the goods at the time of the delivery at destination. It cannot confer immunity from liability for loss due to other causes, e.g., loss due to fall in prices resulting from undue delay in transit, or loss due to disappearance of goods due to theft etc. A I R (Vol 15) 1928 Lah 166 : 10 L L J 1 : 29 P L R 344 : 108 Ind Cas 177 (DB).

——S. 72—Property in the goods entrusted to a carrier remains with the owner, and he is bound to take delivery thereof even if they are damaged, his remedy in that case being to claim compensation. AIR (Vol 13) 1926 Lah 512 : 8 L L J 264 : 27 P L R 590 : 96 Ind Cas 454 (DB).

——S. 72—Loss caused by delay.

If owing to the delay, damage was suffered by the plaintiffs independently of any deterioration of the goods themselves, the railway company is liable for the damage caused and is not protected by the risk-note. AIR (Vol 12) 1925 Nag 350 : 21 N L R 78 : 88 Ind Cas 291 (DB).

——S. 72—Delay in transmission.

If risk-note does not specially protect Railway against delay notwithstanding risk-note, Railway is liable for unreasonable delay in transmission of goods which it cannot explain. AIR (Vol 11) 1924 All 760 : 22 A L J 769 : 5 L R A Civ 579 : 46 All 844 : 80 Ind Cas 19.

——S. 72—Delay in transit.

Damage suffered by the consignor owing to delay during transit entitles him to sue the company for damages. Risk-note B does not protect the company in such cases. AIR (Vol 11) 1924 All 8 : 45 All 534 : 21 A L J 448 : 4 L R A Civ 242 : 77 Ind Cas 1046.

——S. 72—Unreasonable delay.

Railway Company is liable to pay ordinary damages for unreasonable delay in transmission of goods notwithstanding risk-note protecting Company from "loss, destruction or deterioration of, or damage to the said consignment," in the absence of special conditions to the contrary or satisfactory explanation for delay. AIR (Vol 11) 1924 Nag 425 : 80 Ind Cas 1.

——S. 72 — Unreasonable delay — Nature of the consignment.

Under Section 72 of the Indian Railways Act the position of the Railway Company carrying goods for another is that of a bailee; and it is bound to carry the goods under ordinary circumstances within a reasonable time. If any loss accrues to the owner of the goods on account of the delay in the delivery, the Railway Company is not liable for the same unless the delay is unreasonable. But where there is evidence to show that the delay is unreasonable and that goods such as fireworks are not ordinarily saleable in the market except at certain times of the year, the plaintiff is justified in refusing to take delivery of the goods unless the company is willing to compensate him for the deterioration of their value and for the loss caused to him by the delay. A I R (Vol 9) 1922 All 324 : 43 All 623 : 19 A L J 654 : 64 Ind Cas 868 (D B).

——S. 72 — Absence of special contract — Contract Act, S. 161—Delay.

In the absence of risk-note in form A or of any proof to show that the goods were despatched at the risk of the consignor or consignee, or that any notice was given that the goods were to be carried subject to the rules contained in the Goods Tariff Regulations the contract between the parties could not be said to be contract under which goods were to be carried subject to clause 40 of the Goods Tariff Regulations, and ordinary rule applicable to a bailee would be applicable under these circumstances. Under S. 72 of the Railways Act, 1890, S. 161 of the Contract Act would govern the liability of the Railway. Under that section the railway would be responsible for delay in the delivery of goods at the proper time. A I R (Vol 9) 1922 All 63 : 20 A L J 114 : 65 Ind Cas 771.

8. Delivery of goods.

——S. 72 — Appendix C. Cl. (3) — Construction and scope — Tender of railway receipt and signature in delivery book — Effect — If conclusive evidence of complete delivery.

Cl. (3) of Appendix C to the Railways Act cannot be read as meaning that the tender of the railway receipt and the signature of the consignee or his agent in the delivery book at the destination would be conclusive evidence of complete delivery so as to exclude any other evidence to show that there was no complete delivery. A I R (Vol 35) 1948 Pat 242 (D B).

——S. 72 — Delivery should be only to consignee or his nominee — Liability of Railway Company — Clause regarding production of receipt before delivery and to refuse delivery for non-production.

Under S. 72, there is no obligation on a Railway Company to deliver the goods to any particular person. A condition printed on the receipt granted to the consignor of the goods that "the receipt must be produced at the destination by the consignee before delivery can be made or where he does not wish to take delivery porsonally, he must endorse the receipt in favour of the person whom he desires to take delivery, and if the receipt is not produced, the Company may refuse delivery or demand indemnity etc." does not impose any liability on the Railway Company to deliver the goods to the consignee or his endorsee only. The Company has got discretion to deliver the goods to a person other than the endorsee of the consignee in case it is satisfied that he is a person entitled to receive them. A I R (Vol 23) 1936 Bom 274 : 38 Bom L R 514 : 164 Ind Cas 157.

——S. 72 — Short delivery — Form H — Applicability — Transport by canal not being Railway.

Form H embodies the contract with regard to the journey as if made between the consignor and the Railway Company and unless it is shown that the journey was made on a railway it cannot apply. Held, that it cannot opply to transport by canal there being a general contract between the canal company and the railway company. A I R (Vol 18) 1931 Mad 115 : 1930 M W N 816.

——Ss. 72, 56 — Railway receipt, Rr. 3 and 4—Consignment of goods — Consignee, whether entitled to refuse to take delivery unless he is allowed to note condition of goods — Signing delivery book whether bars subsequent claim for damages.

The responsibility of a Railway Administration in India is no less than it would be in England, and as regards delivery, the liability of a Railway Company is expressly governed by S. 161, Contract Act. Refusal to grant delivery except upon an unjust or unreason-

able condition would amount to a default within the meaning of that section and the Railway Company would be liable for such refusal.

But a consignee is not entitled to refuse to take delivery of the goods because he was not allowed to make certain remarks in the delivery book about their weight and condition; if he refuses to take delivery on this ground, the Railway Company will be justified in selling the goods after giving notice under S. 56, Railways Act.

If a consignee is not satisfied as to the quantity or the condition of the goods, he has only to give notice to the delivery clerk at the time of taking delivery and cannot be subsequently debarred from making a claim against the Company simply because he has signed the delivery book. A I R (Vol 18) 1931 Nag 29 : 27 N L R 230 : 130 Ind Cas 82.

——S. 72 — Risk-note A.

The expression "loss arising from the same" in Risk note A means "loss arising from the condition in which the goods are delivered," and shortage in weight is a condition in which the goods are delivered and is covered by the saving clause. A I R (Vol 16) 1929 All 124 : 51 All 480 : 1929 A L J 185 : 113 Ind Cas 752.

——S. 72 — Proof of delivery — Principles — Mere placing of goods in the shed.

The question as to when certain goods will be deemed to have been delivered in a particular case to the railway company is really a question of fact to be decided with reference to the special circumstances of each case. And where it is shown that the consignor has done all that is possible for him to put the goods in the possession of the railway company and that there is nothing left for him to be done in that connection and there is clear evidence, direct or circumstantial, that the railway company has accepted the custody of the goods, the liability of the railway company as a bailee will begin to operate.

A consignor left the goods in the goods-shed in the absence of any railway servant and there was sufficient evidence in the case to hold that it was the practice of merchants and traders to bring their goods and place them in the goods-shed at their own risk, this being permitted by the railway company solely for the convenience of the traders. The goods had neither been marked nor weighed and all that had happened was that the consignment notes had been made over to the marker who used also to discharge the duties of the Goods Clerk when the latter was busy otherwise.

Held, that the goods had not been put in the possession of the railway company and that mere acceptance of the consignment notes was not equivalent to the acceptance of the goods by the railway company. A I R (Vol 16) 1929 Pat 296 : 10 P L T 235 : 8 Pat 808 : 117 Ind Cas 311 (D B).

——S. 72 — Risk-note B.

Loss of a portion of a consignment or of a package does come within the main provisions of the new form. A I R (Vol 15) 1928 Nag 340 : 111 Ind Cas 535.

——S. 72 — Risk-note H — Duty to point out to Railway Servants.

Where in a suit to recover damages from the railway for short delivery, the allegation was that one of a number of bales of cotton yarn had been cut and some bundles extracted :

Held, that it was necessary for the plaintiff to allege much more than this in order to establish any case under Cl. (b) and in order to throw on the railway administration the burden of producing evidence to show how the consignment had been dealt with while it was within the administration's control, as Cl. (b) requires that any pilferage from a package or packages must be pointed out to the servants of the railway administration on or before delivery. A I R (Vol 14) 1927 All 591 : 49 All 916 : 25 A L J 615 : 103 Ind Cas 317.

——S. 72 — Risk-note H.

Loss of a portion of a consignment or of a package does come within the main provision of the form. A I R (Vol 14) 1927 All 371 : 49 All 889 : 25 A L J 549 : 102 Ind Cas 440 (D B).

——S. 72 — Risk-note H (of 1924) — Scope of the rule.

The effect of the new Risk-note H (introduced in 1924) is that the railway is liable for non-delivery of the entire consignment or of one or more complete packages if they fail to disclose in detail how they have dealt with the consignment, or if the effect of such disclosure gives rise to a presumption of misconduct, or if misconduct be otherwise proved; but is protected from liability of loss, including non-delivery, of part of a consignment not consisting of one or more complete packages. A I R (Vol 13) 1926 All 565 : 48 All 584 : 24 A L J 697 : 95 Ind Cas 450.

——S. 72—Risk-note.

Where in a suit for damages for short delivery the Risk-note exempts the railway company from all liability except in certain specified cases, the burden is clearly on the consignor of proving that there had been wilful neglect by the railway company or its servants or theft by its servants. AIR (Vol 13) 1926 Nag 296 : 91 Ind Cas 345.

——S. 72—Risk-note.

The expression "loss of a complete package" means the loss of both covering and contents. Where the Railway Company delivered all the bags, though some of them were empty :

Held, that that was no loss of a complete "package." AIR (Vol 12) 1925 Nag 350 : 21 NLR 78 : 88 Ind Cas 291 (DB).

——S. 72 — Dispute as to fact of delivery by railway —Railway receipt in the hands of plaintiff—Plaintiff's signature as to receipt of goods not found in railway books — Delivery can be proved by other evidence. AIR (Vol 12) 1925 Oudh 389 : 12 OLJ 224 : 87 Ind Cas 350.

——S. 72—Burden of proof.

In case of short delivery the defendant Railway must prove loss of the goods, and it is only after they have proved this that the plaintiff can be required to prove that the loss was due to a cause for which the railway company would be liable. The word 'loss' means loss by the railway company and not loss to the plaintiff. AIR (Vol 11) 1924 All 7 : 45 All 530 : 21 ALJ 438 : 4 LRA Civ 249 : 73 Ind Cas 986.

——S. 72—Burden of proof.

Where short delivery is the cause of suit the issue should be framed so as to throw the onus on the Railway Company to prove the loss and the plaintiff should be given an opportunity to rebut the company's evidence by proof of neglect on their part. AIR (Vol 11) 1924 Nag 288 : 79 Ind Cas 602.

——S. 72—Burden of proof.

In cases of short delivery, the defendant Railway must prove that the goods have been lost and it is only after they had done so that the plaintiffs could be asked to prove that the loss was due to any fault of the Railway Company which would make them liable. AIR (Vol 10) 1923 All 605 : 45 All 575 : 21 ALJ 515 : 4 LRA Civ 280 : 74 Ind Cas 814.

——S. 72 —Refusal to give open delivery.

When goods are consigned to be carried at railway risk and there is a shortage in weight at the destination, the company's refusal to give "open delivery" does not give a cause of action to the consignee for the realisation of the price of goods consigned there being no provision in the Railways Act whereby a railway company is bound to give "open delivery." AIR (Vol 9) 1922 Lah 448 : 67 Ind Cas 312.

——S. 72—Burden of proof.

In a suit for short delivery of goods consigned under Risk-note Form B, it is not sufficient for the Railway merely to admit that the goods were lost without leading evidence to show that they were lost. AIR (Vol 8) 1921 Bom 443 : 45 Bom 1201 : 23 Bom LR 525 : 63 Ind Cas 241 (DB).

——S. 72—Burden of proof.

In the case of short delivery of goods consigned under Risk-note Form B, the Railway Company must give proof of the actual loss of the goods. After that it would be for the claimant to prove the exceptional circumstances mentioned in the Risk-note making the Railway Company liable for the damages, such as wilful neglect on the part of the Railway servants or theft by them. The Company would have in the first instance to offer evidence, however formal it may be to show that the goods have been actually lost. AIR (Vol 8) 1921 Nag 164 : 5 NLJ 233 : 69 Ind Cas 750.

——S. 72—Railway receipts—Delivery without production of.

The measure of responsibility of a railway as a carrier of goods is that of a bailee under the Contract Act. The railway is liable for loss caused by misdelivery. A railway company is under no obligation to deliver the goods consigned to the consignee or any person entitled to it, only on production of the railway receipt. It is under no duty to the public to get back the railway receipt on delivery of the goods. It only preserves liberty to refuse to deliver the goods, unless the railway receipt is produced or an indemnity given. AIR (Vol 6) 1919 Mad 140 : 41 Mad 871 : 35 MLJ 35 : 24 MLT 38 : 8 LW 340 : 49 Ind Cas 69 (DB).

——S. 72—Goods—Receipt — Short delivery — Liability — Estoppel — Admission.

A Railway Company which accepts consignments of goods for delivery at a particular place and issues receipt for the same is liable for short delivery at that place either because the Company is estopped from pleading non-receipt of the goods against one who has in accordance with custom acted on the railway receipt and paid for the goods or because the receipt is prima facie proof of the goods delivered and there is no proof that the receipt mis-stated the goods delivered. (1901) 3 Bom LR 260 (267, 268).

9. Deviation from route.

——Ss. 72 and 75 — Consignment under risk note — — Deviation—If and how affects liability of Railway administration in case of loss of goods.

A common carrier has to proceed without deviation from the usual and ordinary course to the place of delivery. If a carrier deviates from the usual route and the goods are lost (even if by inevitable accident) he is liable. The risk notes which consignors execute are available only for the booked or usual route. If there is any deviation from the route, the railway administration cannot rely upon them for the purpose of reducing their liability as the risk notes become unavailable and the statutory liability under S. 72 of the Act is restored. The provisions of this section are subject to those of S. 75 and so even if there be a deviation from the usual or booked route the railway administration would be entitled to claim the protection of S. 75 of the Act. AIR (Vol 37) 1950 All 543: 1950 A L J 625 (DB).

——S. 72—Risk-Notes A and B cannot be invoked by Railway Company — Railway prevented from fulfilling obligation by circumstances beyond human control — Negligence amounting to misconduct — Liability.

The exemption from liability afforded to the Railway Administration by the Risk notes A and B is operative and available to the Railway administration only during the transit on the ordinary route and once the goods are diverted from the route, the protection afforded by these risk notes ends. In case of deviation from ordinary route, the responsibility of the railway Company will be that of an ordinary bailee as provided by S. 151, Contract Act. The Railway Company cannot escape liability where a consignment of fresh fruit, on account of deviation due to floods, reaches late and totally deteriorates.

Ordinary, the Railway Company should not be held to be liable to pay damages if they are prevented from fulfilling their obligation by some circumstances beyond human control, but they cannot escape liability if there is negligence amounting to misconduct on their part. A I R (Vol 30) 1943 Pat 111 : 21 Pat 764 : 9 B R 209 : 205 Ind Cas 252 (DB).

——S. 72 — Contract between company and consignor necessarily implying that goods would be carried by ordinary route— On his understanding, consignor packing and loading goods and by executing Risk Notes A and B taking risk of loss and deterioration upon himself—Breach in line due to floods— Goods diverted to another route, involving transfer of goods from smaller wagon to bigger — Consignor not informed — Shortage in goods — Company, if liable.

The exemption from liability afforded to the Railway administration by the Risk Note Forms A and B is operative and available to the Railway Administration only during the transit on the ordinary route and once the goods are diverted from that route, the protection afforded by these Risk-notes ends.

In a contract between the consignor and the Railway Company, it was necessarily implied that the consignments were to be taken to their destination by the ordinary route. Upon this understanding, the consignments were packed and loaded, and the consignor took the risk of loss or deterioration upon himself by execution of the Risk-note Forms A and B. The company due to breach caused by floods, diverted the consignment to another route which involved transfer of goods from small to bigger wagon. The consignor was not informed. There was a shortage in the goods consigned :

Held, that the diversion of route and the transfer of goods from a small wagon to a bigger one constituted a breach of a necessarily implied term in the contract between the parties and the Railway Company could not, therefore, claim any protection under the Risk-note Forms A and B. If they had informed the consignor, he would have taken the necessary measures, but they did not convey any information to him. It could not, therefore, be held that they acted like an ordinary prudent man dealing with his own goods and that they were, therefore, guilty of negligence and were consequently, liable for the loss caused. AIR (Vol 25) 1938 All 561 : I L R (1938) All 888 : 1938 A W R 557 : 1938 A L J 855 : 178 Ind Cas 70.

——S. 72—Deviation from route.

The despatch of a consignment by a different route from the contracted route amounts, no doubt, to misconduct so as to deprive the company of any protection under the risk-notes but where the goods were, in fact, despatched by the route by which both parties to the contract intended they should be despatched, there is no misconduct and the goods are covered by the risk-note. A I R (Vol 24) 1937 Cal 410 : 173 Ind Cas 797.

——S. 72—Risk Notes A and B—Deviation from ordinary route — Effect — Protection under Risk Notes, whether ceases — Onus of proving that damage occurred before actual deviation.

The exemption from liability afforded to the Railway Administration by the Risk-note Forms A and B is operative and available to the Railway Administration only during the transit on the ordinary route, and once the goods are diverted from that route, the protection afforded by the Risk-notes ends.

The burden of proof in such a case that the loss for which the Railway Administration is sought to be made liable occurred prior to the commencement of the deviation from the ordinary route is on the Railway Administration. AIR (Vol 19) 1932 All 584: 1932 A L J 788 : 139 Ind Cas 381.

——S. 72—Plea of Risk-note.

• If the goods are taken across a different route, and loss is incurred by the consignor, the carrier, i.e., the railway company, is responsible. When the contract is to relieve the company from liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during transit, the exemption is only from liability during the transit and when once the goods are diverted from that route the protection ends. Change from ordinary route, therefore, puts an end to the protection given by the risk-note. A I R (Vol 17) 1930 All 132 : 1930 All 297 : 121 Ind Cas 828 (DB).

——S. 72—Plea of Risk-note.

Railway Company is not protected by either the Risk-note A or B and is liable for damages when there is over-carriage of goods, the over-carriage being not within the terms of the contract embodied in Risk-notes, beyond the station of destination involving a delay of three days resulting in deterioration of the goods consigned. A I R (Vol 16) 1929 Bom 421 : 31 Bom L R 1087 (DB).

——S. 72—Plea of Risk-note.

Where there is deviation from the specified route and the loss of consignments takes place after wagon left the station from which there was deviation, the railway company cannot rely upon the risk-note to exempt itself from liability for loss. A I R (Vol 16) 1929 Pat 618 : 10 P L T 835 (DB).

——S. 72—The onus of proving that loss occurred before deviation in the specified route is on the railway company. A I R (Vol 16) 1929 Pat 618 : 10 P L T 835 (DB).

——S. 72 — When goods are consigned to be carried by any particular route, any deviation therefrom renders the Risk-note invalid. A I R (Vol 15) 1928 Lah 899 : 10 Lah 537 ; 30 P L R 626 : 114 Ind Cas 56 (DB).

——S. 72—Plea of Risk-note.

Where goods (potatoes) consigned under Risk-notes A and H. were taken out of the ordinary route and other route through which they were negligently despatched took nine days instead of two days and the goods had deteriorated :

Held, that the Company was not protected by the risk-notes and was liable for the deterioration. A I R (Vol 14) 1927 Pat 354: 8 P L T 651 : 104 Ind Cas 147 (DB).

——S. 72 — Where route is not fixed — Delivery within reasonable time.

Where there was no contract on behalf of the Railway Company that they would carry the goods by any particular route and there was nothing except the name of the place of despatch and the name of the place of consignment contained in the contract between the parties concerned.

Held, so long as the goods were delivered at the place of consignment and so long as they were delivered in due course, i. e., within a reasonable time, it mattered not to the plaintiffs or to anyone else by what particular route the goods may have been, for the convenience of the Railway Company, despatched by the carriers. 94 Ind Cas 510 : 1926 P H C C 123 : AIR (Vol 13) 1926 Pat 273.

——S. 72—Plea of Risk-note.

Where a Risk-note in Form B contained the words "the said goods may be carried in transit from Nimtolla Station to Jumna Bridge Station over your railways etc."

Held, that the route by which the goods were to travel was "expressly indicated," at the very least "impliedly indicated," by the terms of the contract, to be the ordinary route from Nimtolla to Jumna Bridge and that in taking the goods off that route the Company violated the contract and are not exempted by the owner's Risk-note from liability. 85 Ind Cas 114 : 47 All 234 : 22 A L J 1020: 6 L R A Civ 72 : AIR (Vol 12) 1925 All 10.

——S. 72—Onus of proof as to shortage.

Where there was deviation from the route originally intended when the goods were consigned to the Railway for transit the Railway Company is bound to prove that the shortage did not occur during the deviation. 80 Ind Cas 256 : 26 Bom L R 285 : AIR (Vol 11) 1924 Bom 386 (DB).

——S. 72 — Contract for a shorter route — Plea of Risk-note B.

The contract with the Company was to carry the goods by the nearest route, and that, if the Railway Company, to suit their convenience, wished to carry the goods by a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he should sign the Risk-note in Form B or not. The evidence showed that the route via Dhond and Manmad would be the usual route for goods coming from Southern India via Raichur, and that as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled via Dhond and Manmad.

Held, that the Company carying the goods via Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the loss which occurred. 67 Ind Cas 366 : 46 Bom 830 : 24 Bom L R 316 : AIR (Vol 9) 1922 Bom 74 (DB).

10. Estoppel.

——S. 72 — Risk Note mentioned in receipt —Consignor suing for damages on non-delivery, whether bound by Risk Note.

Where a plaintiff sues a Railway Company to recover damages for non-delivery of goods basing his claim upon a Railway receipt which specifically mentions the existence of a Risk-note, he is not entitled to allege that the Risk note was not executed without authority. AIR (Vol 21) 1934 Lah 136 : 36 PLR 536 : 15 Lah 596 : 150 Ind Cas 709 (DB).

——S. 72 (2) — Consignor approbating contract by sending goods under it—Whether can claim inconsistently with the contract.

The Railway Company does not owe a consignor any duty which the contract under S. 72 (2) is expressed on the face of it to exclude and if he has approbated that contract by sending his goods under it, he cannot afterwards reprobate it by claiming a right inconsistent with it. AIR (Vol 21) 1934 Lah 186 : 15 Lah 596 : 36 P L R 536 : 150 Ind Cas 709 (DB).

——S. 72—Admission that packing is defective.

If the consignor of goods agrees that the condition of the package is not satisfactory, he cannot afterwards turn round and say that the packages were in good condition. AIR (Vol 18) 1931 Cal 489 : 131 Ind Cas 31.

——S. 72—Where a consignor sues a railway company for damages due to loss of consignment on the basis of a railway receipt which refers to the Risk-note, it is not open to him to deny that the Risk note was duly signed. 116 Ind Cas 616 : 11 Lah 4: AIR (Vol 16) 1929 Lah 698 (DB).

——S. 72—If at the time of booking, the Railway Company is dissatisfied and the person delivering the goods for carriage agrees that the condition of the packages is not satisfactory, it cannot afterwards be made matter of objection in a suit upon the contract

that the packages were in good condition. 106 Ind Cas 247 : 55 Cal 142 : 47 C L J 32 : 32 C W N 53 : AIR (Vol 15) 1923 Cal 170 (DB).

——S. 72—Risk-note B signed.

A plaintiff consignor cannot go behind his special contract (i. e., Risk-note B) with the Company and sue the Company for damages for non-delivery under normal statutory liabilities as are imposed upon parties to a contract under the Contract Act and upon Railways as carriers under the Railways Act. 90 Ind Cas 812 : 5 Pat 118: 7 P L T 561 : 1925 P H C C 305: AIR (Vol 13) 1926 Pat 148 (DB).

——S. 72—Title of consignors.

As between the Railway Company, on the one hand, and the consignors, on the other, the Railway Company cannot dispute the title of the consignors to the goods. 87 Ind Cas 379 : 47 All 549 : 23 A L J 398 : AIR (Vol 12) 1925 All 656.

——S. 72—Consignor and consignee — Liability of Railway Company — Risk note—Maintainability of suit—Common carrier — Loss of goods—Contract Act, Ss. 151, 152 and 162.

A consignor of goods who paid a special reduced tariff rate and signed a risk note prescribed under S. 72 of the Railways Act, purporting to limit the responsibility of the Railway Company sued the Railway Company for compensation on account of short deiivery of goods.

Held, that the suit was not maintainable as the agreement signed by the consignor absolved the Railway Company from such a liability. (1902) 7 C W N 370 : 30 C 257 (260, 261) (DB).

11. General liability.

(a) General.
(a-1) Default by the other party—Liability.
(b) Liability limited by contract.

(a) General.

——S. 72—Carriage of goods—Liability of Railways —Extent — English and Indian Law—Liability of Indian Railway for acts of its servants—Goods looted by riotous mob including railway servants.

The extent of the liability of railways for carriage of goods differs in India from that under the law in England in certain respects. Under English Law the railway is a common carrier. Under English Law a common carrier is responsible for the safety of the goods entrusted to him in all events except for act of God or the King's enemies. In India the legal position is different. Indian Railways are free from the high degree of liability imposed on a common carrier in England. Their liability, in a case not affected by contract, starts only at the level of the liability of a bailee, that is to say, a duty to take as much care of the goods entrusted to them for carriage as a man of ordinary prudence would be expected to take of his own goods. This is the effect of the express statutory legislation contained in S. 72 (1) and (3) of the Railways Act read with Ss. 152 and 161 of the Contract Act. The statutory standard of duty to take care imposed on the Railway can, however, be effectively reduced or enhanced by means of a special contract.

The principles of a bailee's liability for negligence of his servants are well settled. The bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed; but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented nor the unauthorised acts of his servants outside the scope of their employment.

Applying these principles, it is clear that while in particular circumstances the Railway Administration might well be found to be liable for acts of its servants if these amounted to ordinary pilfering in the course of ordinary carriage of goods on an ordinary journey, it will be wholly free from any liability if the cause of the loss is shown to be by acts of riotous looters acting as a riotous mob over which the Railway had no control even though the looters be its own servants. Such looting must be held to be an act in itself wholly outside the course of their employment as railway servants and that in joining the riot and in looting in it the railway servants could not have been acting in their employment at all. It cannot be brought within the category of a case of "an unauthorised mode of doing authorised acts." (1950) 54 C W N (2 D R) 35 (DB).

——S. 72—Loss of goods — Liability of Railway—When commences.

Under S. 72, Railways Act, the liability for loss, etc., of a railway administration is the same as that of bailee under Ss. 152 and 161 of the Contract Act, but before such liability can arise there must be an express delivery of the goods to the railway by being made over to a person authorised on its behalf or deposited at the place reserved for or usually used for this purpose. Where in a case all that had happened was that the gate clerk of the Railway signed the forwarding note and allowed the goods to pass into the railway premises but nothing has been proved to establish the "passing from the physical custody" of the consignor to the "physical custody" of the railway or its agent nor was there any implied acceptance of the goods by the railway, the stage could not be said to have reached where the liability of the Railway in case of loss could commence. AIR (Vol 37) 1950 E P 87 : 51 P L R 397.

——S. 72—Liability of Railway Company under—Nature of—Goods placed in railway goods shed to the knowledge of the goods shed officials before booking — Loss by theft—Liability.

Any one who places goods in a railway goods shed without taking any initial step in the matter of booking or even apprising the goods shed officials that he is doing so clearly leaves the goods at his own risk and the railway administration cannot be held responsible as there has been no delivery to them of goods for being railed.

But in cases where to the knowledge of the goods shed officials or with their permission specific goods lie in a goods shed, deposited there before the shed is locked up for the night, the railway company cannot avoid the responsibilities of bailees under S. 72 of the Railways Act. Delivery in such cases cannot be made contingent on the completion of a particular stage in the process of booking. It is an inference to be drawn from the circumstances of each case.

The liability of the railway company as a bailee is governed by S. 72 of the Railways Act, and any rules which seek to evade this liability must be deemed to be inconsistent with the Act and therefore ultra vires.

There is really no difference in substance in the liability of the railway company as a bailee under S. 151 of the Contract Act, who is expected to take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take and in their liability as restricted in the risk note to cases of misconduct by their servants. AIR (Vol 37) 1950 Mad 700 : (1950) 2 M L J 27.

——S. 72—Liability of Railway Administration — Loss of goods after arrival at destination — Goods Tariff, Part 1, R. 28 (2).

Under S. 72 of the Railways Act, the liability of the Railway administration for the loss, destruction or deterioration of goods delivered to it to be carried by rail, remains in force only for the period during which the goods remained in transit and for a reasonable time after their arrival at the destination. After the expiry of such reasonable time there is no legal

obligation imposed on the railway administration to look after the goods or to account for them. If therefore the consignee allows a period of about six weeks to expire after the arrival of the goods at their destination before he asks for their delivery, and if, in the meanwhile, the bulk of the goods have been lost, he cannot hold the railway administration liable for the same, and this independently altogether of the provisions of R. 28 (2), Goods Tariff, Part I. AIR (Vol 36) 1949 Lah 166.

——**S. 72—Liability of Railway - Nature and extent—Goods reaching destination in damaged condition—Consignee refusing to take delivery—Goods damaged by riotous mob while lying in railway goods shed—Liability of railway.**

Under S. 72 of the Railways Act, the Railways in India are merely bailees in respect of goods entrusted to them for carriage and are governed by the provisions of the Contract Act on bailment. If the consigned goods reach their destination in a damaged condition, the consignee should take delivery of the consignment in the condition in which it is found after giving notice to the officer giving delivery as to its condition and then sue the railway company for damage or shortage, if any. He has no right in law to insist on the goods being delivered to him after weighing and after ascertaining the extent of damage and noting the same. If as a result of the consignee's refusal to take delivery duly offered to him the goods lie in the railway goods shed, the railway company still continues to be the bailee and remains liable as such. The consignee is however liable to compensate the company for any necessary expenses incidental to the safe custody of goods. The liability of the company is not however unqualified. It is expected to take only that care of the goods which a prudent owner would take of the goods owned by him. The company, as a bailee, cannot be held liable for the damage done to the goods as a result of unforeseen and unavoidale eventuality (e. g.) damages done by an unruly and furious mob. AIR (Vol 35) 1948 Nag 65 : I L R (1947) Nag 335 : 1947 N L J 212: 231 Ind Cas 185.

——**S. 72—Railways are not common carriers — But they are liable for negligence as bailees.**

Railways in India are not common carriers and can exempt themselves from liability in respect of their servants' negligence although not expressly doing so in the terms of the contract. But they have to accept the responsibility placed upon bailees by Ss. 151 and 152, Contract Act, which make a bailee liable for negligence. AIR (Vol 33) 1946 Cal 249 : ILR (1944) 2 Cal 487 : 48 Cal W N 554 (DB).

——**Ss. 72, 75—Absence of proof of negligence—Railway Company taking care of consigned goods with prudence—Loss of consigned goods—Railway Company if liable.**

Two bars of silver were loaded in a treasure van which was properly locked. The locks were intact when the wagon reached B where it was detected that a hole had been cut in the floor of the wagon and one of the bars removed. The train had been held up outside the station at C on account of the hosepipe having burst. It had again stopped at station N where the defective hose-pipe was removed. There was no evidence that the guard was negligent while the train was held up outside C. The locks of the wagon had not been broken and there was no reason for him to suspect that any attempt was being made to cut a hole in the floor of the wagon :

Held, that the company was not responsible for the loss. AIR (Vol 21) 1934 Pat 583 : 15 P L T 818 : 1 B R 70 : 152 Ind Cas 562 (DB).

——**S. 72 — Extraordinary delay in transit — Goods rendered valueless to consignor — Liability of Railway for damages.**

Under S. 72 the responsibility of a Railway Administration for loss or damages is that of a bailee under Ss. 152 and 161 of the Contract Act, and consequently, if by the fault of the railway, the goods are not delivered or tendered at the proper time, it is liable for the loss so caused.

Where the extraordinary delay in the transit of goods has rendered the goods valueless to the consignor, he will be justified in declining to pay demurrage and take delivery of the goods after such extraordinary delay and in the circumstances, award of damages to the extent of the price of the goods is proper. AIR (Vol 20) 1933 Oudh 339 : 10 O W N 1319 : 143 Ind Cas 219.

——S. 72—Liability of a Railway Company under S. 72, Railways Act, is subject to the provisions of S. 75 and is not unqualified and absolute. AIR (Vol 19) 1932 Cal 3 : 58 Cal 989 : 35 C W N 452 : 134 Ind Cas 886 (DB).

——**S. 72—Exemption.**

Where exemption from responsibility is claimed by a railway company on the basis of a Risk-note, the intention to exempt should be expressed in clear and unambiguous language. AIR (Vol 17) 1930 All 132: 1930 A L J 297 : 121 Ind Cas 828 (DB).

——**S. 72—Liability as bailee.**

The sub-section deals with the responsibility of the railway company for loss, detention or deterioration only. It does not exclude other sections of the Contract Act, in regard to bailment. If S. 72 had intended to exclude them, there would have been a reference to them in S. 72 (3). AIR (Vol 16) 1929 All 960 : 1929 A L J 1169 (DB).

——S. 72—Whether the loss is due to theft by railway servants or by outsiders the railway is not responsible if they have fulfilled the requirements of S. 151, Contract Act. AIR (Vol 15) 1928 Cal 697 : 47 C L J 611 : 112 Ind Cas 197 (DB).

——**S. 72—Absence of special contract — Negligence —Onus of proof.**

When there is no special contract between the railway and the plaintiff, under S. 72 of the Railways Act the Railway occupies the position and suffers from the liabilities of the bailee imposed by Ss. 151 and 161 of the Contract Act. The consequence of this liability is that the loss or non-delivery in proper time of goods entrusted to a bailee is prima facie evidence of negligence and the burden of disproving negligence, therefore, lies on the bailee.

Where the plaintiff was guilty of negligence in not seeing that the bale was properly labelled before despatch by the goods clerk and in not responding to the call of the Railway to come and identify bale found lying unclaimed,

Held, that the neglect on the part of the plaintiff may affect the measure of damages and the principle on which they should be assessed but cannot exonerate the defendants from the legal liability of disproving their negligence. AIR (Vol 12) 1925 Cal 737 : 85 Ind Cas 786 (DB).

——**S. 72—Duration.**

The position of the Railway Companies as carriers continues till the date of the delivery to the consignee. AIR (Vol 11) 1924 All 605 : 5 L R A Civ 586 : 80 Ind Cas 737 (DB).

——**S. 72—Consignment at ordinary rate.**

Plaintiff tendered to the defendant company 5 bales of cotton tussore to be carried from Sholapore to Cawnpore. The company had an established owner's risk rate from Sholapore to Itarsi, but they had published no such rate between Itarsi and Cawnpore and no consignors of goods between these two latter stations could require the company to carry them at owner's risk. While the goods were proceeding on their journey between Itarsi and Cawnpore, smoke was seen to be issuing from a wagon near the engine

and in the result the consignor sustained a pecuniary loss by destruction of and damage to his goods. Held, that the fact that he paid the ordinary rate on the Itarsi Cawnpore section of the journey entitled him to regard the railway company during this portion of the journey as a bailee. The company was, therefore, bound to show that they took the same degree of care in relation to those goods as a reasonably prudent man would act in relation to his own. AIR (Vol 11) 1924 All 254 : 46 All 161 : 22 ALJ 1 : 4 L R A Civ 619 : 78 Ind Cas 893 (DB).

——S. 72—Liability is that of bailee.

The liability of a Railway Company under S. 72 of the Railways Act is that of a bailee under Ss. 151, 152 and 161 of the Indian Contract Act. The Company is bound to take as much care of the goods bailed to them as a man of ordinary prudence would of his own goods, and in the absence of any special contract they are not responsible for damage to the parcel. AIR (Vol 11) 1924 Nag 358 : 78 Ind Cas 34.

——S. 72—Station Master accepting bailment.

Where the conduct of the Station Master showed that he accepted the bailment of the goods on behalf of the Railway Company S. 72 of the Railways Act came into operation and the Railway Company was responsible for their safe custody. AIR (Vol 10) 1923 All 71 : 82 Ind Cas 772 (DB).

——S. 72—Station Master accepting goods.

The making over of the goods to and the receipt of them by the Station Master following upon the letter of instructions by D. T. S. is delivery for carriage within S. 72. Loss or damage by fire having been committed it is for the company to prove that they had taken the care described in S. 151, and that there was no negligence on their part. AIR (Vol 10) 1923 Nag 174: 8 NLJ 101 (DB).

——S. 72—Bailee under the law of contract—Absence of Railway Receipt.

The Railway Company is not exempted from liability within the meaning of S. 72 of the Railways Act, even where a consignor did not take the railway receipt, where as a matter of fact, the package was taken over by the goods clerk and was duly marked and was actually despatched from the receiving station. S. 72 makes the railway a bailee under Ss. 151, 152, and 161 of the Contract Act, because S. 149 of the Contract Act gives a clear definition of delivery and the two Ss. 148 and 149 of the Contract Act are equally incorporated with the Railways Act and define and control the liability of the Railway Company. AIR (Vol 9) 1922 All 9 : 20 ALJ 31 : 44 All 218 : 65 Ind Cas 109 (FB).

——S. 72—Loss of goods—Liability.

S. 72 lays down the nature and extent of the responsibility for loss of goods delivered to a Railway to be carried. It resembles the liability of a bailee under Ss. 152 & 169 of the Contract Act. The Railway must take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. AIR (Vol 4) 1917 Sind 24 : 10 SLR 196 : 39 Ind Cas 904.

——S. 72 (2)—Railway Company— Liability for loss of consignment.

Plff. sued to recover money paid by him for a Railway receipt for charas sent to him by the defendant which consignment was lost by the Railway. No special rate was paid or tendered by the consignor as required by S. 72 (2). Held, that the Railway administration was not liable. 2 PLR 1919.

——S. 72—Statutory powers—Exercise of —Ordinary care and skill — Conditions.

Statutory powers are to be exercised with ordinary care and skill and with some regard to the property and rights of others. These are granted on the condition sometimes expressed and sometimes understood that the undertakers "shall do as little damage as possible" in the exercise of their statutory powers. (1903) 27 B, 344 (352) : 5 Bom L R 405 : 30 I A 60 (P C).

(a.1) Default by the other party —Liability.

——S. 72—Liability of railway as bailee—Time limit —Consignee not taking delivery of goods within 24 hours of their arrival — Liability of railway for damage caused after such time.

Under S. 72 of the Railways Act the liability of the railway company as bailee continues from the period when the goods are delivered to them to the period when the goods are ready for delivery. In short, the liability of the railway is limited to the period of transit or carriage of the goods with the addition of a reasonable period of time for loading the goods and a reasonable period of time which is to be given to the consignee to take delivery. There is nothing in the Railways Act or in any other law in India which would impose the liability of a bailee upon a railway company for any period beyond this time.

Where the consignee knows that the goods have arrived at their destination on a particular date, twenty-four hours are more than enough within which delivery should be taken by him. If he fails to do so within that time by reason of the railway receipt not being made over to him owing to differences between him and the consignor, his failure to take delivery within a reasonable time is due to his default, and the railway company is not liable to any damages for damage caused to the consignment after the expiry of such time. AIR 1948 Nag 65, diss. from. (1950) 54 C W N 902 (DB).

——S. 72—Condition in rule exempting Railway Company from liability for loss if goods are not removed within time allowed free of demurrage exceeds rule-making power and is inconsistent with liability imposed by S. 72. A I R (Vol 30) 1243 Lah 244 : 46 P L R 62 : 211 Ind Cas 216.

——S. 72 — Goods delivered for transportation — Goods not refused and allowed to remain in company's premises — Railway is liable as bailee.

Where a consignor brings goods to a Railway Station to be transported by the Railway, the delivery is complete when the goods are not refused by the Company and allowed to be placed in their premises and the Railway is liable as bailee for the goods. AIR (Vol 23) 1936 All 69 : 1935 A W R 1389: 1936 A L J 387 : 58 All 576 : 160 Ind Cas 703 (DB).

——S. 72—Railway Company does not insure against negligence of consignor.

A Railway Company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed. This is even so where the responsibility of a carrier is much more than that of a Railway Administration. AIR (Vol 22) 1935 Cal 271 : 39 C W N 114 : 60 C L J 590 : 155 Ind Cas 1052.

——S. 72—Van packed by consignor — Liability of Railway for defective packing.

Where the van was packed entirely by the consignor and his men and the Railway Officials had nothing to do with the packing, the Company cannot be held responsible for defective packing. A I R (Vol 21) 1934 Cal 508 : 38 C W N 352 : 61 Cal 293 : 149 Ind Cas 1229 (DB).

——S. 72—Limit as to.

The liability of a railway as a carrier to the consignee after the arrival of the goods is not the same as that of a warehouseman or a bailee for hire, and, therefore, where a consignee refuses to take delivery of goods which have not become valueless on the ground that they are damaged, and the railway sells the goods by auction, the consignee is entitled only to the price fetched at the auction sale minus any demurrage due to the Railway Company. In such a case the proper remedy of the consignee is to take

delivery of the damaged goods and claim damages from the Railway Company. AIR (Vol 13) 1926 Lah 575 : 7 Lah 370 : 8 L L J 504 : 27 P L R 572 : 96 Ind Cas 323 (DB).

——S. 72—Loss of goods—Goods left uncleared for unreasonable time.

A consignee of goods cannot make the carriers responsible for any loss if he for his own convenience or by his own laches, allows them to remain with them for an unreasonable time after the goods have arrived at their destination and the carriers are ready to deliver them. A different liability as warehousers would arise if the evidence established such an agreement. The charging of demurrage does not necessarily give rise to such an implication. AIR (Vol 7) 1920 All 280 : 18 A L J 764 : 2 U P L R (All) 268 : 58 Ind Cas 1000 (DB).

(b) Liability limited by contract.

——Ss. 72, 76—Risk Notes A and B—Liability under —Misconduct—Onus—Failure to disclose how consignment was dealt with — Presumption.

Ordinarily the responsibility of the Railway Administration as carrier is that of a bailee under Ss. 152 and 161 of the Contract Act, the responsibility, however, can be limited by an agreement in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods in an approved form. Risk-note Forms A and B modify the responsibility as a bailee of the railway administration to the extent that the liability arises only upon the misconduct of the railway administration's servants, and the burden of proof as defined in S. 76 of the Act is modified to the extent that in the two cases of (1) non-delivery and (2) pilferage, the railway administration will have the burden to disclose to the consignor about the dealings of the consignment throughout the transport up till delivery. If from this disclosure no misconduct of the railway servants is inferable, then only the consignor will have to prove that his loss was due to such misconduct. Where the railway administration fails to make a full disclosure of how the consignment was dealt with during the time it was in its possession or control, the consignor is entitled to an inference in his favour and adverse to the administration that if materials withheld would have been produced, they would have supported the case of misconduct, on the principle of S. 114 (g), Evidence Act. In a trial involving adjudication of the Railway Administration's liability, somewhat literal compliance with the procedure provided in Risk-note B is of vital importance. AIR (Vol 34) 1947 Pat 84 : 1946 P W N 148.

——S. 72—Risk Note Form B, proviso—Non-delivery of whole consignment — Liability—Burden of proof —Nature of evidence to be adduced by Railway Company.

Under the proviso to Risk-note B in the case of non-delivery of the whole consignment, where such non-delivery is not due to accidents to trains or to fire, the Railway Administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control and to give evidence in respect thereof and if misconduct on the part of the Railway Administration cannot be inferred from such evidence, then only the burden of proof is shifted to the consignor. The evidence of the Railway Company in this respect must be all the evidence which the railway administration considers desirable to avoid a fair inference of misconduct keeping in mind the provisions of S. 114, Evidence Act. A Railway Company, therefore, will be liable if they fail to account as to how the consignment was dealt with or from the evidence adduced in regard thereto an inference of misconduct can be presumed or if misconduct is proved. AIR (Vol 25) 1938 Mad 206 : 1937 M W N 1309 : 176 Ind Cas 738 (DB).

——S. 7 —Risk-notes—Effect — Protection to Railway.

The effect of the risk-notes, if the goods are covered by them, is to protect the Railway from all liability except that due to misconduct of the Railway Company's servants, so that if the risk-notes apply, it must be proved in that case that the damages would not have occurred but for the misconduct of the defendant Company's servants. AIR (Vol 24) 1937 Cal 410 : 173 Ind Cas 797.

——S. 72—Failure to send goods by particular train.

In the absence of a specific contract, the consignor cannot ordinarily hold the Railway Administration liable for failure to send the goods by any particular train or by a particular date. AIR (Vol 22) 1935 Lah 492: 16 Lah 280: 37 P L R 579 : 159 Ind Cas 72 (DB).

——S. 72—Consignment sent under Risk Note form B—Amount charged less than that for carriage at owner's risk—Consignor and consignee, if bound by clause exempting Railway Company from liability.

Where the amount charged by the Railway Company on consignment sent under Risk Note B is less than what would have been payable if the goods were taken at the owner's risk and is much less than what would have been payable if the goods had been taken at railway risk, the consignor or consignee will be bound by the clause exempting the Company from all liability. AIR (Vol 20) 1933 All 854 : 1933 A L J 901 : 148 Ind Cas 419.

——Ss. 72 (2) (b)—Risk Note A — Absence of wilful neglect—Liabitity.

Where the Risk Note provides that Railway Administration would not be responsible for the condition of the goods until the same are delivered at destination or for any loss arising from the same, the Company can be held responsible only if there was any wilful negligence on the part of the Railway Company or their servants in the transit of the goods; and if this is found in the negative, then the plaintiff bringing a suit for damages against the Railway Company cannot succeed. AIR (Vol 18) 1931 Cal 489 : 131 Ind Cas 31 (DB).

——S. 72—Contract for carriage by passenger train —Risk-note H.

M consigned goods under Risk-note H and paid special rates for carriage of goods by parcel or passenger train. After a certain distance consignment was forwarded by goods train. Consequently consignment arrived late causing deterioration of the goods.

Held, that the company was liable to pay damages for the breach of contract and goods were not covered by Risk-note H as the conditions of contract as to the manner in which the goods were to be carried was not complied with. AIR (Vol 16) 1929 Bom 355 : 31 Bom L R 616 : 119 Ind Cas 665 (DB).

——S. 72—If it be found that the Risk-note is out of the way then the case will have to be tried on the footing of the liability of the railway company under the provisions of S. 72 and then it would be necessary to consider whether in point of fact the company have succeeded in showing that they took as much care of the consignment as a man of ordinary prudence would do in the circumstances of the case. AIR (Vol 16) 1929 Cal 510 (DB).

——S. 72—Risk-note H—Time of operation.

Where the goods are delivered to the railway company for carriage under Risk-note and are so accepted, the responsibility of the railway company for each parcel of goods accrues forthwith on the delivery of the goods and the acceptance of such delivery and accordingly the Risk-note attaches to them immediately on such delivery and acceptance and even before their actual despatch when they are lying on

the platform awaiting transport. AIR (Vol 15) 1928 P C 24 : 54 M L J 167 : 52 Bom 169 : 55 I A 67 : 47 C L J 214 : 30 Bom L R 275 : 9 P L T 171: 5 O W N 219 : 32 C W N 544 : 27 M L W 667: 26 A L J 545 : 1928 M W N 938 : 107 Ind Cas 124.

——S. 72—Plaintiff who signed the Risk-note form B sued a Railway Company for the loss of a consignment. It was loaded in a van which was not padlocked and there was no seal and it was also proved that it was the practice not to padlock the doors.

Held, that the company was liable as omission to padlock was intentional and deliberate and the loss was due to the wilful neglect of the Railway Company. The company was also liable under S. 151, Contract Act, as it is inconceivable that a man of ordinary prudence would let similar goods of his own to be carried in an unlocked van under similar circumstances. A I R (Vol 15) 1928 Cal 498 : 48 C L J 32 : 111 Ind Cas 792 (DB).

——S. 72—Risk-note form B—Contract Act, Ss. 152 and 161.

The general liability is not the liability known to English common law as the liability of a common carrier, but is the liability of a bailee as defined in Ss. 152 and 161 of the Contract Act; in other words, the railway company is not an insurer but is under the duty of taking a certain measure of reasonable care, the purpose of Risk-note is to provide that notwithstanding there may have been a breach of the duty to take reasonable care, the railway company shall not be liable for certain things in certain special cases. AIR (Vol 15) 1928 Cal 65 : 55 Cal 132 : 46 C L J 428 : 32 C W N 76 : 106 Ind Cas 252 (DB).

——S. 72—Non-delivery—Risk-note.

Since S. 160, Contract Act, is not mentioned in S. 72, the Railway Administration is not entitled to limit its liability under S. 160, Contract Act, by any agreement embodied in a Risk-note where the railway is sued for loss sustained by non-delivery of goods. AIR (Vol 15) 1928 Lah 774 : 112 Ind Cas 736 : 10 Lah 360 : 30 P L R 541 (DB).

——S. 72—Scope of operation of Risk-notes.

Plaintiff despatched his goods from A to K and executed Risk-notes for the same. When the goods arrived at K, they were rebooked for S as per telegraphic instructions from plaintiff. The goods were damaged during the journey from K to S. Plaintiff sued for damages.

Held, that the Risk-notes covered the journey between A and K and protected the railway only if loss occurred between A and K. No Risk-note being executed when the goods were rebooked, the railway company was liable for the loss between K and S. AIR (Vol 15) 1928 Lah 349 : 111 Ind Cas 749 : 9 Lah 519 (DB).

——S. 72—Risk-note should have been executed.

To limit the liability of a Railway Company, in respect of a consignment it must be shown under S. 72 (2) that the person delivering the goods entered into an agreement to that effect.

The fact that the Goods Clerk wrote on the receipt given to the consignor the words "O. R. H." signifying owner's risk as per H form or that the consignor was aware that a lower rate was charged on account of the Risk-note, would not take away the liability of the Railway Co., in the absence of proof that the person who delivered the goods authorised the clerk to enter the aforesaid letters on the receipt or at least that he consented or was aware that such letters were written thereon. AIR (Vol 14) 1927 Mad 689 : 101 Ind Cas 55.

——S. 72 — The protection offered by the Risk-note extends to damage done after the goods have been unloaded. AIR (Vol 13) 1926 Lah 651 : 97 Ind Cas 318 : 8 Lah 24 : 28 P L R 449 (DB).

——S. 72—Risk note A.

The terms of the Risk note A free the Railway from all responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising from the same. AIR (Vol 12) 1925 Nag 333 : 87 Ind Cas 1031.

——S. 72—In cases of Risk-note B the company is liable only for the loss of a complete consignment or of one or more complete packages. AIR (Vol 12) 1925 Cal 518 : 78 Ind Cas 413.

——S. 72—Risk-note B.

A Railway Company when entrusted to carry goods from one station to another has under S. 72 the liability of a bailee. The Company can however contract itself out of that liability by a special contract in one of the forms recognised by Government. Risk note B is one of those forms. AIR (Vol 11) 1924 All 605 : 80 Ind Cas 737 : 5 L R A Civ 586 (DB).

——S. 72—Risk-note X.

If the article in respect of which the risk note X is given is not one of the excepted articles, the mere giving of the risk note X would not take away the liability of the Railway Company. AIR (Vol 10) 1923 All 538 : 74 Ind Cas 300 : 21 A L J 351 : 45 All 453 : 4 L R A Civ 204.

——S. 72—Risk-note A— Special contract as to non-liability.

It was stated in Risk-note Form A that the consignment was in bad condition and was liable to damage, leakage and wastage as the "bakoos" of tobacco were old and torn and the contents were wet, and the consignors agreed to hold the Railway Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same ;

Held, the Railway was not responsible for any loss to the plaintiff. AIR (Vol 10) 1923 All 234 : 65 Ind Cas 583.

——S. 72 — The ordinary liability of the Railway Company under Sections 72 to 76 of the Act is intended to be limited by the special agreement between the Railway Company and the consignor embodied in risk-Notes A and B and the consideration for limiting the liability of the Railway Company is the reduced tariff rate. Such an agreement has been saved by Clause (2) of Section 72. AIR (Vol 9) 1922 Pat 17 : 67 Ind Cas 664 : 3 Pat L T 222.

——Ss. 72 and 73—Risk-note— Liability of Railway.

A risk note not signed by the consignor or on his behalf, but filled in by the Railway Clerk, cannot relieve the Railway of its responsibility. AIR (Vol 4) 1917 All 172 : 38 Ind Cas 143.

——S. 72—Risk-note, Form H—Consignor signing—Liability of the Company.

Where a consignor signs a Risk Note in form H, which frees the Company from all responsibility for any loss, the Company cannot be held liable for compensation for loss. (1912) 13 Ind Cas 297 (Ajmer-Marwara)

12. Interpretation.

——S. 72 — Risk-notes A and B — "Misconduct" — Meaning of — If synonymous with negligence — Failure of railway administration to fasten caution labels to wagon—If amounts to misconduct.

Misconduct on the part of the Railway Administration or its servants contemplated by Risk Note Forms A and B under the Railways Act is not synonymous with negligence. For an act to amount to misconduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the nature of improper behaviour and is not merely wrongful commission or wrongful omission. An act of misconduct can well be negligence, but a negligent act by itself is not misconduct. The failure of the Railway Administration to fasten to the wagon

labels cautioning against rough shunting, amounts to negligence and not to misconduct. 1933 Pat 630, Disapproved. AIR (Vol 36) 1949 Pat 119 : 27 Pat 301 (DB).

——S. 72—Risk-notes A and B—Misconduct — What amounts to—Error of judgment.

Misconduct is not necessarily established by proving even culpable negligence; it is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. Mere error of judgment is not misconduct: there must be unbusinesslike or unreasonable conduct. AIR (Vol 34) 1947 Pat 84 : 1946 P W N 148 : 230 Ind Cas 288 : 13 B R 428 : 1947 P W N 54.

——S. 72—Risk-notes A and B—Misconduct — Question as to—If question of law or fact.

"Misconduct" means wilful negligence and whether there was wilful negligence is a question of law and not a question of fact. In deciding a case of negligence a Court has to decide keeping in view what in law negligence amounts to. Where a Court, in judging about occurrence of negligence or otherwise, departs from what negligence in law is, it commits an error of law. AIR (Vol 34) 1947 Pat 84 : 1946 P W N 148 : 230 Ind Cas 288 : 13 B R 428 : 1947 P W N 54.

——S. 72 (1), (2) — 'That responsibility', meaning of.

The words "that responsibility" in S. 72 (2), Railways Act, can only mean grammatically "the responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway" as set forth in S. 72 (1). The word "that" is used in order not to repeat the same words over again which had already been used in S. 72 (1) and not in S. 75 (1). AIR (Vol 21) 1934 Lah 186 : 15 Lah 596 : 36 P L R 536 : 150 Ind Cas 709 (DB).

——S. 72—Risk note—"Package".

The word 'package' in a risk note means both that which is packed and that in which it is packed i. e., its covering or receptacle. AIR (Vol 5) 1918 Cal 796 (2) : 21 C W N 815 : 40 Ind Cas 626 (DB).

13. Loss, destruction or deterioration.

(a) General.

(b) Loss, destruction or deterioration — Meaning of, in risk-notes.

See also N 5.

(a) General.

——S. 72—"Loss" — Meaning of — Non-delivery or mis-delivery of goods—If constitutes.

The word "loss" in S. 72 of the Railways Act means loss of goods by the Railway and does not mean pecuniary or monetary loss to the consignor or the owner. Loss occurs when the railway company has lost possession of the goods and for the time being is unable to trace them. Proof of non-delivery of misdelivery is by no means conclusive evidence as to "loss". Non-delivery of goods may be due to the fact that goods are being deliberately detained by the railway company, or that they have been misdelivered to some person, or that they are "lost". Non-delivery or mis-delivery may be due to "loss" or it may be due to other causes. AIR (Vol 36) 1949 Cal 380.

——S. 72—Proof of loss—Theft by servants.

Even where the railway company succeeds in proving that there was 'loss' the provisions of the Risk-note will not absolve the railway company from liability if it is once proved that the loss was due to theft by the servants of the company. A I R (Vol 16) 1929 Cal 510 (DB).

——S. 72—Initial onus of proof — Loss beyond control of the Company.

Where out of 40 bags of sugar consigned under Risk-notes in forms A and B only 33 bags are received and a suit is brought against the Railway Company for damages, the initial burden lies upon the company of proving that there is in fact loss of the goods and that the same are not in the control of the Railway Administration; but where the company proves that the whole consignment was loaded in a waggon and it was closed and sealed according to the prevailing practice but at a station a door was found broken open and seven bags were discovered missing and further proves that missing goods were not in control of the company, the company has adequately discharged the initial burden. AIR (Vol 16) 1929 Nag 315 : 118 Ind Cas 876.

——S. 72 — (Obiter) The term "loss" should be construed as including cases where the article consigned is loss to the consignor as such article. A I R (Vol 15) 1928 Cal 697 : 112 Ind Cas 197 : 47 C L J 611 (DB).

——S. 72—Contract Act, S. 152—Something should happen to the goods.

The word "loss" is used in the section in the sense of something that happens to the goods as distinct from any loss to the owner. It could not be the object of the section to lay down that provided the bailee takes as much care as a prudent man he will not be liable to bailor for loss sustained by him on account of non-delivery of goods. AIR (Vol 15) 1928 Lah 774 : 112 Ind Cas 736 : 10 Lah 360 : 30 P L R 541 (DB).

——S. 72 — In a suit based on non delivery the railway company must prove loss before they can claim the benefit of the Risk-note. It is not sufficient for the railway company merely to admit loss. AIR (Vol 15) 1928 Pat 95 : 105 Ind Cas 546 : 9 PLT 118 (LB).

——S. 72—Non-delivery.

Where a consignor bases his claim on non-delivery, the defendant railway company must not only allege loss but must also prove it. (1928) 110 Ind Cas 778 : 9 P L T 611 (DB).

——S. 72—Non-delivery.

Where a party sues the railway on the ground of non-delivery, it is necessary for the railway to give some evidence of loss before they can meet the claim by pleading the non-delivery was due to a loss for which the railway company was not responsible. AIR (Vol 14) 1927 All 833 : 102 Ind Cas 114 (DB).

——S. 72—Rotten goods destroyed by railway.

When goods, in the custody of the railway, become rotten and are destroyed under the orders of the railway authorities, it must be held that the owners had suffered "loss of a whole consignment," within the meaning of that phrase as used in risk-note. A I R (Vol 14) 1927 Lah 854 : 103 Ind Cas 287 (DB).

——S. 72—Non-delivery—Onus of proof.

Risk-note B does not cover the case of non-delivery and, therefore, in a case of claim against a railway company based on non-delivery of the goods consigned it is in the first instance for the company to plead and prove loss, destruction or deterioration and when this is done then the onus shifts upon the claimant to show that the loss, destruction or deterioration was due to the wilful negligence of the company. A I R (Vol 14) 1927 Pat 193 : 102 Ind Cas 403 : 6 Pat 189 : 8 P L T 385 (DB).

——S. 72—Onus of proof.

Where a plaintiff does not come into Court on the ground of loss, destruction or deterioration, the Railway company must prove that the goods have been lost or destroyed, or have deteriorated before they can claim the protection of the Risk-note. A I R (Vol 13) 1926 All 228 : 92 Ind Cas 993.

——S. 72—Loss of goods by Railway.

"Loss" means loss not to the consignor but loss of the goods by the railway. A non-delivery may be due

to loss of the goods, but may be due to other causes, and it is possible to conceive of cases where goods have not been lost and yet not delivered. A I R (Vol 13) 1926 Cal 612 : 94 Ind Cas 762 : 30 C W N 209 (DB).

——S. 72—Onus of proof.

It is for the Railway Administration to prove in the first instance that goods have been lost, and it will be then for the plaintiff to show that the loss was due to the wilful neglect or of theft by railway servants. That also must in almost every case be impossible for the plaintiff to prove, but that is what he undertakes to do under the risk note; at any rate the decided cases hold that it is for him to prove it. AIR (Vol 13) 1926 Cal 612 : 94 Ind Cas 762 : 30 C W N 209 (DB).

——S. 72—Onus of proof.

When any one has entrusted goods to a Railway Company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the Railway Company the fact of the loss, damage, or destruction is enough to cast upon the Company the burden of proving that loss was not due to any negligence on its part. A I R (Vol 13) 1926 Lah 217 : 91 Ind Cas 963.

——S. 72—In a suit against the Railway Company for damages in respect of goods consigned to them the onus lies, in the first instance, on the railway to prove the loss of the goods. AIR (Vol 12) 1925 All 384 : 86 Ind Cas 162 : 23 A L J 51 : 6 L R A Civ 280 (DB).

——S. 72—Deterioration—Depreciation in value.

The fall in value of an article is not a deterioration within S. 72 and the 'loss' in S. 72 is not the loss caused to the owner owing to delay in delivery and fall in market price in the interval. The deterioration of a thing, whether it be in quality or in value, implies in an ordinary parlance a change for the worse in the thing itself. If a thing is worth less than it was before only because the market rate has gone down it would be correct to say that it has depreciated in value, but not that it has deteriorated. AIR (Vol 12) 1925 Lah 255 : 85 Ind Cas 404 : 5 Lah 523 (DB).

——S. 72—The term "loss" as used in the Risk-note and in Chap. VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntary or through inadvertence loses possession of the goods and for the time being is unable to trace them. A I R (Vol 11) 1924 Cal 725 : 79 Ind Cas 126 : 51 Cal 615 : 28 C W N 1001 (DB).

——S. 72—Failure to prove.

If the Railway Company fails to prove that the goods are lost, that is to say that they are no longer in possession of the company and that they are not lying about, in their premises, or at least that some kind of search has been made for them, they are liable to pay damages to plaintiff for the short delivery. A I R (Vol 11) 1924 Nag 43 : 73 Ind Cas 375 : 6 N L J 97.

——S. 72—Railway Strike.

The mere proof that a strike took place on the Railway of the principal defendant is by no means a justifiable basis for the inference that that Railway was not responsible. But it must be proved that the loss occurred on the Railway which was affected by the strike, that the loss occurred during the period of the strike and that the loss was in some specific way the result of the strike. A I R (Vol 11) 1924 Pat 811 : 75 Ind Cas 18.

——S. 72—Non-delivery—Presumption as to possession.

Mere non-delivery is not necessarily "loss" and the Railway Company cannot prove loss by merely alleging it but must at least prove that the goods are really lost and are not lying about, on their premises, that is to say, some kind of a search has been made for them. If nothing is known about the goods except that they were delivered to the Railway Company by the consignor but were not delivered by the Railway Company to the consignee, the presumption must be that they are still in the possession of the Company and it is for the Company to rebut that presumption by showing that they have gone out of their possession, that is to say, are lost. A I R (Vol 10) 1923 Nag 223 : 72 Ind Cas 333 : 19 N L R 56 (FB).

——S. 72—Loss by mis-delivery.

Per Full Bench (Abdul Raoof, J., dissenting). The word "loss" in Chapter 7 includes loss to the owner of goods made over to a railway administration which have been mis-delivered and so have been lost to the person entitled thereto. (6 P. R. 1897, Overruled). AIR (Vol 8) 1921 Lah 1 : 61 Ind Cas 925: 2 Lah 133 : 3 L L J 297 : 75 P L R 1921 (FB).

(b) Loss, destruction or deterioration —Meaning of, in risk notes.

——S. 72—Risk Note A—Claim based on non delivery of goods—If barred.

The Railway Administration can never plead the execution of Risk Note A in bar to a claim based on non-delivery of goods. The word "loss" as used here, cannot refer to any loss of the goods, but refers to loss arising from the condition in which the goods are delivered. In other words, the risk note has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and therefore, no question arises of any loss arising from the condition in which the goods were found on delivery. AIR (Vol 35) 1948 Pat 48.

——S. 72—Risk Note B—Delivery to wrong person, whether 'loss'—Liability of company.

Where goods are delivered by a Railway Administration to a person in contravention of the explicit instructions of the consignor, the case falls within the exception mentioned in the Risk Note B as the 'loss' is due to the misconduct of the Railway servants, and the consignor has a good cause of action against the railway for damages. A I R (Vol 20) 1933 Lah 425 : 34 P L R 749 : 144 Ind Cas 404 (DB).

——S. 72—Risk Note Form A—Suit for loss caused to consignment of goods — All bales consigned under risk note A, delivered—Shortgage due to some goods slipping out of bales—Suit for damages :

Held that in order to make the Railway administration liable, the loss must be shown to have been caused due to misconduct on the part of the Railway administration or its servants. AIR (Vol 18) 1931 All 135.

——S. 72—Loss, Meaning of.

The word 'loss' as used in a risk note means loss of the goods by the railway company while in transit and occurs whenever the railway company involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them. AIR (Vol 16) 1929 Cal 510 (DB).

——S. 72—Loss of goods.

The term 'loss' as used in the risk-note and in Ch. VII, Railways Act, does not mean pecuniary loss to the owner of the goods, but means loss of goods by the Railway Company while in transit. AIR (Vol 15) 1928 Pat 270 : 107 Ind Cas 540 : 7 Pat 192 : 9 P L T 163 (DB).

——S. 72—Onus on the Company.

The Railway Administration must prove that the goods consigned have been lost before they take advantage of the agreement contained in the Risk-note to throw upon the plaintiff the onus of showing that

the goods were lost by dishonesty or wilful negligence; and that it is not sufficient for the Railway Company to plead execution of the Risk-note and to plead loss; they must definitely prove that there has been loss of goods. A I R (Vol 15) 1928 Pat 259 : 9 P L T 616 : 107 Ind Cas 158 (DB).

——S. 72—Non-delivery—Allegation of loss.

Loss to the plaintiff by detention is loss within the meaning of the Risk-note B. If a railway company pleads the exception but does not give any proof that the goods have been lost to them, the consignor will be entitled to a decree on the ground that though there has been loss within the meaning of the risk-note he is entitled to a finding that the goods are being wrongly withheld in the possession of the railway company and therefore there was wilful neglect in not delivering the goods to him. If the railway company gives evidence or the parties are agreed that the goods have been lost to the company also, the burden of proof will be shifted upon the consignor to prove wilful neglect. In a contract based upon risk-note B a mere allegation that the cause of action is non-delivery will not suffice to take the case out of the risk-note. A I R (Vol 14) 1927 Pat 337 : 6 Pat 369 : 103 Ind Cas 655 (DB).

——S. 72—Risk Note B—Non-delivery.

(Per Jwala Prasad J.)—S. 72 deals only with the responsibility arising from loss,destruction or deterioration of goods delivered to the Railway Administration for carriage and does not deal within the responsibility for non-delivery. Similarly the agreement in the Risk Note B based upon S. 72 limits the general liability of the Railway Adminisration only in respect of loss, destruction or deterioration of goods consigned to it and not in respect of non-delivery of the goods. AIR (Vol 14) 1927 Pat 234: 8 P L T 415: 6 Pat 718 : 102 Ind Cas 673 (FB).

——S. 72—Non-delivery—Admission of loss — Onus of proof.

Where the plaintiff alleged in his plaint that on account of non-delivery he had suffered a loss but in the earlier portions of the plaint he alleged that he came to know that the goods had been lost owing to negligence on the part of the Railway servants, and the Railway Company whilst not admitting the allegations in the plaint relied upon the provisions of the Risk-note and no issue was framed as to whether the goods had been lost or not.

Held, (Per Full Bench; Jwala Prasad, J., dissenting), that in these circumstances it being admitted that there was a loss of the goods the onus no longer lay upon the Railway Company to call evidence to prove loss of goods.

Per Jwala Prasad, J.—The admission of the plaintiff must be taken as whole. The defendants' pleading must be construed strictly and upon a true import and scope of the pleadings in the case, the plaintiff's case was one of non-delivery and the loss of the goods within the meaning of the terms in the Risk-note was neither admitted nor pleaded nor proved, and the Risk-note did not apply or exonerate the Railway from the liability to the plaintiff for non-delivery of the goods. A I R (Vol 14) 1927 Pat 234 : 6 Pat 718 : 8 P L T 415 : 102 Ind Cas 673 (FB).

——S. 72—Onus of proof.

Per Dawson, Miller, C. J. & Jwala Prasad J.—The onus of proving that the goods were lost within the meaning of the Risk-note is primarily with the Railway Company which seeks to exempt itself from liability to deliver by reason of the exemptions contained in the contract. AIR (Vol 14) 1927 Pat 234 : 6 Pat 718 : 8 P L T 415 : 102 Ind Cas 673 (FB).

——S. 72—Misdelivery and non-delivery—Pleadings.

The words "loss, destruction or deterioration" in the Risk Notes are not used in a different sense to that in which they are used in Chap. 7 of the Act. "Loss" includes loss by the carrier as well as loss to the owner, and, therefore, it necessarily follows that any suit whether it be for misdelivery of the goods or for their non-delivery is a suit for loss of goods to the owner and therefore the loss of the goods is necessarily alleged in the pleadings of the plaintiff and under the circumstances it is not necessary for the defendant even to allege the loss of the goods, much less to prove it by independent evidence.AIR (Vol 13) 1926 Lah 596 : 98 Ind Cas 946.

——S. 72—In cases of non-delivery of goods, though booked at owner's risk the burden of proving loss is on railway. AIR (Vol 13) 1926 Nag 489: 9 NLJ 152:98 Ind Cas 236.

——S. 72—Admission of loss—Difference between Risk Notes A and B.

Risk Note A would absolve the Company from any responsibility for loss owing to the bad condition of the bags throughout the period of transit, and the period of transit would commence from the time that the bags were received and were carried to the train. The question of onus will not be the same in regard to the Risk Note in Form A as it is in regard to the Risk Note in Form B. The two indemnities are quite different. It is not necessary for the defendant Company to prove that there has been such loss or damage as is contemplated in the Risk Note, where it is clear form the admissions that there was such loss and damage. AIR (Vol 13) 1926 Pat 137 : 7 PLT 45 : 90 Ind Cas 1 (DB).

——S. 72 — The Railway Company cannot claim exemption under the risk note unless it establishes that the goods have actually been lost to the company. AIR (Vol 12) 1925 All 675 : 6 L R A Civ 519 : 89 Ind Cas 497 (DB).

——S. 72—The word "loss" in Risk-note Form B means loss to the owner. AIR (Vol 12) 1925 Nag 333: 87 Ind Cas 1031.

——S. 72—It is not necessary for the defendant Railway Company in a suit for compensation for non-delivery of goods consigned under Risk-note form B, to call evidence to satisfy the court that the goods are not still in its possession. It is sufficient to plead loss as contemplated by the risk-note. AIR (Vol 12) 1925 Pat 304 : 78 Ind Cas 479.

——S. 72—Non-delivery.

Where a railway company is used for compensation for non-delivery of the goods consigned under Risk-note form B if the company proves loss of the goods the burden is on the plaintiff to establish that the loss was due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of the servants. A I R (Vol 11) 1924 Pat 315 : 73 Ind Cas 642.

——S. 72—Loss by Railway.

The consignor who has executed a note in Form B has no claim for destruction, or deterioration of or damage to the consignment. He can only claim in the event of loss occasioned in the manner specified in the contract. The word "loss" in this connection clearly means loss by the Railway Administration and cannot mean loss to the owner in the sense of injury to him arising out of his being deprived of his goods. AIR (Vol 10) 1923 All 426: 21 ALJ 220: 45 All 380 : 4 L R A Civ 166 : 71 Ind Cas 609.

——S. 72—Deterioration but no loss.

Where goods consigned under a risk note were despatched to a wrong place through the wilful neglect of railway servants and consequently the goods deterioated :

Held, deterioration due to wilful neglect would give no cause of action against the railway company as the consignment was sent under a risk note. A I R (Vol 10) 1923 All 122: 20 A L J 973: 4 L R A Civ 20: 77 Ind Cas 1020 (DB).

——S. 72—Onus of proof.

There is ample authority for holding that in case of non-delivery the Railway Company must give proof of the actual loss of the goods and that it is not sufficient that they have not been delivered; after the loss is proved it is for the claimant to prove the exceptional circumstances mentioned in the risk note making the Railway Company liable for damages, such as wilful neglect on the part of the Railway servants or theft by them. AIR (Vol 10) 1923 Lah 609 : 72 Ind Cas 779.

——S. 72—Risk Notes A and B.

In case of short delivery of a consignment booked under Risk-notes in forms A and B, the initial onus of establishing loss, destruction or deterioration of or damage to the said consignment, lies on the Railway Administration concerned, and the onus of proving that it was due to the neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants, etc., should not be thrown on the person claiming compensation for it. A Railway Company seeking shelter under a risk-note for the non-delivery of the whole or a part of a consignment must show that it was lost. AIR (Vol 10) 1923 Lah 432 : 73 Ind Cas 447.

——S. 72—Carriage of goods — Liability for loss — Contract Act, Ss. 151 and 152—"Loss"—Meaning of —Default of servant.

Railways in India are common carriers; and a Railway Company has not the liabilities of an insurer but only those of a bailee under Ss. 151, 152 and 161 of the Contract Act. It is open to a Railway Company to limit its liability under a special contract in respect of the minimum care which the Contract Act imposes on bailees. Where in pursuance of a special contract embodied in a risk note a Railway in consideration of acceptance of a reduced charge, limited its liability only to cases of loss through wilful negligence. Held, the Company can be held liable only for the loss of a complete consignment or one or more complete packages and the Company would be exempted from liability where there has been merely "destruction, deterioration and damage." It cannot be said that there is no loss whatever to the contents if the outer cover which encloses the parcel was delivered by the Company. Per Seshagiri Iyer J. Persons who undertake to do certain things and who employ servants to do those things must be responsible for the careless negligence or wilful default of the servants in the discharge of their duties. A I R (Vol 7) 1920 Mad 512 : 38 M L J 360: (1920) M W N 198: 28 MLT 49: 11 L W 358 : 55 Ind Cas 754 (DB).

——S. 72—Onus of proof.

In a suit for compensation for non-delivery of goods consigned to the railway for carriage on a approved risk-note, it is for the railway company to prove the loss, and for the plaintiff to prove that the loss, was caused by the theft or wilful neglect of the company's servants. A I R (Vol 7) 1920 L B 124 : 10 L B R 354 : 13 Bur L T 190 : 64 Ind Cas 395.

14. Loss of complete package—Meaning of.

——S. 72—Loss should be of the article itself—Destruction or deterioration.

The words "except for the loss of a complete consignment or of one or more complete packages forming part of consignment" point to this that destruction or deterioration of or damage to goods is a thing which a Railway Company are not to be responsible even in case of wilful neglect. Only thing for which in certain events they are to be responsible is loss, that is to say, loss of all or any of consignments, and they are to be responsible for that only when there is a loss of complete consignment or one or more of complete packages. All arguments based upon the notion of loss as meaning monetary or pecuniary loss to the consignor have nothing to do with this word as used in the Risk-note Form H. AIR (Vol 16) 1929 Cal 700 : 50 CLJ 24 : 33 CWN 989 : 57 Cal 73 (DB).

——S. 72—Contents—Loss of.

Where a Risk-note makes railway company liable for loss of complete packages; if the whole contents of a package are lost and only outer covers of the packages or gunnies are delivered, there is no delivery of packages and the company is liable for the loss. AIR (Vol 16) 1929 Pat 618 : 10 PLT 835 (DB).

——S. 72—Perishables—Deterioration.

In the case of perishable goods if the contents of the whole consignment deteriorate to such an extent that they become of no value, the loss amounts to a loss of the whole consignment. AIR (Vol 13) 1926 Lah 614 : 94 Ind Cas 173.

——S. 72—Risk-note B — Contents of some packages missing.

Where in a consignment under Risk-note form B, the contents of some of the packages are missing, but all the packages are delivered, there is no loss of a complete package and the railway company is exempt from liability for the loss. AIR (Vol 12) 1925 Bom 534 : 49 Bom 827 : 27 Bom L R 1111 : 90 Ind Cas 562 (DB).

15. Misconduct.

(a) General.
(b) Illustrative cases.
(c) Responsibility of the railway.

(a) General.

——S. 72 — Risk Notes A and B — What amounts to "misconduct."

Misconduct is not necessarily established by proving culpable negligence; it is something opposed to accident and negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. Unless the conduct is unbusiness-like misconduct cannot be inferred. Mere error of judgment also is not misconduct. AIR (Vol 34) 1947 Pat 84 : 1946 PWN 148.

——S. 72—Negligence and misconduct — Distinction between, pointed out.

Negligence is the failure to take that care which an ordinary prudent man would take in the circumstances, and is the omission to do something which such man would do, or in doing something which he would not do. For an act to amount to misconduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the nature of improper behaviour and is not merely either wrongful commission or wrongful omission. An act of misconduct can well be, and in most cases probably is, negligence; but a negligent act is not by itself misconduct. Misconduct is the genus and negligence is a species of the genus and involves the the passing of a moral judgment on the part of the person concerned, however slight may be the lapse from rectitude which provokes it. AIR (Vol 33) 1946 Cal 249: ILR (1944) 2 Cal 487: 48 Cal WN 554 (DB).

——S. 72—What is.

Misconduct is something opposed to accident or negligence; it is the intentional doing of something which the doer knows to be wrong and which he does recklessly not caring what the result may be. AIR (Vol 27) 1940 Nag 238 : 1940 NLJ 171 : 188 Ind Cas 536.

——S. 72 — Meaning of — Term, whether includes mere acts of negligence.

The word 'misconduct' in Risk Note A is not equivalent to 'wilful misconduct'—the expression used in English risk notes. The word denotes wrong or improper conduct. It is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part

in the existing circumstances to do or fail to omit to do (as the case may be) a particular thing or to persist in the act, failure or omission, or acts with carelessness. The term should be construed in relation to the consignor and the responsibility judged accordingly. AIR (Vol 23) 1936 Mad 508: 43 LW 638: 70 MLJ 608: 1936 MWN 594 : 59 Mad 789 : 163 Ind Cas 493.

——S. 72 — Wilful misconduct and misconduct — Difference.

There is no difference between wilful misconduct and misconduct. AIR (Vol 23) 1936 Pat 84 : 16 PLT 887 : 2 BR 290 : 160 Ind Cas 1086.

——S. 72—Meaning of.

"Misconduct" is not a term of art. In ordinary parlance, it means bad management or mismanagement, being often used quasi-specifically in the sense of malfeasance or culpable neglect of an official in regard to his office. The word is sometimes said to connote moral obliquity, but this is largely due to the fact that the word is also used in the sense of improper conduct or wrong behaviour especially adultery; the word "conduct" itself means not only "manner of conducting business etc.," but also "behaviour" specially in its moral aspect, as good or bad conduct. There is little reference to ethics when misconduct in Railway risk notes is taken to mean the doing of a wrong thing; and such misconduct may or may not be wilful. AIR (Vol 23) 1936 Pat 70: 16 PLT 837 : 2 BR 97 : 159 Ind Cas 580.

——S. 72—What amounts to.

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident and negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. AIR (Vol 22) 1935 Cal 811 : 159 Ind Cas 907

——S. 72 (1) (2) — Liability of Railway Administration — Rain water entering wagon by great force of wind — Whether misconduct.

In India, the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence, there is no liability. Whatever the term 'misconduct' may imply, the word implies something more than negligence. If rain water enters a wagon by the great force of wind, the omission of the Railway Company to provide absolutely watertight doors as would not permit even a drop of water to enter, would not amount to misconduct. To insist on such a high standard would be to make an Indian Railway Administration virtually an insurer and not a bailee. AIR (Vol 22) 1935 Cal 271 (2) : 39 CWN 114 : 60 CLJ 590 : 155 Ind Cas 1052.

——S. 72—What amounts to.

It is well settled now that misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence; it is the intentional doing of something which the doer knows to be wrong or which he does recklessly, not caring what the result may be. AIR (Vol 20) 1933 Cal 742 : 60 Cal 996 : 57 CLJ 281 : 147 Ind Cas 752.

— S. 72 — Goods sent under Risk Note Form 'H'— Theft—Wagons properly sealed and rivetted—Guard taking usual precautions—Liability.

The onus of proving misconduct is on the party alleging it, and when misconduct is alleged on the part of the servants of a Railway Company, it must be shown that the servants were actually responsible for the guilt or the wrongful act; knowledge on the part of the Railway Administration or of Railway servants that an act is likely to cause injury is not sufficient. Misconduct is not necessarily established by proving even culpable negligence. Misconduct is something opposed to accident or negligence; it is intentional doing of something which the doer knows to be wrong or which he does recklessly, not caring what the result might be.

Where, in spite of the fact that the wagons were properly sealed and rivetted and the guard took all the usual precautions about inspecting the wagons, theft of bales which were sent under Risk-note Form 'H' took place :

Held, that the loss was not due to the negligence and misconduct on the part of the Railway servants. AIR (Vol 22) 1935 Lah 206 : 153 Ind Cas 625.

——S. 72—What is.

The incompetence in steering a boat used for transports is not misconduct. AIR (Vol 18) 1931 Mad 115 : 1930 MWN 816 : 130 Ind Cas 658.

—— S. 72 — The word misconduct as used in new Risk-note Form B is not the same thing as "wilful neglect" in the old form. It suggests that a railway servant has been guilty of doing something which is inconsistent with the conduct required of him by the rules of the company. AIR (Vol 17) 1930 Bom 129 : 31 Bom LR 1426 : 54 Bom 105 (DB).

—— S. 72—The word "misconduct" means the doing of wrong thing. Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence the misconduct, not the conduct, must be wilful. Wilful misconduct is very different from negligence and is not necessarily established by proving culpable negligence. Wilful misconduct is included in misconduct. AIR (Vol 17) 1930 Cal 298 : 33 C W N 1048.

——S. 72 — The word "misconduct" is used in a sense which carries an imputation of some degree of moral obliquity. AIR (Vol 17) 1930 Lah 120 : 120 Ind Cas 286 (DB).

——S. 72—Plea of.

Under the Risk-note form B it is necessary for the consignee before he can establish his claim to damages to prove that the loss was due to the misconduct of the railway company or their servants. AIR (Vol 17) 1930 Pat 283 : 11 P L T 161 : 124 Ind Cas 833 (DB).

——S 72 Failure to prove neglect.

Wilful misconduct is not less than wilful neglect and consequently failure to prove wilful neglect means failure to prove wilful misconduct. AIR (Vol 17) 1930 Pat 283:11 P L T 161:124 Ind Cas 833 (DB).

——S. 72—Onus of proof.

Burden of proving misconduct on the part of the companies' servants lies on the consignor. AIR (Vol 16) 1929 All 124 : 51 All 480 : 1929 A L J 185 : 113 Ind Cas 752.

——S. 72—Negligence.

Under certain circumstances negligence is good evidence for misconduct or mismanagement of a Railway Company AIR (Vol 16) 1929 Cal 654 : 49 C L J 551.

——S. 72 - Mismanagement.

Substitution of the word "misconduct" in the Railway risk-notes in place of "wilful neglect" used in risk-notes before 1924 make company liable for mismanagement in the absence of proof that damage was caused by an event or circumstance over which the Railway Company had no control. AIR (Vol 16) 1929 Cal 654 : 49 C L J 551.

— S 72— Inference as to.

Where from the facts found an inference of misconduct on the part of the railway servants may be legitimately drawn, it is not necessary to call upon the consignor to give evidence of misconduct. AIR (Vol 15) 1928 Nag 340 : 111 Ind Cas 535.

— S. 72—Evidence as to

Where from the facts found an inference of misconduct on the part of railway servants may legi-

timately be drawn, it is not necessary to call upon the consignor to give evidence of misconduct whether the loss is of a complete package or part of a package: AIR 1926 All 565, Diss. from. AIR (Vol 14) 1927 All 371 : 49 All 889 : 25 A L J 549 : 102 Ind Cas 440 (DB).

——S. 72 – Refusal to account for loss.

The refusal of the Railway Company to account for the loss of the goods cannot justify the Court in holding that the loss arose from the wilful misconduct of the Company's servants. AIR (Vol 13) 1926 Lah 40 : 7 L L J 588:26 P L R 819:90 Ind Cas 1054.

(b) Illustrative cases.

——S. 72 — Open truck containing wooden articles attached to goods train — Truck placed nex to engine — Truck catching fire caused by sparks emitted from engine — Railway servants not taking proper care to see that contents of truck did not catch fire – Acts held were not acts of misconduct.

The plaintiff consigned certain goods to a Railway company for carriage. The goods were packed in three covered wagons and one open truck. Risk Note "B," which covered the whole consignment, provided that the plaintiff agreed to hold the Railway harmless and free from all responsibility from any loss, destruction or damage to the consignment from any cause whatever except upon proof of misconduct on the part of the railway or its servants. Risk Note "C," which applied to the goods carried in the open truck, purported to exempt the railway from all responsibility for any damage to the consignment which might arise by a reason of its being conveyed in an open wagon. The wagons and the truck were attached to a passenger train but later on they were detached and recoupled to a goods train, the open truck being placed next to the engine. The truck caught fire caused by the sparks emitted from the engine resulting in the complete destruction of everything in the truck. In a suit by the plaintiff to recover damages for loss, alleging misconduct on the part of the servants of the railway :

Held that Risk Note "C" did exempt the railway from loss caused by its servants' negligence or misconduct, but to a limited extent, namely to loss which might arise by reason of the consignment being carried in the open wagon. But it did not exempt them from all responsibility.

Held further that the acts of the servants of the railway in attaching the open truck containing wooden articles to a goods train placing the truck next to the engine and not taking proper care to see that the contents of the truck did not catch fire were not acts of misconduct and no misconduct having been proved as required by Risk Note "B" the railway was not liable to the plaintiff for his loss. AIR (Vol 33) 1946 Cal 249 : I L R (1944) 2 Cal 487 : 48 Cal W N 554 (DB).

——S. 72 Negligence, if amounts to misconduct — Bags of tobacco carried in non-waterproof wagon — Damage — Failure to inspect wagon at every stage —Whether misconduct.

Negligence would not always be tantamount to misconduct but it amounts to misconduct in the ordinary meaning of the word if it involves culpable neglect likely to cause damage, even if it does not involve recklessness.

Where certain bags of tobacco are allowed to be carried in non-waterproof wagon and the goods are found to be damaged at the destination, the inference that the damage was due to the company having despatched in such a wagon can be drawn if there is no suggestion that the damage was caused during transhipment or at any time except while the bags were in the wagon. But the mere failure to inspect the wagon at every stage of a long journey cannot be said to amount to misconduct. AIR (Vol 24) 1937 Cal 410 : 173 Ind Cas 797.

——S. 72—Risk Note B— Consignment destroyed by fire – Servant doing best to save goods – Misconduct.

In a suit by consignor for damages for loss by fire during transit of a consignment of sal wood sent under Risk Note B, it was found that the servants of the company, soon after the discovery of fire, had shifted the two trucks carrying the wood to a siding near a tank and had engaged a number of men to pour water on the burning logs. In spite of these efforts, the logs could not be saved. It was contended that the failure on the part of the servants to unfasten the chain between the two trucks or unload the truck or use a hosepipe amounted to misconduct on their part :

Held, that nobody could say that the unfastening of the chain and attempting to unload the truck or using hosepipe would not have been as useless as the pouring of water by means of buckets. Unless the conduct of the officials was unbusinesslike, misconduct could not be inferred. Because the Railway Officials took one step rather than the other, they could not be said to be guilty of misconduct. AIR (Vol 24) 1937 Pat 289 : 3 B R 554 : 169 Ind Cas 354.

——S. 72 – Short delivery, suit for— Risk Note H — Misconduct, meaning of—Disclosure, connotation of.

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence, and is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be.

The plaintiffs filed a suit for short delivery of certain tins of ghee out of a consignment which was booked under Risk Note H. The contract was one of carriage at a special reduced rate in consideration of which the Company is exonerated from all liability for loss or damage to the consignment, except on proof that such loss or damage arose from the misconduct of the servants of the Company. There was a proviso that in case of non-delivery of the whole of one or more packages forming part of the consignment, such non-delivery not being due to accident to a train or to fire, the Company shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in possession or control of the Company, and if necessary, to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct cannot fairly be inferred from such evidence, the burden of proving such misconduct shall lie on the consignor. It was found by the Courts below that the closed tins were placed in a wagon which was sealed and rivetted, and that nothing more was required to ensure the safety of the consignment which was a through consignment. The wagon was intact at Station G. At Station C, the offside of the wagon was open, the seal removed, and some of the contents missing. The rivets and seal had been cut and pilferage had taken place between G and C :

Held, (i) that no misconduct on the part of the Railway servants could fairly be inferred from the established facts ;

(ii) that there was disclosure by the Company of how the consignment was dealt with while under their control.

Disclosure does not connote that the Company must, in the case of a through consignment, be prepared to give evidence as to the condition of the wagon at any intermediate stage of the journey. The position might possibly be different if a question of transhipment were involved AIR (Vol 23) 1936 Cal 24 : 61 C L J 526 : 160 Ind Cas 728 (DB).

——S. 72 Risk Note Form A — Charging ordinary rates for goods consigned under Risk Note Form A—

Legality — Consignment of skins in wagon containing an acid, formal-de-hyde—Skin damaged—Liability of Company.

It is open to a Railway Company to consign goods under Risk Note form A if the goods are of the description mentioned therein even when ordinary rates are charged.

Some bags of skins were consigned at Cuddapah for delivery to the plaintiff at Trichinopoly under Risk Note Form A. On opening the wagons, it was found that the wagons contained some jars of an acid known as formal de-hyde and that this acid had damaged the hides but there was nothing to show that the Railway servants who loaded the skins knew that the formal-de-hyde in the wagons was of full strength and dangerous to the hide. Formal-de-hyde is not also classed under dangerous goods in the rules:

Held, that the servants of the Railway Company could not be held to have been guilty of misconduct. AIR (Vol 23) 1936 Mad 508 : 43 L W 638 : 70 M L J 608 : 1936 M W N 594 : 59 M 789 : 163 Ind Cas 493.

——S. 72—Risk Note H— Consignments damaged by rain water — Suit for damages — Breach of rules by Railway servants established— Whether misconduct —Liability.

The plaintiff sent certain consignment of ata, flour and suji under Risk Note in Form H by the defendant Railway. Damage was actually caused to the consignments and it was found by the trial Courts that the servants of the Railway had acted in violation of the various rules in connection with these consignments and that damage was caused by rain water entering into the wagons, which were either leaky or were not securely closed and made water-tight owing to the negligence of the defendant company and their servants :

Held, that it was not satisfactorily shown that the wagons were absolutely water tight; the examination at a Station on the route was sometimes, at any rate, directed to ascertaining merely whether the wagon was fit for running, and no Railway witnesses spoke even in the monsoon of testing the wagon for holes and secondly, the special standing order that wagons with flap doors and windows should, on no account, be used for carrying damageable traffic during the monsoon itself showed that it was not enough to have a wagon with a water-tight roof, and that the breach of rules established in the case was such as to amount to misconduct and hence the Railway company was not absolved from liability for the damage. A I R (Vol 23) 1936 Pat 70 : 16 P L T 837 : 2 B R 97 : 159 Ind Cas 580.

——S. 72—Suit for damages for non-delivery of potatoes consigned on Risk Note Form B— Railway Company loading the potatoes with another consignment of rotten potatoes and sending them not by first available train—No proof of wilful neglect of the Company — Company, held was not guilty of misconduct. (1936) 17 P L T 521.

——S. 72 — Perishable goods in damaged condition and unfit to undergo further journey—Railway Company disposing them of after consulting consignor — Consignee not consulted If misconduct.

The consignor does not lose his title in the goods as soon as he makes them over to the Railway Company for delivery to consignee at another station. It depends upon the circumstances of each case. Where, therefore, a consignment of perishables, which was in damaged condition and unfit to stand any further journey was disposed of by the Railway Company on consulting the consignor :

Held, that the company was not guilty of misconduct in not consulting the consignee, as such a step would have caused further delay, nor in disposing of the goods. A I R (Vol 21) 1934 Cal 508 : 38 C W N 352 : 61 C 293 : 149 Ind Cas 1229 (FB).

——S. 72 — Risk Note H — Goods damaged by rain leaking in through crevices of wagon—Whether evidence of misconduct.

Where, in a suit against a Railway Company for damages in respect of loss caused to the plaintiff by certain bags of rice having become wet during transit it appeared that the bags of rice became wet on account of the rain blowing into the wagon through the crevices of the doors and there was evidence that the wagon in which the goods were despatched was found water-tight, both when it was examined before the damage occurred and also when it was re-examined after the date of the damage :

Held, that there was no evidence of any misconduct on the part of the Railway Administration. AIR (Vol 21) 1934 Mad 715 : 40 L W 702 : 67 M L J 704: 1934 M W N 1385 : 154 Ind Cas 453.

——S 72—Risk Note B — Consignment of goods for carriage—General strike of employees—Damages.

Where certain perishable goods were consigned for carriage under Risk Note B and owing to a strike of Railway employees, a long time elapsed before the goods reached the destination and the consignor suffered damages :

Held, that the refusal to work by a single employee or by general strike must be considered misconduct of the Railway. AIR (Vol 20) 1933 Nag 42: 29 N L R 66 : 143 Ind Cas 389.

——S. 72—Risk Note H—Loss of bale consigned — Inference of misconduct.

Misconduct need not be wilful ; failure of duty towards the consignor of goods by Railway comes under 'misconduct'.

A bale weighing 9½ maunds consigned to a Railway under Risk Note H was found missing at the destination :

Held, that there was no escape from the conclusion that the bale was removed owing to either the deliberate misconduct of the Railway servants in the shape of standing by or helping in the theft or at any rate, in so neglecting the waggon containing it that was possible for several men to arrive at the place and remove it AIR (Vol 19) 1932 All 321 : 1932 ALJ 217: 54 A 368 : 140 Ind Cas 103 (DB).

——S. 72—Goods reaching destination after eleven days and sold by auction as found perishing — Suit for non-delivery.

A consignment of potatoes reached the destination after eleven days from the date of consignment and the potatoes were sold by auction as they were in a perishing condition. The consignors instituted a suit against the Railway Company for non-delivery. The trial Court found that there was no misconduct on the part of the Company and dismissed the suit. On revision :

Held, (i) that case was not one of non-delivery, and the conditions of the Risk Note imposing an obligation on the Company to give evidence as to their dealing with the goods did not arise ;

(ii) that there was no misconduct on the part of the Company under sub-cl. (b) of Risk Note B inasmuch as the goods, though in one sense perishable, were not perishable in the sense that they could, under no circumstance, stand the Railway journey and would not have perished if they were in a good condition when they were first consigned. AIR (Vol 18) 1931 Pat 201 : 130 Ind Cas 837.

——S. 72—Unnecessary and undue detention.

Where a load of plantains was consigned from Muttra under Risk-note form H, to be delivered to Lahore and no weigh bridge being available there, instructions to reweigh the consignment were telegraphed to Delhi, Bhantinda and Lahore, and the consignment having been accordingly reweighed at Delhi, the wagon was detained for about 30 hours at

Bhatinda without either weighing or making enquiries in that direction.

Held, that this behaviour amounted to misconduct. AIR (Vol 17) 1930 Lah 120 : 120 Ind Cas 286 (DB).

——S. 72 — Consignment of animals — Failure of consignor to supply food.

A merchant delivered a consignment of 50 pigs to the railway authorities at Delhi for carriage to Karachi. The loaded waggon left for Karachi by the first available passenger train and arrived at Karachi after a delay caused by halt at the intermediate stations for about 18 hours. The two servants of the merchant left Delhi by the same train to which the loaded waggon was attached. 35 pigs of the consignment expired in transit before reaching Karachi. It appeared from the evidence that the servants failed to provide sufficient food and water in the waggon carrying the pigs.

Held, that the servants of the railway company were not guilty of negligence or misconduct and that they did nothing that contributed to the loss of pigs. AIR (Vol 16) 1929 Sind 238 : 117 Ind Cas 769.

——S. 72—Consignment requiring higher degree of caution—Loss of goods—Presumption.

The less the evidence of negligence of servants, that is to say, the more careful the railway arrangements may be, the stronger is the inference of misconduct against the railway administration, if the goods have disappeared in spite of the exercise of due care, because if the custody and care of the goods is of a high order it is impossible for a trespasser to remove them without the connivance of the diligent servants.

A waggon containing bales of cloth weighing more than four maunds each was lying in the station yard for a night. The yard was adequately lighted and guarded, but the next morning the seal of the waggon and the rivet were found tampered with and two bales were thus short delivered. It was proved that the seal and rivet, which were tampered with, could not be tampered with by an ordinary individual without some instrument, and without making a noise certain to attract attention during the night.

Held, that it was a legitimate inference to be drawn from the disappearance of these heavy articles from the railway premises during the night that the operation must have been done either by railway servants themselves, or by trespassers, with the connivance, if not the assistance, of the railway servants. Whichever it was a clear case of misconduct. AIR (Vol 15) 1928 All 230 : 26 ALJ 446 : 117 Ind Cas 743 (DB).

(c) Responsibility of the railway.

——S. 72— Risk Note B — Misconduct — Inference from evidence of railway company.

It is open to the plaintiff in a suit for loss of goods against a railway company to establish misconduct on the part of the railway administration by an inference from the railway company's disclosure as to how the consignment had been dealt with as required under Risk Note B. AIR (Vol 35) 1948 Pat 36 : 29 PLT 99.

——S. 72— Risk Note B — Suit for non-delivery of goods against Railway Administration Immunity of latter from liability—Extent—Plaintiff alleging misconduct of defendant's servants Defendant alleging destruction of goods by fire—Withholding by defendant of contemporaneous evidence as to their dealing with goods while, in their possession — Adverse inference—Evidence Act, S. 114, Ill. (g).

Risk Note B relieves the Railway Administration from liability for loss, save upon proof of misconduct of their servants but the immunity given to them is subject to the proviso that in case of non-delivery of the whole or part of the consignment, they are bound to give evidence how they dealt with the consignment throughout the time it was in their possession or control. The production of that evidence is a condition to be fulfilled by them in order to avail themselves of the immunity given by the risk note. It is not sufficient for some evidence to be given, but the evidence must be comprehensive and relate to all the dealings with the consignment. If the Railway Administration fail to observe this condition in the risk note, they are liable for the loss, even in the absence of proof that it was caused by the misconduct of the servant, since the benefit of the risk note cannot be availed.

Where in a suit against the Railway Administration for damages for non-delivery of a consignment of goods made under Risk Note B on the allegation that the non-delivery was due to the misconduct of the defendant's servants, the defendants allege non-delivery was due to destruction of the goods by fire, the withholding by the defendants of all contemporaneous documents and oral evidence as to their dealing with the goods during the whole time it was in their possession or control and the absence of satisfactory evidence establishing that it was the wagon, in which the goods were loaded which was on fire and its contents wholly destroyed, brings S. 114 (g) of the Evidence Act into operation. In those circumstances it is fair to presume and infer that if all available evidence had been produced it would have shown that the non-delivery of the plaintiff's goods was occasioned by the misconduct of the defendant's servants. AIR (Vol 34) 1947 Cal 98.

——S. 72—Risk Notes A and B—Misconduct—Meaning of.

Misconduct referred to in Risk Notes A and B is something more serious than mere neglect. The only other term which is convertibly employed for it is wilful neglect. Wilful neglect means and imports that the act must have been done deliberately and intentionally and not by accident or inadvertence, AIR (Vol 34) 1947 Pat 459.

——S. 72—Consignments under Risk Notes A and B —No liability without proof of misconduct — Onus on plaintiff.

Where consignments were made under Risk Notes A and B, there is no liability on the part of the railway administration concerned without a finding of misconduct on the part of the railway servants. The onus is on the party alleging misconduct. Mere knowledge that an act on the part of the railway servants, or even their culpable negligence is not sufficient to constitute misconduct. There must be intentional doing of something which the doer knows to be wrong or which he does recklessly.

Where trial Court knows an inference of misconduct the High Court cannot in revision interfere with the finding. A I R (Vol 34) 1947 Pat 81 : 1946 P W N 137.

——S. 72—Risk Note Form A—Misconduct of railway administration Proof of.

When both the parties have entered into evidence the question of onus of proof is not very material and the Court has to draw its conclusion from the evidence and attendant circumstances. In the circumstances of transhipment of goods through railway it is well nigh impossible for a consignee to establish categorically as to how and when exactly or by which servant of the railway administration misconduct was committed resulting in the loss of goods.

(On the evidence and attendant circumstances of the case held that the loss of the portion of the goods arose from the misconduct of the servants of the railway administration in charge of the goods.) AIR (Vol 33) 1946 Pat 336 : 223 Ind Cas 236 : 12 B R 348 (DB).

——S. 72—What amounts to.

The mere fact that by the engagement of more coolies than those actually employed, the consign-

ment could have been boarded on the earlier connected train does not amount to misconduct. A I R (Vol 31) 1944 Cal 50 : ILR (1943) 1 Cal 397 : 211 Ind Cas 270.

——S. 72 — Risk Note Form H — "Misconduct", meaning of — Duty of Court — Railway, held not guilty of misconduct.

The word "misconduct" in Risk Note Form H means "improper conduct." The Court has, in cases of this sort to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. If it is established that the employees of the railway administration, in defiance of the ordinary practice, placed tins of molasses in the wagon which contained the plaintiff's yarn consignment or alternatively, if they placed the plaintiff's consignment in a wagon which contained tins of molasses, it must be held that they acted recklessly, knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves to be indifferent to such results. Where, however, the plaintiff has merely proved that the packages were received in good condition at the station from which they were despatched and that they were found to be damaged by molasses on arrival at the destination the railway cannot be held to be guilty of misconduct in the absence of proof that they placed tins of molasses in the wagon containing the plaintiff's yarn consignment. AIR (Vol 28) 1941 All 164 : 1941 AWR 5 : 1941 A L J 29 : 1941 O W N 234 : I L R (1941) All 160 : 194 Ind Cas 113.

——S. 72 —Risk Note Form B — Loss by fire—Responsibility of railway.

There is absolutely no justification for the view that in the case of a consignment destroyed by fire, the Railway Company is exempted from all liability, even though it is proved that the fire was due to or the result of some misconduct on the part of its servants. AIR (Vol 26) 1939 All 55 : 1938 A L J 1169: 1938 A W R 746 : 180 Ind Cas 107.

——S. 72—Wagons merely sealed and not locked.

Where there has been no proof that it was the rule of the Railway Administration that the goods wagons should be locked, it cannot be said that mere sealing and not locking of the Railway wagons of itself is misconduct on the part of the Railway servants. AIR (Vol 23) 1936 Pat 84 : 16 P L T 887 : 2 B R 290 : 160 Ind Cas 1086.

——S. 72—What is.

Delay which is not unreasonable on the part of the Railway Company to any consignment is no indication of misconduct. AIR (Vol 22) 1935 Cal 811 : 159 Ind Cas 907.

—— S. 72 — Risk Note B—Misconduct.

A mistake in the preparation of the Railway receipt which throws doubt on the identity of the consignment to which it relates is a misconduct. AIR (Vol 20) 1933 All 477 : 1933 A L J 966 : 55 A 625 : 144 Ind Cas 113.

——S. 72 — Damage during transit — Inference of misconduct.

Merely because the goods were damaged in transit, it cannot be inferred that the Railway Company did not take sufficient precautions. AIR (Vol 20) 1933 Cal 742 : 57 C L J 281 : 60 C 996 : 147 Ind Cas 752.

——S 72 — Consignment under Risk Note B—Suit for damages for loss —Misconduct, what amounts to.

In a suit for damages for loss in respect of goods consigned under Risk Note B, the consignor, to succeed, must prove misconduct on the part of the Railway servants. Negligence is not the same thing as wilful neglect and wilful neglect is not the same thing as misconduct. The fact that the District Commercial Inspector investigated the case and assessed the damages has no bearing whatever on the essential question of the misconduct on the part of the company's servants. AIR (Vol 20) 1933 Nag 1 : 144 Ind Cas 204.

— S. 72 — Risk Note Forms A and H—Liability of Company—'Misconduct', meaning of — Failure to provide against rain water forcing itself into wagon.

The liability of a Railway Company under risk Notes A and H, arises when loss, deterioration or damage arises from 'misconduct' of the Railway Administration's servants. Ordinarily, 'misconduct' means failure to do what is required of a person to do. The failure of a Railway administration to provide against the ordinary contingency, such as rain-water forcing itself into the wagon and causing damage to grain etc., in it, is misconduct on the part of the Railway administration. AIR (Vol 20) 1933 Pat 630 : 148 Ind Cas 396.

S. 72 — Risk Note—'Misconduct' — Violation of standing orders as to mode of loading goods liable to damage—Liability of company—Leakage—Inference.

There is misconduct on the part of the Railway where there has been a violation of the standing order to the effect that the goods liable to damage must not be loaded right up against the side of the flap door but should be loaded well away from the door to minimize the risk of damage from rain water leaking in through the flap doors and door crevices.

There is no inflexible rule of law that wherever leaks are found in the waggon at the arriving station, it is not permissible to infer that the leaks must have existed at the starting station also. AIR (Vol 19) 1932 Cal 70 : 54 C L J 314 : 134 Ind Cas 1268.

——S. 72 — Risk Note B — Misconduct of Railway Administration—Burden of proof—Inference.

Under the proviso to Risk Note Form B, it is obligatory on the Railway Company to disclose in detail how the consignment was dealt with throughout the transit and if the circumstances so disclosed raise an inference of misconduct on the part of either the Railway Administratron or its servants, the burden of proving misconduct on the part of the Railway Company's servants as in the original clause of the Risk note must be taken to have been discharged by the consignor.

Further, in cases covered by the proviso, inference of misconduct even on the part of Railway Administration as distinguished from that of its servants is sufficient to discharge the burden which lies on the consignor of proving the misconduct of the Railway Administration's servants.

Where the Railway Administration did not put padlocks on the wagon doors but only secured them with rivetted tin shackles, which could be easily removed :

Held that the Company was guilty of misconduct. AIR (Vol 18) 1931 Cal 734 : 54 C L J 154 : 35 C W N 1250 : 134 Ind Cas 940 (DB).

——S. 72—Risk note B — Pilferage—Burden of proof.

Where a consignment is booked under Risk note form B, in case there is pilferage, the railway company is bound to show how the consignment was dealt with whilst it was in its possession and if misconduct cannot fairly be inferred from such evidence the burden of proving it lies on the consignor. It cannot be inferred merely from the fact that the precautions adopted by the railway company were insufficient for protection of goods of the consignor. 31 Bom L R 1426 : 54 Bom 105 : AIR (Vol 17) 1930 Bom 129 (DB).

——S. 72—Failure of duty towards consignor.

The misconduct referred to in the Risk-note means wilful neglect and includes a fortiori anything more culpable and is not such misconduct of railway

servants as may amount to a failure of duty towards, their employers, but such misconduct on the part of railway servant or the railway administration itself as amounts to a failure of duty towards the consignor. AIR (Vol 17) 1930 Pat 559 (DB).

——S. 72—Negligence.

The neglect of Railway Company in sending the goods in a wagon sealed merely with paper, seal and wax is not covered by the word "misconduct" on the part of the Railway Administration, in the meaning of the risk-note H. "Misconduct" does not ordinarily cover acts of negligence. AIR (Vol 15) 1928 Bom 504: 52 Bom 770: 30 Bom LR 1104 : 118 Ind Cas 241 (DB).

——S. 72—Presumption.

Failure to disclose or to give satisfactory evidence with respect to manner in which consignment was dealt with raises presumption of misconduct on part of railway and it should be held liable for loss suffered by consignor. AIR (Vol 15) 1928 Nag 340: 111 Ind Cas 535.

——S. 72—Risk note A—Failure to reweigh.

Failure of the Company to reweigh the goods after their arrival at destination is a default which amounts to misconduct on the part of the Railway Company's servants within the meaning of the contract as embodied in Risk-note Form A. AIR (Vol 14) 1927 Nag 77: 100 Ind Cas 406.

16. Miscellaneous.

——S. 72—Risk Note A—Misconduct—Burden of proof.

In the circumstance of transhipment of goods through railway, it is well nigh impossible for a consignee to establish categorically as to how and when exactly or by which servant of the Railway Administration misconduct was committed resulting in the loss of goods. When both parties have entered into evidence, the question of onus of proof is not very material and the Court has to draw its conclusion from the evidence and attendant circumstances. AIR (Vol 33) 1946 Pat 336: 12 BR 348: 223 Ind Cas 236 (DB).

——S. 72—Consignment of cattle.

A person bringing cattle to the railway station is bound to inquire as to the time of running of cattle trains and cannot by omitting to inquire put upon the company the obligation to forward cattle out of the ordinary course of their arrangement. AIR (Vol 16) 1929 Sind 238: 117 Ind Cas 769.

——S. 72—Evidence of railway servants.

In the majority of cases of claims against railway for loss, the railway can produce no other evidence of how it dealt with the goods except by producing those of its servants who had dealt with the goods and therefore to disbelieve the evidence of these servants on the ground that they naturally would not admit any dereliction of duty would be to cast an impossible onus on railway administration. AIR (Vol 15) 1928 Lah 56: 106 Ind Cas 801.

——S. 72—Pleadings—Nature of.

Under the new form of risk note B, possibly it is initially the plaintiff's duty to call upon the railway administration to disclose its dealings with the consignment, and the railway should in its pleadings disclose how the consignment was dealt with. The plaintiff should call upon the railway to prove either its pleadings of its previous disclosure or the Court should decide if it is necessary for the railway to give evidence. AIR (Vol 15) 1928 Lah 56: 106 Ind Cas 801.

——S. 72—Method of packing.

It cannot be said that it was the duty of the consignor to pack his goods in water-proof cloth, otherwise they were defectively packed within the stipulation in Risk-Note Form A. AIR (Vol 14) 1927 All 514: 108 Ind Cas 698 (DB).

——S. 72—Alteration of contract.

It cannot be permitted to the Railway Administration to override the terms of contract under which the goods were accepted by it to be carried to the place of destination. Condition 6 on the back of Risk-note B cannot be so interpreted as to permit any basic alteration in the terms of the contract. AIR (Vol 14) 1927 Oudh 145: 2 Luck 152: 100 Ind Cas 663: 4 OWN 204 (DB).

——S. 72—A suit by consignor for compensation for non-delivery is not a suit in tort: it is a suit in contract. AIR (Vol 10) 1923 Pat 285: 4 PLT 173: 1923 PHCC 82: 1 Pat LR 169: 2 Pat 442: 72 Ind Cas 440 (DB).

——S. 72—Consignee cannot demand inspection of goods on Ry. premises before delivery—He cannot call upon Ry. Company to warehouse goods until acceptance of goods.

A consignee has no right to demand that the goods shall be opened and inspected on the railway premises before he can be called upon to take delivery. There is no provision of law or any statutory rule which obliges a Railway Company to make or to allow to be made in its delivery register any note alleging that goods are in a damaged condition. A plaintiff cannot refuse to take delivery because the Railway Company refuses to make an entry in their books. The plaintiff cannot insist upon an entry. If he has any complaint he is entitled to make his representation to the Company in any other way. Plaintiffs have no right to call upon the Railway Company to warehouse their goods until such time as the Company was prepared to offer them damages which they would accept. There is no warrant for such a proposition and even, if there were, the plaintiffs must be deemed to have abandoned the position completely when they claim not damages but the full price of the goods. AIR (Vol 9) 1922 All 514: 44 All 763: 20 ALJ 761: 68 Ind Cas 961.

——S. 72—Wilful neglect—Miscellaneous.

Where the loss of goods consigned to a Railway administration is due to its wilful neglect, the risk-note cannot be pleaded as freeing it from all responsibility. AIR (Vol 9) 1922 Pat 106: 1922 PHCC 145: 3 Pat LT 215: 69 Ind Cas 103.

17. Notice.

——S. 72—Consignment of mangoes—Risk Note B—Railway unable to carry to destination owing to flood—Sale by Railway — Notice to consignee—Damages—Liability.

Where some bundles of mangoes consigned to Railway Company under Risk Note B were sold in auction without notice to the consignee, as the train which carried the mangoes could not proceed to the station to which they were sent owing to the flood:

Held, that there was misconduct on the part of the Railway servants inasmuch as the consignment would not have been despatched by the route on which the breach had occurred if prompt steps had been taken, and that the company was liable for damages for loss sustained:

Held, also that the Railway Company should have sent notice to the consignee before selling the consignments. AIR (Vol 19) 1932 Cal 492: 55 CLJ 104: 138 Ind Cas 487 (DB).

——S. 72—It is always a question of fact to be determined in view of the circumstances of each particular case whether a notice is sufficient or not. AIR (Vol 15) 1928 Cal 697: 47 CLJ 611: 112 Ind Cas 197 (DB).

——S. 72—Short delivery.

The wording of S. 77, as it stands, does not show that a notice is required to be served where the claim is for short delivery of goods. AIR (Vol 11 1924 Nag 288: 79 Ind Cas 602.

18. Over Charge.

—— S. 72 — Contract for carriage of goods, when complete — Demand of excess charge—Duty of consignee.

A contract of carriage of goods by Railway is complete as soon as the goods are delivered to the Railway Company and accepted by the company for carriage. The grant of a Railway receipt is not essential to complete the contract.

Where the Railway Company claims excess charges, it is the duty of the consignee to take delivery on paying the excess charges and to sue for recovery of the excess, if so, advised. He has no right to refuse delivery and if he does so and the goods are left on the Railway premises, he would be liable to pay demurrage. AIR (Vol 20) 1933 Nag 261: 29 NLR 333 : 147 Ind Cas 959.

——S. 72 — Goods carried at owner's risk — Charge at the Railway risk rate.

Plaintiff consigned a quantity of charcoal at reduced rate under which goods were carried at owner's risk though it ought to have been sent only at the first class rate or maund rate which entailed its going at railway risk. On arrival at the station of destination the charcoal was weighed and the freight was recalculated at the maund-rate with the result that the plaintiff had to pay excess of a large amount. In a suit by plaintiff to recover that amount :

Held, that the Company was bound to refund the excess amount as the Company itself intended to carry the goods at owner's risk in spite of their general rule to the contrary and so accepted the agreement made by the Station Master to carry them at the lower rate for that consideration. The lower rate was, a part of the original contract, and the recalculation at the second station had accordingly to be made at the rate, so that the amount paid at the first station was correct. AIR (Vol 15) 1928 Nag 52 : 24 N L R 87 : 107 Ind Cas 206.

——S. 72—Goods carried at owner's risk-note.

Where goods which under Railway rules could be carried only at railway risk were carried at owner's risk, it is not permissible under R. 6 for the Railway to charge the difference between class 1 rate and schedule rate on the ground that they were booked at owner's risk instead of Railway risk through mistake of the booking clerk. AIR (Vol 13) 1926 Lah 631: 7 Lah 412 : 27 P L R 602 : 96 Ind Cas 904 (DB).

—— S. 72—Collection by foreign railway.

Where a Railway Company undertakes to carry goods from a station on its Railway to a station on another Railway there is only one contract for the whole distance and the Company is liable for the over-charge wrongfully demanded from the consignee by the foreign Railway. AIR (Vol 12) 1925 All 823 : 6 L R A Civ 395 : 88 Ind Cas 575.

—— S. 72 — Receipt of goods by one Company for carriage over its own and another company's line—Liability in respect of overcharge made by delivering Company — Bye-laws — Power of Railway Company to alter the principle of calculation of rates.

Two waggon loads of chillies were received by the Station Master at Bezwada on the Nizam's Guaranteed State Railway for carriage to Agra Station on the Great Indian Peninsula Railway Company's Station. Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges. Held, that the contract for carriage of the goods for the whole distance was one entire contract with the receiving Company who were liable for overcharge, if any, wrongfully demanded from the consignees. Held also, that a bye-law of the Great Indian Peninsula Railway Company which reserved to the Railway the right of remeasurement, reweighment, recalculation and reclassification of rates, terminable and other charges at the place of destination and of collecting before the goods are delivered, any amount that may have been omitted or undercharged did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of waggon rates. 1907 A W N 21 : 4 A L J 80 : 29 A 228 (231, 232) (FB).

19. Re-Measurement.

—— S. 72—Risk Note B—Consignment of oil—Leakage discovered in route — Refusal to take delivery till reweighment — Loss found to be due to negligence and misconduct of Railway servants — Railway's liability.

The plaintiff despatched a consignment of oil under Risk Note B to N from A. On the way, while the wagon was at C, a leakage was discovered. The wagon was sent from C to N. The plaintiff having noticed the leakage, refused to take delivery till the oil was reweighed. There being no arrangement for re-weighment at N, the consignment had to be taken back to C. On re-weighment, shortage in the oil was discovered. In a suit by plaintiff, the lower Court found that the tank was not placed under watch and ward after its arrival at C :

Held, that in view of the finding of the lower Court, shortage of the goods must be held to have been due to the negligence and misconduct of the Railway servants, and that the plaintiff's insistence for re-weighment being perfectly justified, the plaintiff should not be saddled with the responsibility for the additional loss to the consignment that accrued between N and C when the consignment was sent back to C for re-weighment, and that he should not be charged the frieght from N to C. AIR (Vol 21) 1934 All 393 : 1933 A L J 1316 : 149 Ind Cas 659 (DB).

——S. 72—Mean weight given in the Ry. Receipt.

Where the weight of a consignment shown in a railway receipt is the mean weight and not actual, it is merely for the purpose of calculating the railway charges and the administration reserves the right for remeasurements both under the receipt and the Goods Tariff Rules. It is not an admission by the company that the weight accepted prima facie for the purpose of charging freight is the actual weight. R. 15, Part 1, Goods Tariff, clearly specifies that the railway receipt contains no admission of weight. A I R (Vol 17) 1930 Bom 262 : 32 Bom L R 285 (DB).

——S. 72—Right of party.

Rule 73 of the E. I. Ry. Traffic Code Part 2 shows that at the request of a consignee a Station Master is bound to re-weigh a consignment if from any cause whatever the consignee suspects that there may be under weight. The proposition holds true in case when there is no risk-note, and cannot be applied generally to cases of risk-notes. AIR (Vol 16) 1929 All 960 : 1929 A L J 1169 (DB).

——S. 72—Right of party.

The railway Company is not under legal obligation under all circumstances to reweigh the goods at the sweet will of the customer. AIR (Vol 16) 1929 Nag 58 : 112 Ind Cas 653.

20. Running train—Meaning of.

——S. 72 — The expression "running train" includes a train temporarily stopped at a signal between stations. AIR (Vol 13) 1926 All 724 : 96 Ind Cas 785.

——S. 72 — The term "running train" must be construed in the ordinary sense of the expression as used by the public. A train is still a running train even though it stops when held up by a signal.

The term does not signify that the train must actually be in motion. If the train is on its journey from one destination to another, that is, from junc-

tion to junction, it cannot be said that the train is not a running train simply because it stops either on the roadside station or at any place between the two roadside stations. AIR (Vol 13) 1926 Oudh 218 : 1 Luck 106 : 13 O L J 404 : 29 O C 141 : 3 O W N 145 : 92 Ind Cas 603 (DB).

——S. 72 — A stop for a few minutes at the signal does not mean that the train ceased to be a running train. AIR (Vol 12) 1925 All 273: 47 All 136 : 6 LRA Civ 59 : 85 Ind Cas 474.

——S. 72 — A "running train" means a train in motion between stations. AIR (Vol 11) 1924 Lah 594 : 6 L L J 237 : 79 Ind Cas 428.

21. Rules.

——S. 72 — G. I. P. Railway Coaching Tariff Rules, Rr. 23, 24, 127 — Agreement to charge according to weight - Claim at destination to charge according to measure.

Where, as the place of despatch, the Railway has agreed to charge by weight, it cannot, at the place of destination, claim to charge by measurement. That is not a claim to re-weigh or to re-measure but a claim to measure for the first time and to calculate in accordance with such measurement. AIR (Vol 20) 1933 Nag 135 : 29 NLR 306 : 144 Ind Cas 386.

——S. 72 — Risk Note B—Carrying goods at owner's risk at lower rate — Right to demand higher rate at destination — Mistake of booking clerk, effect of — Tariff Rules, whether binding on consignor in the absence of notice.

A consignment of planks was despached from S to A. The weight charged was 272 maunds which was the carrying capacity of the whole wagon. It appeared that according to the goods tariff for the defendant Railway planks were included under the classification. 'Wrought timber' for which there was only one class of rate at the company's risk at 4 annas 8 pies per maund. The consignment was, however, charged at the rate of 2 annas 9 pies, and despatched at owner's risk. At A the company demanded freight at the rate of 4 annas 8 pies per maund on the ground that the booking clerk had made a mistake :

Held, (i) that though the booking clerk had made a mistake in charging at a lower rate than that mentioned in the Tariff, the mistake was not one of mere classification and in the circumstances, the Railway Company was bound by the rate of contract entered into on their behalf by their agent, the booking clerk, and was not, therefore, entitled to demand any freight in excess of what had already been charged : (ii) assuming that there had been a mistake in the reclassification of the goods, the company was not entitled to demand a higher rate in this particular case as the conditions of the contract printed on the back of the receipt had inadvertently omitted the words 'reclassification' which occur in R. 15 of the General Rules, 1926.

It cannot be assumed that a consignor had knowledge of the rate entered in tariffs issued by a Railway Company without reference to the Railway Board. In order to fix knowledge of the rate mentioned therein, it must be shown that the attention of the other contracting party was specifically drawn to it inasmuch as the question of notice is a question of fact and not of law. AIR (Vol 19) 1932 All 540 : 1932 ALJ 526 : 54 All 557 : 138 Ind Cas 439 (DB).

——S. 72—Rules under — Ultra vires — Rule opposed to Act.

A rule framed by a Railway Administration that the Railway Administration is not accountable for any article unless they are booked and a receipt is given to the consignor is inconsistent with the Railways Act and is therefore, ultra vires. AIR (Vol 19) 1932 Cal 257 : 35 CWN 1242 : 137 Ind Cas 445.

— S. 72—Tariff Rules, R. 15 — Agreement to carry goods at certain rate — Levy of freight at different rate at destination, legality of.

Where a Railway Company agree under a Risk Note to carry certain goods at the owner's risk at a certain rate per maund, they are not entitled to charge from the consignor on the arrival of the goods, freight at a different rate altogether. (1931) 132 Ind Cas 336 : 1931 ALJ 367.

——S. 72 — Under S. 54 (1)—Mode of packing—Test as to the Validity of Rules.

No doubt the Railway Company is a common carrier and is bound to accept consignments for despatch; but if the consignments are despatched at railway risk, it is entitled to take reasonable precautions to protect itself from loss. It is entitled to impose conditions by making rules under S. 54 (1) as regards the form of packing as a condition precedent to the acceptance of goods by it for carriage at its own risk as a common carrier.

The proper test for determining as to whether a particular rule made by a Railway Administration is or is not valid, is to see whether that rule framed is a reasonable one and is not inconsistent with the Railways Act. The fact that another mode of packing is as secure as the one enjoined by a rule framed by the Railway Administration is irrelevant for the purpose of determining the validity of that rule. AIR (Vol 14) 1927 All 400 : 100 Ind Cas 571.

——S. 72—N. W. Railway Rules, Ch. 1, R. 22.

Rule 6 of the risk-note which is an abridged reading of R. 22 of Ch. 1 of the Noth-Western Railway General Rules, does not authorize the Railway to alter contract between the parties. AIR (Vol 13) 1926 Lah 631 : 7 Lah 412 : 27 PLR 602 : 96 Ind Cas 904 (DB).

——S. 72 — Rule 34-A under the Act — Non-compliance of.

Plaintiff sued the G. I. P. Railway Co., for the value of the goods which consisted of goatskins consigned by him at Ahmednagar for despatch to Poona. The noting of "contents unknown" was not properly done and instead of the bags containing the goatskins some other consignment of 9 bags containing sheep skins reached Poona. These 9 bags were offered to the plaintiff, but he naturally declined to accept them. Ultimately the Railway Co., sold these 9 bags containing sheep-skins and realised Rs. 140.

Held, that R. 34-A could not help the defendant in the present case because if the sender does not comply with the rule, the consignment will be booked as "contents unknown," and the Railway will not be responsible for the number, condition and description or contents of such consignment but as "contents unknown" was not properly done the Railway is responsible for the loss. AIR (Vol 12) 1925 Bom 196 : 88 Ind Cas 68 (DB).

——S. 72—Under S. 47—Delivery to railway servant.

A Railway Company cannot enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the railway, nevertheless the Court shall not deem the goods to have been so delivered unless and until the railway servant in question has performed a particular Act, for example, granted the railway receipt. No such rule controlling or limiting the liability under S. 72, being inconsistent therewith, is of any effect. AIR (Vol 9) 1922 All 9 : 20 ALJ 31 : 44 All 218 : 65 Ind Cas 109 (FB).

——S. 72—Effect of breach of sale rules.

A sale contrary to rules is a nullity and the consignee is entitled to damages. (1912) 15 C L J 211 : 16 C W N 356 : 13 Ind Cas 509 (DB).

22. Theft and robbery.

——S. 72 — Theft of consignment—Evidence of servants and guard — Evidence of guard not submitted —Presumption.

When the consignment is stolen from a Railway train, in a suit by the consignor, it is the duty of the Railway Administration to give the evidence of those of the Railway servants who were responsible for the care of the consignment at the stations between which the incident took place and during the intervening journey. But held, that while the defendant, by his failure to submit the evidence of the guard in charge of the train is, in breach of his contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with, the failure to submit his evidence in the circumstances of the case entitled the Court to presume in terms of S. 114 g), Evidence Act, that the guard's evidence, if produced would be unfavourable to the defendant and that, in consequence, misconduct by complicity in the theft of some servant or servants of the respondent may be fairly inferred from the defendant's evidence. AIR (ol 24) 1937 PC 152 : 3 BR 461 : 41 CWN 837 : 46 L W 180 : ILR (1937) Bom 375 : 31 SLR 326 : 39 Bom LR 946 : 1937 MWN 904 : 1937 OWN 1045 : 18 PLT 767 : (1937) 2 MLJ 689 : 1937 ALJ 1117 : 1937 A W R 1159 : 64 I A 176 : 168 Ind Cas 1.

——S. 72 — Risk Note H — Wilful neglect—Loss of goods at station — Inference as to theft or wilful neglect of servants of Railway Company — Liability for compensation.

A consignment of cloth was sent under Risk Note H from A to B. There was proof to show that the goods reached Station C and that the bale was in the goods wagon at half-an-hour before the train left C, but when the train reached the next stopping station, the bale was found to be missing. In a suit by the consignee against the Railway Co., for compensation :

Held, that the circumstances led to an inference that the loss of the bale was due to theft by servants of the company or by strangers with the connivance and knowledge of the Railway servants or that the loss was by reason of wilful neglect of company's servants and consequently, compensation was recoverable. A I R (Vol 19) 1932 Mad 545 : 62 M L J 573 : 1932 M W N 506 : 35 L W 687 : 137 Ind Cas 884 (D B).

——S. 72 — Theft from running train.

Where there is a pilferage while the goods covered by risk note form B are in transit and there have been frequent stoppages at intervening stations, the railway company is not obliged to show how the theft took place and at what particular place. A I R (Vol 17) 1930 Bom 129 : 31 Bom L R 1426 : 54 Bom 105 (D B).

——S. 72 — The terms theft and robbery as used in the risk notes are not synonymous : A I R 1922 Bom 256, Diss. from : A I R (Vol 17) 1930 Lah 37 : 11 Lah 158 : 31 P L R 419 : 123 Ind Cas 845 (D B).

——S. 72 — Where it appears from evidence produced in the case that thefts from running trains were frequent in the section through which the particular waggon in question passed at night, and in spite of such thefts precaution to prevent such theft was not taken by the railway authorities, the Railway Company is bound to compensate the consignor for the consignments stolen while in transit : A I R (Vol 17) 1930 Nag 239 : 123 Ind Cas 480.

——S. 72—The terms "robbery" and "theft" are not synonymous. "Robbery" has been used in the sense in which that word has been used in the Penal Code. A I R (Vol 15) 1928 Cal 498 : 48 C L J 32 : 111 Ind Cas 792 (D B).

——S. 72 — When the Railway Company knew that there were frequent thefts between certain stations, its continuing sending goods in unlocked waggons amounts to wilful neglect : A I R (Vol 15) 1928 Nag 73 : 23 N L R 180 : 105 Ind Cas 843.

——S. 72 — Sufficiency of proof.

A Railway Company who accept goods for carriage in accordance with Risk-note Form B cannot successfully plead that there was a robbery from a running train merely by giving proof of the fact that the goods were on the train at one particular station in a sealed van, and subsequently at a later station were missing from the van, the evidence of the theft being provided by the fact that the seals were broken. A I R (Vol 15) 1928 Nag 73 : 23 N L R 180 : 105 Ind Cas 843.

——S. 72 — The expression "robbery from a running train" does not include a furtive theft : AIR (Vol 14) 1927 All 751: 101 Ind Cas 536 (DB).

——S. 72 — If a railway company chooses merely to seal waggons, the position may come to this that if there are repeated thefts and the sealing proved by those thefts to be inadequate, continuance of that inadequate method may show a neglect on the part of railway amounting to a wilful and determined neglect not to avail themselves of any other measures that may be open. A I R (Vol 14) 1927 All 751 : 101 Ind Cas 536 (D B).

——S. 72 — The term "robbery" in the risk note includes theft from running train. A I R (Vol 14) 1927 Nag 34 : 97 Ind Cas 940.

——S. 72 — The term "robbery" in the Risk Note does not mean the same as the term "theft," but it implies intimidation, force or violence in abstracting the goods : (39 All 418; A I R 1923 All 79 and A I R 1924 All 621, Diss. from.) A I R (Vol 14) 1927 Pat 9 : 6 Pat 168 : 1926 P H C C 305 : 8 P L T 147 : 97 Ind Cas 714 (D B).

——S. 72 — As an abstract proposition it is impossible to lay down that a mere failure properly to secure wagons always amounts to wilful neglect, or that the mere sealing of the wagon necessarily excludes wilful neglect. Every case must depend on its circumstances. The absence of any device to shut out thieves is a circumstance which the Court is entitled to take into account. It is for the Courts which have to find facts to hold whether the absence of precautions under the circumstances of that particular case amounted in their opinion to wilful neglect on the part of the railway administration. The frequency of thefts that had taken place, and the steps or absence of steps to prevent them, are matters which can be legitimately taken into consideration. If after taking all such matters into consideration a finding is recorded by a Court, which is the final Court, for finding of facts, that finding, unless vitiated by some other circumstances, would have to be accepted. But when in arriving at that finding the Court is labouring under some misconception of the law that finding cannot be final. (Case law discussed.) A I R (Vol 13) 1926 All 394 : 48 All 766 : 96 Ind Cas 1046.

——S. 72 — Quantum of proof.

Per Sulaiman J. — There is no justification for holding that the word "robbery" in Risk-note B means simple theft, without implying any idea of force or fear :

Per Boys J. —The term "robbery" is used in Risk-note Form B is used in the sense in which it is used in the Penal Code and does not include mere theft.

Per Ashworth J. — "Robbery" means what "robbery" is defined to mean in the Penal Code: even if this is not correct it must mean something more than mere theft by stealth from a train, running or otherwise.

Per Walsh J. — The word "robbery" when used in the expression "robbery from a running train" need not be interpreted with reference to the definition of "robbery" contained in the Penal Code; the word "robbery" covers all acts of theft committed by trespassers upon premises which they have entered by force.

Per Mukherji J. — The word "robbery" in Risk-note Form B has been used in almost the same sense as the word "theft" and not in the highly technical sense.

Per Full Bench. — A railway company who accepts goods for carriage in accordance with Risk-note Form B cannot successfully plead that there was a robbery from a running train merely by giving proof of the fact that the goods were on the train at one particular station in a sealed van and subsequently at a later station were missing from the van, the evidence of a theft being provided by the fact that the seals were broken. (A I R 1923 All 79; 39 All 418 overruled.) A I R (Vol 13) 1926 All 369 : 24 A L J 825 : 96 Ind Cas 1039 (F B).

——S. 72 — Delay in taking effective measures of prevention — Inquiry as to loss.

In a suit for damages for non-delivery of goods entrusted to Railway Company for carriage the proved facts were : the bales in question were lost by running thefts; there was a regular epidemic of running train thefts on the section, on which the goods were carried, from the year 1917 upto the year 1921 when the precautions taken by the defendant company proved effective and reduced the number of thefts by at least half; the precautions of fixing locks on the doors of goods waggons and providing armed police guards for goods train were introduced in 1921; the guards in charge of the trains saw bales lying on line and also robbers while leaving the station, but did not report the matter to the police and station master also did not inform the police of the theft.

Held, that the loss occasioned by the thefts in question was due to the wilful default or neglect of the Railway administration, as also of its servants. The long inaction and the delayed introduction of more effective measures is the best proof of wilful neglect on the part of the Railway Administration.

The introduction of the other precautions of running loaded trains by day and locking the doors and sealing them was delayed unduly by the administration, and this delay was unjustifiable under the circumstances. Coupled with these circumstances was the failure to provide for a prompt machinery for starting investigation speedily, and above all was the total abstention from making search for the goods lost. All these acts of commission and omission on the part of the Railway Administration and its servants completely destroyed the protection afforded by the risk notes. A I R (Vol 13) 1926 Nag 399 : 9 N L J 111 : 97 Ind Cas 195.

——S. 72 - The Company cannot be held guilty of wilful neglect by not putting on padlocks immediately on hearing that thefts are frequent between two railway stations on running trains. A I R (Vol 13) 1926 Oudh 468 : 94 Ind Cas 644.

——S. 72 — The word 'robbery' in Risk-note B is not to be construed as synonymous with theft without violence. A I R (Vol 13) 1926 Oudh 218 : 1 Luck 106 : 13 O L J 404 : 29 O C 141 : 3 O W N 145 : 92 Ind Cas 603 (D B).

——S. 72 — Wilful neglect of Railway servants.

The exception purports to protect the Railway administration from liability for loss by fire or by robbery from a running train though such loss or robbery has been caused or made possible by wilful neglect of the servants of Railway Administration. A I R (Vol 13) 1926 Sind 9 : 20 S L R 245 : 91 Ind Cas 145.

——S. 72 — The expression "robbery" in the proviso appearing in the Risk-note Form B is synonymous with the word "theft" which appears in the earlier portion of the Risk-note. A I R (Vol 12) 1925 Lah 515 : 6 Lah 305 : 26 P L R 200: 87 Ind Cas 592 (DB).

——S. 72 — "Robbery" in Form B includes theft. A I R (Vol 12) 1925 Mad 745 : 21 M L W 728 : 1925 M W N 186 : 48 M L J 400 : 87 Ind Cas 79.

——S. 72 — Where goods consigned under Risk-note B are lost through theft from a running train, the Company is not liable. The probable conclusion is that the theft was not committed by the Company's servants or through their negligence. A I R (Vol 12) 1925 Oudh 595 : 85 Ind Cas 815.

——S. 72 — Wilful neglect.

As used in risk note B, the word "robbery" is synonymous with "theft". Where the plaintiff depends for his cause of action for loss on wilful neglect on the part of either the Railway administration or any of its servants, he cannot succeed if it is shown that the loss of goods was due to theft from a running train. A I R (Vol 11) 1924 All 621 : 5 L R A Civ 575 : 46 All 837 : 82 Ind Cas 313 (D B).

——S. 72 — The word "robbery" as used in risk-note form B is really synonymous with theft. AIR (Vol 10) 1923 All 79 : 45 All 56 : 70 Ind Cas 854.

——S. 72—Test of.

To absolve a railway company from liability for loss of a consignment due to the looting by the railway servants on strike, it must be proved whether, the strike being regarded as an unforeseen event, the railway Administration took as much care of the consignment or rather the lost part of the consignment as a man of ordinary prudence would, under similar circumstances, take of it. AIR (Vol 10) 1923 Cal 491: 48 C L J 37 : 32 C W N 805 : 112 Ind Cas 303 (DB).

——S. 72—If nothing more can be proved except that there was a theft in a running train, then the companies by the Risk-Note Form B are protected. AIR (Vol 9) 1922 Bom 256 : 24 Bom L R 787 : 68 Ind Cas 534 (DB).

23. Validity of form.

——S. 72 (2)—Person delivering the goods—Who is —Consignor—Liability of.

Person signing the consignment note at the time of the delivery of the goods to the Railway Company is the person, who delivers the goods. The Railway is not concerned with the ownership of the goods.

A consignor is bound not only by the signature of himself or his agent on the contract, but also by the signature of the person, who delivers the goods to the Railway Company whether that person had authority to sign or not. The contract may be signed by person delivering for carriage and such a person has not merely such authority, to bind the sender as naturally arises from his position of agent, but an absolute statutory authority to bind him. He has authority to sign any form of contract. AIR (Vol 17) 1930 Cal 815 : 52 C L J 235 : 35 C W N 133 (DB).

——S. 72—The Governor-General in Council in prescribing the form has no power to limit or alter the application of cl. (a), sub-s. (2), which implies that either the sender or the deliverer to the railway administration of the goods can sign such a risk-note. The Governor-General in Council has power to draw up a form within those limits which will be valid. A risk-note form making provision for the signature of the sender only is not valid. AIR (Vol 15) 1928 Nag 264 : 109 Ind Cas 579.

——S. 72—Obligation beyond the Act.

There is no obligation on the railway company expressed in the Act to carry any particular class of goods at any particular rate, and it would be quite beyond the powers of the Governor-General in Council to impose by means of a recital in a form for the

purpose of S. 72 an obligation which is not contained in the Act itself. AIR (Vol 14) 1927 Bom 468 : 29 Bom L R 944 : 104 Ind Cas 773.

24. Who can sue.

——S. 72—Right of suit by consignor for damages on non-delivery of goods to consignee.

A consignor of goods which has not been either delivered to the consignee or returned to the consignor who sues for damages for the loss suffered by him cannot be non-suited on the ground that a consignee of goods alone can sue for such loss unless the consignor had failed to prove that he was the owner of the goods and that the property in the goods had not passed to the consignee. Nor could this issue be decided in limine without taking evidence. AIR (Vol 37) 1950 All 89 : 1949 A L J 412 : 1949 A W R 465.

——S. 72—Railway Company—Suit against, for damages — Endorsee of railway receipt can sue.

A railway receipt is a mercantile document of title and an endorsee thereof has sufficient interest in the goods covered by it to maintain an action for damages against the Railway Company who issued it. AIR (Vol 33) 1946 Nag 169 : 1LR (1946) Nag 64 : 1946 N L J 191.

——S. 72—Non-delivery — Suit for damages — Who can sue — Person placing order through agent held entitled to sue.

Plaintiff placed an order for cloth through the agent of a mill. The mill sent the cloth by railway. The railway receipt was issued in the name of a bank. The bank endorsed the receipt in favour of the agent who in his turn endorsed it in favour of the plaintiff. The plaintiff paid the price of the cloth on his receiving the railway receipt :

Held that plaintiff was the real purchaser of the cloth and could sue the railway for damages for non-delivery. It was wrong to treat him merely as the servant or agent of the mill agent. AIR (Vol 33) 1946 Nag 169 : ILR (1946) Nag 64 : 1946 N L J 21 : 222 Ind Cas 191.

——S. 72—Consignee or the endorsee of railway receipt can sue for non-delivery of goods.

Where the goods delivered to the Railway Company for consignment are lost, the right to sue for non-delivery of the goods vests either in the consignee or in the person to whom the railway receipt has been endorsed. AIR (Vol 32) 1945 Pat 387.

——S. 72—Endorsee of Railway receipt, suit by.

A person who is the endorsee of a railway receipt can maintain a suit against the Railway Company. AIR (Vol 31) 1944 Nag 362 : ILR (1944) Nag 612 : 1944 N L J 353.

——S. 72—Title of the consignor can be conveyed to another person by an endorsement on the railway receipt. The endorsee of such a receipt has sufficient interest in the goods covered by it, to maintain an action for damages against the Railway Company, the carrier of the goods. AIR (Vol 11) 1924 All 574 : 22 A L J 663 : 5 L R A Civ 433 : 46 All 691 : 82 Ind Cas 351.

——S. 72—Consignee.

Consignee alone can sue for loss caused by the non-delivery of the goods after goods have been delivered to Railway company for consignment. AIR (Vol 11) 1924 Mad 517 : 73 Ind Cas 537.

——S. 72 — The ordinary law as to the performance of contracts to be found in Ss. 51 and 52 of the Contract Act applies where the Railway makes a special contract contrary to Risk-note. The individual with whom the contract is made can take advantage of the contract. AIR (Vol 11) 1924 Pat 39 : 77 Ind Cas 260 : 1 Pat L R 336.

——S. 72 — Liability of Company for shortage of goods—Rights of consignee.

A risk note in form A is simply an indemnity bond by the sender for the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignments as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. Rights of the consignee considered. AIR (Vol 2) 1915 All 155 : 13 A L J 417 : 29 Ind Cas 207.

25. Who can be sued.

——S. 72—Frame of suit.

A suit for compensation for damage done to goods on the Railway of the defendant company is not maintainable against the Agent of the Company.

Sections 140 and 141 of the Indian Railways Act merely set forth the manner in which notices may be served on a Railway Administration. Order 29 of the Civil P. C. deals with the subscription and verification of pleadings in suits by or against a Corporation and with service on Corporation. They say nothing about the manner in which the suit itself is to be framed. AIR (Vol 8) 1921 Pat 485 : 64 Ind Cas 125 : 2 P L T 679.

——S. 72—Contract to send goods to a certain station —Sender asking Station Master of some other station to wire to the Station Master of the previously arranged place of destination to send it to the latter place — No contract with Company — Company not liable—See (1903) 4 Bom L R 890: 27 Bom 126 (129).

——S. 72—Consignment — Consignor's agent changing the condition in which the consignment was originally agreed to be sent—Consignee ignorant of the changed condition and refusing to take delivery of the consignment as his—Right of suit.

Where plaintiff's agent consigned goods (cocoanuts) in bags to plainttff's address and afterwards removed the bags and loaded them loose in a wagon, but the description in the Railway receipt and label on the waggon as "bags" were not changed and the consignee refused to take delivery otherwise than in bags and sued the Railway Company for damages for non-delivery.

Held (1) that the contract of the Company not being with plaintiff, but with his agent, his right of suit if any was against the agent who had himself modified the contract by his action and not against the Company (1903) 5 Bom L R 953 (956) (DB).

——S. 72—Division of consignment while en route—Delivery of original consignee—Company's liability.

Where consignor requested the Railway Company to direct the consignment to a place different from the original place of destination so that it may be delivered to the plaintiff, a person different from the original consignee, and the Railway Company undertook to do the same, but by a mistake of the Station Master at the place to which the goods were originally assigned, the goods were delivered over to the original consignee and the plaintiff sued the Railway Company for damages :

Held (1) that the Railway Company was liable in damages; the case was a simple case of breach of contract. The defendant Company contracted to carry the goods and deliver them at the altered place of consignment and failed to give such delivery to the plaintiff. (2) That the liability of the Company was not affected by the fact that the Station Master acted wrongly in disregarding the instructions which he received from the starting station. (1903) 5 Bom L R 531 (532) : 27 Bom 597 (DB).

26. Wilful neglect.

See also N. 4.

(a) General.
(b) Proof of.
(c) What amounts to.

(a) General.

——S. 72—Risk-Note B— Wilful neglect — Question of fact— Omission to lock wagon, whether wilful neglect.

The question of wilful neglect on the part of a Railway Administration is one to be determined in the light of the circumstances of each case.

It cannot be laid down as a hard and fast rule that the mere fact that the wagon was s aled and not locked constitutes wilful neglect within the meaning of Risk Note B. AIR (Vol 18) 1931 Lah 627 (2) : 132 Ind Cas 664 (DB).

——S. 72—The mere fact that the waggons are locked on one side only and on the other side seals were used does not justify an inference of law that there was wilful neglect. AIR (Vol 17) 1930 Pat 283 : 124 Ind Cas 833 : 11 P L T 161 (DB).

——S. 72—The expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence so that the mind of the person who does the act goes with it. AIR (Vol 17) 1930 Pat 283 : 124 Ind Cas 833 : 11 P L T 161 (DB).

——S. 72 — The expression "wilful neglect" means that the "act" is done deliberately and intentionally and not by accident or inadvertence so that the mind of the person who does the act goes with it. AIR (Vol 16) 1929 Lah 551 : 111 Ind Cas 795 : 10 Lah 261 : 30 P L R 671 (DB).

——S 72— The expression "wilful neglect" means that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it.

Where goods consigned under risk-note H were lying on platform awaiting transport and there they caught fire and it was found that the means of extinguishing fire were not as they ought to be in the case of a large cotton exporting station that one hydrant was certainly not working and the water was not at sufficient pressure.

Held: that this was neglect, but not wilful neglect within the meaning of risk-note form H, so that the company should be made liable merely on this account. AIR (Vol 15) 1928 P C 24 : 107 Ind Cas 124 : 52 Bom 169 : 55 I A 67 : 47 C L J 214 : 30 Bom L R 275 : 9 P L T 171 : 5 O W N 219 : 32 C W N 544: 27 M L W 667 : 26 A L J 545 : 1928 M W N 938 : 54 M L J 167.

——S. 72—When the plaintiff has proved no delivery the burden of proving that sufficient care and precaution were taken by the railway company against loss or theft of consignment which is not delivered and that the loss was not caused by wilful negligence on the part of the company or its servants is on the railway company under Ss. 160, 151 and 152, Contract Act and S. 76, Railways Act. This burden of proof is not shifted by the fact that the plaintiff signed Risk-note B. AIR (Vol 15) 1928 All 103 : 108 Ind Cas 691 : 50 All 246 : 25 A L J 996 (DB).

——S. 72—"Wilful neglect" means that the act is done deliberately and intentionally and not by accident or inadvertence, but so, that the mind of the person who does the act goes with it. AIR (Vol 15) 1928 Cal 697 : 112 Ind Cas 197 : 47 C L J 611 (DB).

——S. 72—C. P. Code, S. 100.

"Wilful neglect" is a matter of inference from facts proved and the question whether the facts established amount to "wilful neglect" is a question of law. AIR (Vol 25) 1928 Lah 837: 111 Ind Cas 523: 10 Lah 329 (DB).

——S. 72—Failure to lock waggons.

Where it is not proved that the practice of sealing waggons in vogue had been an inadequate safeguard or that a system of locking waggons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the railways, the mere fact that the waggons were only sealed and not locked does not amount to wilful neglect on the part of the railway company. AIR (Vol 15) 1928 Lah 837 : 111 Ind Cas 523 : 10 Lah 329 (DB).

——S. 72—"Wilful neglect" is not a concrete fact which can be proved by direct evidence but is a matter of inference. The finding in a case is based on certain facts and the question for determination is whether those facts are sufficient to establish "wilful negligence" in law. AIR (Vol 15) 1928 Lah 774 : 112 Ind Cas 736 : 10 Lah 360 : 30 P L R 541 (DB).

——S. 72—A person is said to be guilty of wilful neglect when he intentionally and of set purpose does some thing which ought either to be done in a different manner or not at all, or omits to do something which ought to be done. AIR (Vol 15) 1928 Lah 837 : 111 Ind Cas 523 : 10 Lah 329 (DB).

——S. 72 — The term "wilful neglect" implies an intentional and purposeful omission to do a certain act. It is an even more extreme term than gross and culpable negligence and implies that an individual deliberately refrains with his eyes open from doing an act or taking a step which it is his duty to take. AIR (Vol 14) 1927 Nag 34 : 97 Ind Cas 940.

——S. 72 — Failure to explain non-delivery — Presumption.

When it is established that waggons containing consignments were despatched from a certain station but did never reach their destination, and the railway company refuse to vouchsafe any sort of explanation as to the non-delivery, the only conclusion which the Court can reasonably form is that the loss has been due to their wilful neglect. AIR (Vol 14) 1927 Oudh 355 : 1 L C 327 : 104 Ind Cas 728 (DB).

——S. 72 Communication between Guard and Driver—Facilities for.

Where a guard at the rear of a train is utterly unable to communicate with the driver or any one, or to do anything effective in the event of his observing anything wrong with the train in front of him, it is a miserable condition of affairs and there is wilful negligence on the part of the Railway Company in not providing him with better facilities and owners of goods on the train with better safeguards.

Where a train was in motion and the guard observed that goods were dropping down from the waggons but he did not stop or try to stop the train but allowed the train to run on :

Held, that there was wilful neglect on his part and consequently the Railway Company was liable. AIR (Vol 14) 1927 Pat 9 : 1926 P H C C 305 : 6 Pat 168 : 8 P L T 147 : 97 Ind Cas 714 (DB).

——S. 72 — "Neglect" means the omission to perform a duty and implies that a man does something which ought either to be done in a different manner or not at all or that he omits to do something which ought to be done. But wilful neglect goes far beyond this and implies that the party knew that he should do a particular act and that he deliberately abstained from doing it. There may be cases where neglect may be deliberate and yet not wilful, as for instance, when the act is not that of a free agent. Apart from such cases it may be said that every omission is wilful because everyone must be presumed to have intended the ordinary consequence of his act. But the mere presumption of law for the purpose of fixing responsibility is not sufficient. AIR (Vol 13) 1926 Pat 165 : 7 P L T 140 : 1925 P H C C 333 : 90 Ind Cas 790 (DB).

——S 72—Risk-note Form B.

What is negligence or the requisite absence of care in any particular case must depend on the circustances of that case. Every such absence of care does not render the Railway company liable. But only when the delinquent knew what the consequences would be or could if he had not been recklessly indifferent, have known them, the Railway

Company are liable. The line of demarcation may not in certain cases be distinct but it is appreciable. Case law discussed. AIR (Vol 13) 1926 Sind 9 : 20 S L R 245 : 91 Ind Cas 145.

——S. 72 — **Doors of waggon getting opened during Journey – Duty to close.**

Negligence is not a positive but a negative word. It is really the absence of such care as it was the duty of the consignee to use. A bailee is only to use the ordinary care of a man, and so the absence of it is called gross negligence. Gross is a word of description, and not a definition. "Wilful" implies nothing blameable, but merely that the person of whose action the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will.

When the train got in motion at a certain station the guard noticed the doors of two waggons in one of which the goods in question had been kept, open. But the train was not stopped. But the matter was attended to at the next station. The occurrence was in day time. There was nothing wrong with the waggons till the train left the station after leaving which, the doors of the two waggons were observed to be open :

Held, that there was neglect of the guard in not stopping the train and that the company were liable. AIR (Vol 12) 1925 Mad 745 : 21 M L W 728 : 1925 M W N 186 : 48 M L J 400 : 87 Ind Cas 79.

——S. 72 — Where goods consigned for carriage under Risk Note Form B are lost when the wagon containing them is standing at the platform of a station the loss must be held to be due either to the wilful neglect of the railway servants or to theft by one of them AIR (Vol 12) 1925 Oudh 525 : 27 O C 331 : 85 Ind Cas 338.

——S. 72—Wilful neglect on the part of a Railway Company or its servants is not established merely by the fact that the Company alleged that the wagon wherein the goods were being carried was broken into by thieves. AIR (Vol 12) 1925 Pat 304:78 Ind Cas 479.

——S 72 — **Failure to lock the Waggon and to keep Watch.**

Where the waggon containing the lost Ghee was sealed, but not locked and there was a halt of several hours at one station during the latter part of the night and there were no chaukidars keeping watch on the train during the halt.

Held, that the loss was due to the wilful neglect of the Railway. AIR (Vol 11) 1924 Lah 594 : 6 L L J 237 : 79 Ind Cas 428.

——S. 72—Risk-note form B—Damage to package.

When all the bags do arrive and none of the bags are missing the company cannot be held liable even though it be found that the bags had been damaged owing to the wilful neglect of the Railway company. AIR (Vol 11) 1924 All 605 : 5 L R A Civ 586 : 80 Ind Cas 737 (DB).

(b) Proof of.

——S. 72 – What is — Burden of proof.

Where goods consigned at the owners's risk under Risk Note Form H to Railway Company are shown to have been properly directed but not delivered to the consignee, the burden is upon the person who sues the Railway Company to prove that there was wilful neglect on the part of the Railway Administration or its servants.

The words 'wilful neglect,' when applied to such circumstances, will include reckless carelessness and carry with them some element of intention or at least of a conscious disregard of duty. AIR (Vol 19) 1932 Mad 545 : 62 M L J 573 : 1932 M W N 506:35 L W 687 : 137 Ind Cas 884 (DB).

——S. 72 — The question of whether wilful neglect has been proved, if there was evidence before the Court from which wilful neglect could be inferred, is a question of fact. AIR (Vol 17) 1930 Pat 559 (DB).

——S. 72 — The question whether there is any evidence of wilful neglect is a question of law but where a lower appellate Court considers all the facts and circumstances in the case and comes to a conclusion as a fact that there has been no wilful neglect, the High Court cannot interfere with that finding in a second appeal. AIR (Vol 17) 1930 Pat 283 : 11 P L T 161 : 124 Ind Cas 833 (DB).

——S. 72 — A person brought a suit against a railway company for damages. Some of the packages of sugar consigned to him under two Risk notes in form B were lost. The waggon in which the bags were loaded had no lock on it at all but a tin shackle had been put on it which could be broken by any instrument. There had been many thefts on the line and it was followed that the theft did not take place on the running train.

Held, that there was sufficient legal evidence to support finding of wilful neglect and it being a finding of fact was binding in second appeal and that the person was entitled to damages as complete packages were lost. AIR (Vol 16) 1929 All 749 (DB).

——S. 72 – Onus.

Before a person who has consigned his goods under Risk-note B, is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants. AIR (Vol 15) 1928 Lah 299 : 29 P L R 633 : 106 Ind Cas 226.

——S. 72—Onus.

In cases of thefts in trains where wilful neglect is alleged on the part of the Railway Company it is for the Railway Company to prove that it had taken sufficient precautions to prevent or avert the consequences of such neglect. AIR (Vol 15) 1928 Nag 73 : 23 N L R 180 : 105 Ind Cas 843.

——S. 72—Onus.

In cases concerning risk-note the burden lies on the consignor to prove that there was wilful neglect by the Railway Company or its servants or theft by its servants. A I R (Vol 14) 1927 Nag 34 : 97 Ind Cas 940.

——S. 72 — Where when the waggon in which the goods were sent passed through a station it was found that the seal was broken on one side and notwithstanding this the waggon was allowed to proceed.

Held, that this is no evidence that the loss was due to wilful neglect without proof that the goods were still in the waggon after the seal was found to be broken. A I R (Vol 14) 1927 Pat 22 : 97 Ind Cas 452 (DB).

——S. 72—Onus.

A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done and the onus of proving wilful neglect lies upon a plaintiff suing a railway for compensation, for loss of goods consigned under a Risk-note. AIR (Vol 13) 1926 Lah 614 : 94 Ind Cas 173 (DB).

——S. 72—Conduct of the company.

The burden of proving wilful neglect by the Railway Administration or its servants initially lies on the plaintiff-consignor, but the plaintiff is entitled to ask the Court to infer it from the fact that steps taken by the Company to secure goods against loss or theft were inadequate. A I R (Vol 13) 1926 Oudh 218 : 3 O W N 145 : 1 Luck 106 : 13 O L J 404 : 29 O C 141 : 92 Ind Cas 603 (DB).

——S. 72 — In a suit by consignor where goods are sent under Risk Note B admission of loss by Railway dispenses with proof of fact of loss but does not relieve the plaintiff of his burden of proving loss due to neglect of Railway Company. AIR (Vol 13) 1926 Pat 190 : 7 P L T 90 : 1925 P H C C 311 : 90 Ind Cas 687 (DB).

——S. 72—Evidence of Ry. servants.

There is always considerable difficulty almost amounting to impossibility for a consignor to prove wilful neglect or theft by the Company's servants and the evidence afforded by the Company's servants has always to be received in favour of the consignor.

The bales were loaded in wagon at V. When the train arrived at N, the seal of the wagon was found to be broken. A railway servant counted the bales and reported they were in order. A fresh seal was put and it was found intact when the train arrived at a further station, viz. B, where the absence of the lost package was noted.

Held : that it could not be presumed that the railway servant who counted the bales at N and found them alright had miscounted them and that it could not be held on the basis of such presumption that the goods had been lost while the train had been running, before its arrival at N. A I R (Vol 12) 1925 Oudh 525 : 27 O C 331 : 85 Ind Cas 338.

——S. 72 — The Railway Company is protected by Risk-note Form B, even where the loss is due to their negligence unless the loss is of a complete consignment or of one or more complete packages. AIR (Vol 11) 1924 All 521 : 5 L R A Civ 385.

——S. 72 — The plaintiff was the consignee of 126 bags which were loaded at Kidderpur station and were despatched to Cawnpore. The wagon admittedly arrived at Cawnpore and the seals on the wagon were found intact. As the Railway Company had many other wagons to unload, this wagon was put on a siding and remained there for two days when it was reported that the seals on one side of the wagon were broken. When the contents were checked it was discovered that six bags were missing. The plaintiff instituted the present suit to recover damages for the loss of the bags. It was found on evidence that the yard where the wagon was kept was a very large one and that its wall on the jungle side was broken at several places at the time when the goods were stolen.

Held, that though ordinarily the neglect or theft has to be proved by the plaintiff, in this case it has sufficiently been proved and therefore the Railway is liable. A I R (Vol 11) 1924 All 177 : 46 All 125 : 21 A L J 896 : 4 L R A Civ 612 : 79 Ind Cas 341.

——S. 72 — Burden of proving neglect on the part of the company lies on the plaintiff. It is open to the company to say that the bale was lost by theft while the train was running in which case they are as a matter of course exempted from liability ; but the burden of proof on this point lies on the Railway Company. A I R (Vol 11) 1924 Mad 567 : 34 M L T 303 : 46 M L J 302 : 77 Ind Cas 511.

——S. 72 — Duty of the company to examine its servants.

If the plaintiffs have signed the Risk-note B in order to recover, the plaintiffs have to prove that the loss was due to theft by or to the wilful neglect of the company's servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agencies employed by them respectively for the carriage of the whole or any part of the said consignment.

The explanation of the loss is oft n within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken and he is bound to discharge it. It may however be mentioned that in this country a Railway Company should produce before the court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods. A I R (Vol 10) 1923 Bom 389 : 25 Bom L R 350 : 73 Ind Cas 606 (DB).

——S. 72—A consignment of goods handed over to a Railway Company for carriage under risk-note, form H, had been short delivered in respect of some complete packages, and the company, when sued, adduced practically all the available evidence.

Held, the plaintiff would have to show that there was wilful neglect before the company would have the liability thrown on them to prove that the loss was due to a theft in the running train. As the Railway Company adduced practically all the available evidence and made a definite suggestion supported by evidence as to robbery from the running train, though it could not be said that the fact is established, yet the theory of wilful neglect on the part of the Railway servants is sufficiently excluded A I R (Vol 9) 1922 Bom 189 : 46 Bom 11 : 23 Bom L R 583 : 64 Ind Cas 4 (DB).

——S. 72—The liability of the Railway Company under Risk-note H, is not the general liability imposed on common carriers or imposed by Section 72 of the Railways Act. Under S. 72, the Company is entitled to contract themselves out of the provisions of the Act if the form of the contract is approved by the Governor-General-in-Council and there is nothing illegal in the consignor in consideration of the reduced rate charged agreeing to hold the company liable only on certain specific contingencies. The onus of proving the facts necessary to bring the company within the terms of the contract will be on the consignor. Section 106 of the Evidence Act does not apply and if in all cases of loss, of destruction or deterioration of goods consigned the onus will be on the company to prove how it came about, the special contract will be useless. AIR (Vol 9) 1922 Mad 231 : 1922 M W N 328 : 16 M L W 667 : 31 M L T 470 : 43 M L J 90 : 68 Ind Cas 269.

——S. 72—Risk-notes H or B.

In cases where goods are consigned under Risk-notes B, or H, it is incumbent on the plaintiffs to prove, in order to succeed, wilful neglect on the part of the railway or theft. AIR (Vol 9) 1922 Pat 419 : 70 Ind Cas 747.

——S. 72 Carriers Act (1865), S. 9—Onus—Appeal.

Under S 9, in a suit brought against a common carrier for the loss, damages or non-delivery of goods entrusted to him for carriage, it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thus thrown upon the common carrier, on the theory that the loss or damage to the goods is prima facie proof of negligence. But where evidence has been given on both sides, of the circumstances under which the loss took place and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. A I R (Vol 8) 1921 Cal 315 : 33 C L J 72 : 61 Ind Cas 14 (DB).

(c) What amounts to.

——S. 72 — By negligence is meant substantially the doing by a person of some act which a reasonable and prudent man would not have done under the circumstances of the case in question or the omission

to do everything that could fairly and resonably be expected of such a man under circumstances. The words "gross" and "culpable" do not alter the character of the thing omitted. The word "gross" does not define the negligence but expresses a practical difference between the degrees of negligence, and when the degree is such that in view of all the circumstances it amounts to a breach of duty, it is culpable. A I R (Vol 17) 1930 Cal 298 : 33 C W N 1048.

——S. 72 — Sending of goods in a waggon fastened with paper string and wax amounts to wilful neglect. AIR (Vol 17) 1930 Lah 37 : 123 Ind Cas 845 : 11 Lah 158 : 31 P L R 419 (DB).

——S. 72—As an abstract proposition it is impossible to lay down that a mere failure properly to secure waggons always amounts to wilful neglect or that the mere sealing them necessarily excludes wilful neglect. A I R (Vol 17) 1930 Pat 283 : 124 Ind Cas 833 : 11 P L T 161 (DB).

——S. 72 — Where goods consigned under Risk-note in forms A and B are loaded in a waggon and it is closed and sealed according to prevailing practice and, some of the goods are found missing, the company is not guilty of wilful neglect though it does not lock the door of the waggon but merely seals it. AIR (Vol 16) 1929 Nag 315 : 118 Ind Cas 876.

——S. 72—Theft by outsider.

For the case to fall within the exception one of two things will have to be proved; either that the loss was due to theft by servants of the Railway Administration or that the loss was due to wilful neglect on the part of the Railway Administration or its servants. Theft by an outsider has no place except as loss due to wilful neglect on the part of the Railway Administration or its servants. AIR (Vol 15) 1928 Cal 697 : 112 Ind Cas 197 : 47 C L J 611 (DB).

——S. 72—Failure to lock the van.

Plaintiff who signed the Risk-note Form B sued a Railway Company for the loss of a consignment. It was proved that the consignment was loaded in a van which was not padlocked and there was no seal, and it was also proved that it was the practice not to padlock the doors.

Held, that the company was liable as omission to padlock was intentional and deliberate and the loss was due to the wilful neglect of the Railway Company. The company was also liable under S. 151, Contract Act, as it is inconceivable that a man of ordinary prudence would let similar goods of his own to be carried in an unlocked van under similar circumstances. A I R (Vol 15) 1928 Cal 498 : 111 Ind Cas 792 : 48 C L J 32 (DB).

——S. 72 — When very heavy bales requiring 2 or 3 men to lift each of them were stolen from the goods yard in the night and noth ng further was known except that the yard was a big one and the public had not free access to it.

Held, it is impossible to conceive that if there had been anything approaching an efficient patrol of the yard, a theft of such bulky merchandise could have been carried through successfully and the Railway Company must be held to be guilty of wilful neglect. AIR (Vol 14) 1927 All 348 : 100 Ind Cas 553 (DB).

——S. 72 — Where the waggon carrying the goods is not properly secured to prevent abstraction of its contents, wilful neglect can be presumed. A I R (Vol 14) 1927 Oudh 1 : 98 Ind Cas 742 : 3 O W N 869 (DB).

——S. 72 — Sealing a wagon with paper only, constitutes wilful negligence. (1926) 92 Ind Cas 1007 (All).

——S. 72 — Per Boys, J., Contra Mukerji, J. — Apart from any proof of constant thefts on the line, the fact that the Railway deliberately despatched a wagon sealed only with sealing wax and string over a d stance of hundreds of miles in circumstances in which the train would have to do part of its journey during the night and stop at stations and in sidings. is sufficient to establish wilful neglect. A I R (Vol 13) 1926 All 641 : 95 Ind Cas 945 (DB).

——S. 72—Precaution—Standard of.

As soon as the plaintiff proves that he consigned goods with the defendants for carriage and that a portion of them was lost in transit, the defendant Company has to prove that they took such care as is defined in S. 151 of the Contract Act for the goods bailed.

The fact that it was not the practice of the Railway Company to put padlocks on the doors of waggons and that there is no evidence as to the frequency of running train thefts on the particular Railway, alone does not necessarily show want of negligence on the part of the company, but if there was any train theft on the line it may be presumed that the company should take precaution against such recurrence in future.

In order to non-suit the plaintiff and to absolve the defendants from legal liability to the consignor for lost goods it is necessary to find distinctly in the terms of S. 151 of the Contract Act that the company took all precautions which a prudent man would have done in respect of his own goods. A I R (Vol 13) 1926 Cal 983 : 93 Ind Cas 1021 : 43 C L J 211 (DB).

——S. 72—Wilful neglect on the part of the Railway can be inferred from the failure of a Railway Company to secure a wagon by anything better than a sealed label. A I R (Vol 13) 1926 Oudh 218 : 92 Ind Cas 603 : 1 Luck 106 : 13 O L J 404 : 29 O C 141 : 3 O W N 145 (DB).

——S. 72 — Waggons are not locked on any railway system and security is obtained for the contents of the waggon by bolting it and having it sealed. It will be throwing an unwarranted burden on the Railway Company if it were held that they will be guilty of wilful neglect whenever the waggons are not locked. AIR (Vol 13) 1926 Oudh 68 : 90 Ind Cas 46 : 2 OWN 749.

——S. 72—The fact that the goods are sent by goods train in the ordinary way in a waggon sealed merely with paper, and bolted in such a way that the bolt could easily be opened, does not amount to wilful neglect on the part of the railway company. AIR (Vol 13) 1926 Oudh 16 : 94 Ind Cas 672 : 2 O W N 794.

——S. 72 A Railway will be guilty of wilful neglect in sending a waggon hundreds of miles during which the train would have to travel at night and stop at all sorts of sidings sealed only, with paper, string and wax. A I R (Vol 12) 1925 All 562 : 88 Ind Cas 559 : 47 All 724 : 23 A L J 645 (DB).

——S. 72—Semble : Where the guard knew that the article in question had been thrown out by thieves and neither he nor anybody else took any step to endeavour to recover it and he confined his interest in the matter to making a report. Held it is not sufficient to brand the Railway with wilful neglect through its servants. AIR (Vol 12) 1925 All 273 : 85 Ind Cas 474 : 6 L R A Civ 59 : 47 All 136.

——S. 72 — The wagon containing the goods on arriving at a certain station was found to have its seals broken. The Railway Officials took the precaution of fixing fresh seals on the wagon which was then shunted to a siding. Two or three days later, the wagon was opened by the Railway Officials and its contents checked and some were found missing.

Held, that the action of the Railway Officials in not checking the goods when the seals were found broken and in leaving the wagon in a siding for 2 or 3 days afterwards did not amount to wilful neglect. A I R (Vol 12) 1925 Lah 515 : 87 Ind Cas 592 : 6 Lah 305 : 26 P L R 200 (DB).

——S. 72 — Leaving a valuable consignment unprotected from the weather for a period of nearly five

weeks is wilful neglect. AIR (Vol 12) 1925 Nag 333 : 87 Ind Cas 1031.

——S. 72 — The putting of a seal and not of a lock does not amount to a wilful neglect on the part of the railway company. AIR (Vol 12) 1925 Oudh 631 : 87 Ind Cas 215.

——S. 72—Failure to lock wagon.

A consignment was placed in a road-van attached to a mixed train which was supposed to have left Lakhimpur on the 26th January, 1922 at 8-30 p.m. The doors of the van were closed with bolts or cotter pins but were neither locked nor sealed. When the train reached Gola Gokaran Nath at about 10 p.m., one of the station staff called out that the door of the road-van was open and on examination two bundles of cotton yarn belonging to two consignments were found missing. It was urged on behalf of the Railway Company that the road-van is not locked but its doors are secured with bolts because goods have to be loaded and unloaded at intermediate stations and that the guard on duty is required to examine the bolts at every intermediate station.

Held, that if such a practice prevails it is not consistent with the security which the Railway Company is bound to provide for the goods entrusted to its custody for transit and that in the circumstances above mentioned wilful neglect may be inferred from the fact that the steps taken to secure the goods against loss by the theft were inadequate. A I R (Vol 10) 1923 Oudh 212 : 72 Ind Cas 428 : 10 O L J 58.

—S. 73.

——Ss. 73, 72 — Death of birds consigned—Value—Ascertainment of.

On the death of certain birds due to the negligence of the Railway Company the Railway Company is liable to pay compensation at the rates specified in S. 73, if the consignor omits to declare value. A I R (Vol 4) 1917 All 172 : 38 Ind Cas 143.

—S. 74.

——S. 74—Loss of Currency notes.

If any personal injury is caused to a passenger by the negligence of railway company, not only the immediate pain and expense caused by the accident, but also any consequent incapacity to attend to business, would be a natural consequence for the wrongful act. If any loss is caused to his business by reason of the injured person's incapacity to attend to it, it is obviously a loss to the estate and can be recovered, by the injured person if he is alive, and by his representatives if he dies.

Where a passenger had some currency notes about him at the time of the accident.

Held, that the loss of such notes cannot be the cause of action against the railway as the loss of the notes was only a remote and not an immediate result of the accident.

Every cause leads to an infinite sequence of effects, but the author of the initial cause cannot be made responsible for all the effects in the series. He is liable only for those which immediately flow out of his wrongful act. AIR (Vol 12) 1925 Lah 636 : 90 Ind Cas 1026 : 6 Lah 451 : 26 P L R 623 (DB).

——S. 75.

1. Burden of proof.
2. Damages, measure of.
3. Declaration of value.
4. Goods of special value.
5. Liability of Railway.
6. "Loss", meaning of.
7. Parcel or package.
8. Scope and applicability.

1. Burden of proof.

——S. 75—Allegation that goods lost were not excepted articles — Burden of proof.

In a suit for damages for loss of goods during transit over a railway, the onus lies on the plaintiff to show that the goods for the loss of which he claims compensation did not belong to the class of excepted articles as enumerated in schedule 2 of the Railways Act. (1950) 54 C W N 39.

——S. 75—Where articles specified in Sch. 2, Railways Act and requiring a special declaration under S. 75 are included in a consignment, the burden of proof as to what articles are contained in each specific parcel and that the value of such special articles in each package was less than Rs. 100, rests on the consignee as the contents of each parcel is a special matter of knowledge to the consignee. But onus to prove the loss of packages rests on the railway company. AIR (Vol 14) 1927 Nag 328 : 103 Ind Cas 756.

——S. 75 — Exemption from liability—Onus.

To avoid liability under S. 75 of the Railways Act, a Railway Company must establish, first that the articles composing the consignment were articles mentioned in the second schedule to the Act, and, secondly, that the total value of the consignment exceeded Rs. 100. AIR (Vol 6) 1919 All 50 : 42 All 76 : 17 A L J 1031 : 52 Ind Cas 644.

—— Ss. 75, 80—Suit for damages — Short delivery — Matters to be proved.

In a suit for damages against a Railway Company for short delivery of certain packages sent, the plaintiff must prove that the packages were lost while in the possession of the Railway Company. S. 75 of the Act affords protection to, not only articles which ought to be ensured, but to all articles contained in the package in which the articles protected were placed. (1912) 34 All 422 : 9 A L J 492 : 14 Ind Cas 803.

2. Damages, measure of.

——S. 75 (1) and (2) — Scope and effect of compensation for loss, etc. — Measure of—Right to recover declared value.

The value declared under S. 75 (1) of the Railways Act is not the measure or the loss, destruction or deterioration which can be claimed from a Railway company as a bailee. The owner suing for compensation has to prove the true value of the goods in spite of the declaration of value under S. 75 (1), though such valuation has not been objected to by the Railway Administration. Nor does S. 75 (2) in terms entitle the consignor or consignee to get the declared value in case of loss. S. 75 (2) only places or fixes a maximum beyond which the claimant cannot recover; he can recover only up to that amount, whatever be the true value. A I R (Vol 37) 1950 Cal 100.

——S. 75 (1) (2)—"Shall not exceed the value so declared", meaning of—Declaration — Deterioration of package — Whole amount, if can be recovered.

The words "shall not exceed the value so declared" in S. 75, sub-s. (2), imply that a claim may be less than the value declared. When construing these words, the context is to be taken into consideration, the words of the context being 'the compensation recoverable in respect of such loss, destruction or deterioration." In the case of deterioration of a package or packages, the whole amount so declared should not be recovered as damages AIR (Vol 23) 1936 Pat 393 : 17 P L T 268: 2 B R 633: 15 Pat 394 : 163 Ind Cas 685 (DB).

——S. 75—Value of articles—Loss of, includes consequential damage—Articles of special value—Damages—Measure of.

Plaintiff delivered to the deft. Railway Company a parcel containing the account books for carriage from Bombay to Nagpur. The parcel was mis delivered to a person who thinking that the parcel was the one which was sent to him from Khandwa for destruction of the papers therein destroyed the account books. The plaintiff sued the defendant Rail-

way Company for damages for Rs. 25,000: Held, Per Scott C. J. : — S. 75 of the Railways Act applies to articles of special value declared by the legislature in the schedule. They must therefore be articles free from any pretium affectionis on the part of the, owner, that is to say, which could be valued by any sufficiently trained expert quite apart from the feelings of the owner. The damages recoverable against the Railway Company, was the value of the property lost and nothing more. The plaintiff could not sue for any remote or consequential damages which he might allege he had suffered from the loss. The plaintiff could recover Rs. 70 as the actual cost of the books and no more. Per Macleod J.—The protection under S. 75 lasted as long as the Railway Company were liable as carriers and in this case their liability would continue after the goods had arrived at their destination for such reasonable time as would be required for the consignee to come to take delivery. S. 75 would be defeated if the consignor could claim consequential damages for the loss of an excepted article without insuring it on the ground that its value was over Rs. 100. The section was an absolute bar to an action against the Railway Company for any amount exceeding Rs. 100 for the loss, and the consequences of the loss of excepted goods entrusted to them for carriage unless a declaration had been made under the section. The word "value" in S. 75 did not necessarily mean "market value." If an article has a special value to the owner beyond the market value and if he wished to recover that value be must declare and insure the goods. If however a loss occurred the liability of the Railway Company was limited by S. 75 (2) to the true value. A I R (Vol 6) 1919 Bom 67 : 43 Bom 386 : 21 Bom L R 6 : 49 Ind Cas 396 (DB).

[On appeal from 20 Bom L R 591 : 41 Ind Cas 401.]

3. Declaration of value.

——S. 75 (1) and (2) — Applicability and scope — Over-estimation or under-estimation—Effect of.

There is no doubt that S. 75 (1) of the Railways Act applies to all classes of cases where the articles are of the kind mentioned in the second schedule and their intrinsic value exceeds Rs. 100. But it does not follow that, where the value has been declared at a figure less than Rs. 100, the railway company shall not be liable for the loss, destruction or deterioration of the parcel or package. S. 75 (2) protects the railway company against an over-estimation of the value by the consignor and also against an under-estimation of the value by the consignor. The only consequence of an inaccurate declaration by the consignor is that the compensation to be awarded shall not exceed the amount declared if the value has been under-estimated and shall not exceed the true value if it has been over-estimated. A I R (Vol 34) 1947 Cal 182 : 225 Ind Cas 630.

——S. 75, Sch. II — Goods specified in Sch. 21—Declaration of value of goods, necessity of — Loss by theft—Liability of Company.

In the case of goods included in Sch. II of the Railways Act, if they are over rupees one hundred in value a Railway Company to which they are consigned for carriage would not be liable for their loss unless the consignor has made a declaration of their value. A mere declaration of the nature of the goods, for example, that they are laced cloths, is insufficient. A I R (Vol 23) 1936 Mad 491 : 44 L W 333 : 1936 M W N 995 : 163 Ind Cas 840 (1).

——S. 75 (1)— Scope of — Declaration under S. 75 — Whether same as 'account' and 'description' in S. 58.

Per Rowland, J.—Section 75 (1), strictly interpreted, contemplates a declaration regarding the contents, and the value of each package.

The language used in Ss. 75 and 58 is not identical but the "declaration" is not a separate thing from the "account" and "description" referred to in S. 58. The provisions in S. 58 are of general application but in the special circumstances described in S. 75, the account and description to be given under S. 58 must include a declaration as to value. Section 75, cl. (1) contemplates payment of or engagement to pay a percentage on the value declared by way of compensation for increased risk while S. 58 speaks of such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge. Section 78, though not divided into sub-sections, contains two distinct provisions relating to responsibility for the loss, destruction or deterioration of goods with respect to the description of which an account, materially false, has been delivered under S. 58. A I R (Vol 23) 1936 Pat 393 : 17 P L T 268 : 2 B R 633 : 15 Pat 394 : 163 Ind Cas 685 (D B).

——S. 75 (1) — Carriage undertaken on basis of declaration—Consignor, if can go behind it.

Where a Railway Company undertakes to carry the goods of a consignor on the basis of a declaration as to the value of the goods made under S. 75 (1), Railways Act, made by him and the rate of carriage is based on that, the consignor cannot afterwards allege that the declared value is not their true value. A I R (Vol 23) 1936 Pat 393 : 15 Pat 394 : 17 P L T 268 : 2 B R 633 : 163 Ind Cas 685 (DB).

——S. 75 — Where at the time of consignment of a parcel of silver the contents were declared, but the value was not declared, and all that the consignor said was that the parcel weighed thirty seers.

Held, that there was no declaration of value as required by S. 75. A I R (Vol 13) 1926 All 552 : 24 A L J 728 : 96 Ind Cas 193 (DB).

——S. 75—Passenger's luggage—Loss of.

A passenger on the defendant Railway booked three packages from Howrah to Khurja, one of which contained silver and silk articles referred to in the second schedule as articles which must be declared but the plff. did not do so. The package was lost and plff. brought this suit for damages.

Held, a passenger's luggage which is booked is a package within S. 75 of the Railways Act and the Railway Co., is not liable for the loss of plff's package if it contained silver and silk in respect of which no declaration had been made. A1R (Vol-2) 1915 All 328 : 37 All 463 : 13 A L J 658: 30 Ind Cas 400 (DB).

4. Goods of special value.

——S. 75—Medical compounds of gold and silver.

The contents of the lost cases were medicine largely in the form of pills concocted by an elaborate process and in some instances, containing as one of the ingredients gold oxide or sulphite of silver. The process by which the pills were compounded resulted in the gold and silver being reduced to fine powder, in colour dark brown and black.

Held, that these substances were not gold and silver in the sense in which such terms are understood in general parlance, and by the ordinary people. A broad and common sense rather than a technical construction should be placed upon these words. Hence, where the medicines contained in the cases were bona fide made up for the purpose of the plaintiff's calling, the contents of the cases were not covered by cl. (a) of the Sch. II to the Railways Act. A I R (Vol 12) 1925 Cal 115 : 84 Ind Cas 239 : 51 Cal. 929,

——S. 75—Shawls.

The term "Shawls" means an article of dress worn by orientals consisting of an oblong piece of material manufactured in Kashmere from the hair of the Tibetan "Shawl Goat." It has been used in a limited and special sense, namely as an article of special value. AIR (Vol 9) 1922 Bom 416 : 47 Bom 18 : 24 Bom L R 416 : 67 Ind Cas 852.

——S. 75—Shawls.

Where the plaintiff described the articles in respect of which he made his claims as "shawls," it is a consideration of no consequence that the particular shawls which were lost were not Kashmir shawls, nor made of wool nor articles of comparatively high value provided that the value of the articles in the parcel exceeded Rs. 100 in all.

The use of the words "special value" in the marginal note to S. 75 of Act IX of 1890 and in Cl. (s) of the second Schedule must not be taken to imply that only articles falling within the descriptions of the schedule which are of exceptional value, must be declared. 39 Cal 1029, Dissented from. AIR (Vol 8) 1921 Mad 510 : 41 M L J 603: 30 M L T 229: 1921 M W N 852 : 14 M L W 614 : 65 Ind Cas 99.

——S. 75—Shawls.

The term "Shawl" used in item (m), Sch. II, Railways Act, refers to valuable Indian Shawls and does not apply to articles of inferior value such as Alwans. (1912) 39 Cal 1029 : 14 Ind Cas 726.

5. Liability of Railway.

——S. 75 — Goods not declared delivered to wrong person—Suit by owner for price of goods — If competent.

S. 75 of the Railways Act is designed to protect the Railway Administration from liability for the loss, destruction or deterioration of parcels entrusted to them for carriage containing articles of special value unless the value and nature of such articles is declared and the increased charge or an engagement to pay the same is accepted. If goods which ought to be declared are not declared and lost, the railway is protected for their loss and its consequences. The statute does not specify the manner or the circumstances in which the loss should be occasioned. The fact that an article has been lost by misappropriation or by theft or by misdelivery does not alter the fact that it has been lost. Where therefore the loss of the goods was occasioned by the misdelivery of the goods with or without the connivance of the railway servants, it is not within the competence of the owner to recover the price by bringing a suit for non-delivery. AIR (Vol 36) 1949 E. P. 285 : 51 P L R 52.

——S. 75 — Radio set lost during transit—Value not declared — Liability of Railway.

The rule contained in the Goods Tariff including a radio (wireless apparatus) specifically as an article under the second Schedule which mentions the excepted articles which cannot be consigned to the railway administration without a declaration of value and contents and insurance, has been made under authority and has the force of law. A radio set is thus an article regarding which a declaration under S. 75 of the Railways Act is necessary, if its value is above Rs. 100. In the absence of such declaration, the railway administration is not liable for its loss during transit. A I R (Vol 34) 1947 Nag 128 : 1946 N L J 645 : ILR (1947) Nag 169 : 229 Ind Cas 526.

——S. 75—Non-delivery of consignment—Presumption as to loss or destruction—Damages.

Where the plaintiff consignor has proved non-delivery of a parcel while the defendant has not proved that it has been lost or destroyed, S. 75 does not apply and the plaintiff is entitled to the award of damages, even though the value of the contents of the parcel was not declared. For the applicability of S. 75, it is incumbent upon the defendant to show that the whereabouts of the parcel are not known before the Court can hold that the parcel has been lost. AIR (Vol 33) 1946 All 198 : 1945 A L J 543 : 1945 A W R (H C) 388 : 1946 O W N (H C) 18 (DB).

——S. 75—Goods falling under S. 75—Protection by agreement under S. 72.

When articles declared to fall under S. 75 exceeding Rs. 100 in value were sent without the extra percentage, the Railway can protect itself by an agreement under S. 72 (2) provided the conditions falling within that sub-section are satisfied and Risk-Note Form X is not ultra vires. AIR (Vol 21) 1934 Lah 186 : 15 Lah 596 : 36 P L R 536 : 150 Ind Cas 709 (DB).

——S. 75—Non-Insurance of insurable article.

Where the loss was of a part of goods of the value of over Rs. 100 and of a kind which was liable to be insured, the result of non-insurance makes the claim unmaintainable. 92 Ind Cas 622 : 24 A L J 305 AIR (Vol 13) 1926 All 299.

——S. 75—Abstraction by railway servant.

S. 75 protects the Company even where the articles are abstracted by the servants of the Company, and English authorities are not applicable as there is no such provision in the Indian Act as there is in the English Act. 96 Ind Cas 605 : 5 Pat 465 : AIR (Vol 13) 1926 Pat 384 (DB).

——S. 75—Parcel containing silk — Value of over Rs. 100—Parcel not insured—Liability.

Whether a parcel consigned to a Railway Company contains silk, in a manufactured or unmanufactured state and whether brought up or not with other materials of the value of Rs. 100, the Railway Company are not responsible for the loss and for anything contained in it, if the parcel were not declared or insured. 42 Cal 888 : 19 C W N 1034: 22 C L J 212 : 28 Ind Cas 245 : AIR (Vol 3) 1916 Cal 554 (DB).

——S. 75 and Sch. 11, Item (m)—"Shawl"—Alwan of small value—Article sent through Railway and Steamer Companies — Loss in transit over Railway—Liability of Steamer Companies.

The term "Shawl" used in item (m), Sch. II, Railways Act, refers to valuable Indian Shawls and does not apply to articles of inferior value such as alwans. Where a parcel containing alwans was delivered to a Railway Administration for carriage and the value of the articles exceeded Rs. 100, the Rly. administration is responsible for the loss of the parcel though the sender did not declare its value and contents under S. 75 of the Railways Act. Where a parcel was delivered to a Railway to be carried by the Railway and certain Steamer Companies, and the parcel was lost in transit over the Railway, the Steamer Companies are in no way liable for the loss. (1912) 39 Cal 1029 : 14 Ind Cas 726 (DB).

——S. 75—Contents declared—No insurance charges demanded Liability of company—Bye-laws framed by company — Bye-law No. 26—Modifying S. 75—Effect of.

The plaintiff booked a box requesting that special care should be taken of the contents. On being required to declare the contents he showed a list of the same. The company did not require him to pay any extra charges. They handed him a receipt on the back of which was printed Bye-law No. 26 (framed under S. 75 which declared that the company is not responsible for any loss, destruction or deterioration of goods. The goods were damaged in transit.

Held, that the declaration made by the plaintiffs was a sufficient declaration within the meaning of S. 75 and the Railway Company not having demanded any extra payment were not exonerated from liability by reason of the provisions of that section.

Held, further, that the bye-law 26 framed under S. 75 so far as it made the making of a demand from the owner of the goods unnecessary was ultra vires. The bye-law could not be considered as amounting to a demand and a reference to them on the receipt did not affect the plaintiff. (1910) 7 A L J 606 : 6 Ind Cas 333 (335) (DB).

——S. 75—Through booking of goods by Steamer and Rail—Loss of goods during transmission by Rail—Liability of Steamer Co.—Contract, divisible or not—Railway Company whether agent of Steamer Company—Protection under S. 75. See (1907) 34 Cal 419 : 11 C W N 1071 (1074 1075); See also (1907) 11 CWN 1076 (1077); (1912) 39 Cal 1029: 14 Ind Cas 726 (DB).

6. "Loss", meaning of.

——S. 75 - Courts should put such a meaning on the word "loss" in S. 75 of the Railways Act as would be "ejusdem generis" in its effect with the implication of the words following it, (i.e.) "destruction or deterioration." The word is generic enough to include a loss by the company. Hence, where in the case of failure to deliver a box of books booked to be taken in the luggage van of the train in which the plaintiff travelled, in the absence of proof by the company that they were lost in transit, the company cannot claim the benefit of S. 75 of the Railways Act. 1948 A W R (H C) 308 : AIR (Vol 36) 1949 All 223 : 1949 A L J 166.

——S 75—Loss by theft of railway servants.

The word "loss" in S. 75 of the Railways Act includes loss caused by theft or wilful neglect of the servants of the railway administration. 50 C W N 86 AIR (Vol 33) 1946 Cal 235 : 228 Ind Cas 62.

——S. 75—The word 'loss' in S. 75 is wide enough to include loss by theft. AIR (Vol 23) 1936 Mad 491 : 44 L W 333 : 1936 M W N 995 : 163 Ind Cas 840 (1).

——S. 75—The question whether a loss has occurred within the meaning of S. 75 depends on the facts of each case. The expression 'loss" includes cases where the goods are not forthcoming and under S. 77, mere non-delivery may amount to a loss. It is wrong to say that the loss of the goods by the Railway could only occur if the goods had been lost through inadvertence or involuntarily. Loss by theft or by means of fraud is clearly a loss within the meaning of S. 75. Proof that goods have been misdelivered or have not been duly delivered is not conclusive evidence as to whether loss has occurred or not. AIR (Vol 21) 1934 Cal 783 : 61 Cal 599 : 152 Ind Cas 37 (DB).

——S. 75—When a certain article delivered to the Railway Company is not forthcoming for delivery at the destination and its whereabouts are not known the article is 'lost' within S. 75. 92 Ind Cas 622 : 24 A L J 305 : AIR (Vol 13) 1926 All 299.

——S. 75—Protection under.

It is only when the articles have been lost by the Company that it can claim protection under S. 75. 92 Ind Cas 622 : 24 A L J 305 : AIR (Vol 13) 1926 All 299.

——S. 75—Precious metal — Theft in transit—Mode of theft.

S. 75 lays down that the consignor must declare the value of precious metal consigned and pay the percentage to hold the company responsible for the loss. Mere signing of a risk note does not bind the Company. The section embraces the thefts of goods in transit even though the actual way of the theft is not proved. (1912) 34 All 656 : 10 A L J 297 : 16 Ind Cas 369 (DB).

7. Parcel or package.

——S. 75— Glass bangles made into garlands — Wagon load of such garlands—If a parcel or package.

It is not essential for a thing to come within the meaning of "parcel or package" that the articles contained in it are covered and concealed from view. Glass bangles made into garlands by tying together a number of them with a string would be a parcel or package. It cannot be said that a whole consignment of such garlands form one parcel. AIR (Vol 37) 1950 All 543 : 1950 ALJ 625 (DB).

——S. 75—Silver bar not packed.

Where a person consigns a silver bar to the railway on a railway receipt at the owner's risk executing the risk-note in the form "Y" and by doing so derives benefit in being excused from the liability of insuring it in addition to paying full scheduled rate for carriage, he cannot afterwards contend that the bar of silver, not having been packed in the sense of being contained in a complete outer covering, did not come within the purview of S. 75 and was therefore not covered by risk-note "Y." AIR (Vol 16) 1929 Lah 698 : 11 Lah 4 : 116 Ind Cas 616 (DB).

——S. 75—Interpretation.

The word "parcel" or "package" in S. 75, Railways Act, does not include the plural. AIR (Vol 13) 1926 Nag 328 : 103 Ind Cas 756.

8. Scope and applicability.

——S. 75—Claim for amount exceeding Rs. 100— If bound to succeed up to that amount.

S. 75 of the Railways Act says that the bar contained therein would not apply unless the value of the goods exceeds Rs. 100. It cannot therefore be contended that even if the claim is for an amount exceeding Rs. 100 the claim will succeed in any event up to that amount, although it may fail for the balance. (1950) 54 CWN 39.

— S. 75 (1) & (2)—Value of goods declared under estimate—Effect on compensation.

Section 75 (1) is applicable in all cases where the articles are of the kind mentioned in the second schedule and their intrinsic value exceed Rs. 100. But no consequence follows that the Railway Company shall not be responsible for the loss, destruction or deterioration of a parcel or a package where the value has been declared at a figure less than Rs. 100. Sub-section (2) of S. 75 safeguards the Railway Company against an over-estimation of the value by the consignor and the only consequence of an inaccurate declaration by a consignor is that the compensation to be awarded shall not exceed the amount declared if the value has been under-estimated and shall not exceed the true value if the value has been over-estimated. (1946) 225 Ind Cas 630 (631) (Cal).

——S. 75—Liability of Railway Company under S. 72, Railways Act is subject to the provisions of S. 75 and is not unqualified or absolute. AIR (Vol 19) 1932 Cal 3 : 58 Cal 989 : 35 CWN 452 : 134 Ind Cas 886 (DB).

——S. 75—S 75 does not apply when the value of a package does not exceed Rs 100. (1912) 23 MLJ 511: 17 Ind Cas 419 (DB).

— S. 75—Liability of Railway for parcel containing articles mentioned in 2nd schedule.

S. 75 protects the whole parcel in which silk goods, mentioned in cl. (I) of the 2nd schedule, are contained whether the rest of the parcel is composed of articles mentioned in the second schedule or not. The section draws a distinction between articles mentioned in the schedule and the parcel and the package used as cover. 33 Bom 703: (1909) 11 Bom L R 827: 3 Ind Cas 964 (DB).

——S. 76

— Ss. 76, 72—Burden of proof of negligence—Proof that Railway Administration took bailee's care — Sufficiency of.

It is true that S. 72 is to be read subject to other provisions of the Act because it says so but there is nothing in S. 76 which imposes upon a Railway Administration the burden of proving that it is not possible that the loss was due to the negligence or misconduct of its servants. The Administration must show the care of a bailee as defined in Ss. 151 and 152, Contract Act, and it is sufficient if the defendant company calls the material witnesses who were on the spot. It is, of course, to be presumed that the evidence of these witnesses satisfies the Court that the care required by S. 151, Contract Act, was shown.

AIR (Vol 24) 1937 Sind 85 : 31 SLR 22 : 168 Ind Cas 76 (FB).

——S 76—Scope of—Damages not caused by misconduct and negligence of Railway servants — Benefit of S. 76.

The provisions contained in S. 76, were made for the protection of plaintiffs who had suffered loss but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the Railway. But the Act has not anywhere provided that a plaintiff is absolved from the duty of proving that a Railway Administration is liable for causing the loss or deterioration of the goods. If it is clear that the damage has been caused by the misconduct of the Railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. But where, from the evidence, it seems to be highly probable that the goods which were consigned in a damaged condition and remained in the train for over ten days had deteriorated for this reason and not through any misconduct and negligence on the part of the Railway Administration, S. 76 has no application. AIR (Vol 22) 1935 All 525 : 1935 AWR 604 : 1935 ALJ 640 : 155 Ind Cas 97.

——S. 76—Scope.

The primary question in suits for damages for non-delivery of goods entrusted to a Railway Company is whether the Company has taken as much care of the goods as a man of ordinary prudence would take of his own goods under similar circumstances. As regards burden of proof, S. 76 does no more than take away from the plaintiff the burden which, in any case lies upon the defendant under S. 106, Evidence Act, viz., to prove facts which are within his special knowledge. It is for the defendant to place all material evidence that may be available before the Court, and if there is failure on the defendant's part in this respect, the plaintiff may ask the Court to presume that if produced, such materials would have gone against the defendant. The plaintiff must show, upon the material produced by the defendant that there was negligence on the part of the latter or his servants or his agents. AIR (Vol 21) 1934 Cal 151 : 37 CWN 1109 : 58 CLJ 98 : 150 Ind Cas 189 (DB).

——S. 76—Wilful neglect.

The onus of bringing the case within the exception mentioned in Risk-note form B and of establishing wilful neglect is on the person claiming damages. AIR (Vol 15) 1928 Cal 697 : 47 CLJ 611 : 112 Ind Cas 197 (DB).

——S. 76—Deterioration.

"Deterioration" is not a word of art and it must be taken in its ordinary sense. Where parcel is impaired in value by the abstraction of the articles contained in it, there is deterioration of the parcel. AIR (Vol 13) 1926 Pat 384: 5 Pat 465: 96 Ind Cas 605 (DB).

—— S. 76—Risknote executed—S. 76 does not apply.

Where the consignor has signed a risk note in the usual form, he must prove that there had been a loss of one or more complete packages out of the consignment and that the loss was due to the wilful neglect of the Ry. Company or its servants. AIR (Vol 12) 1925 Bom 96: 86 Ind Cas 393 (DB).

——S. 76—Applicability.

Section 76 does not apply to contract limiting Railway Company's liability under Section 72 of the Railways Act. AIR (Vol 12) 1925 Cal 306: 78 Ind Cas 449.

——S. 76—Risk note.

Where goods are consigned by the Railway Company under the special terms of a risk note and they are lost, the plaintiff has to prove how the loss occurred. S. 76 has no application to the case. AIR (Vol 11) 1924 Mad 388: 18 MLW 322: 1923 MWN 731: 75 Ind Cas 260 (DB).

——Ss. 76 and 80—Railway Company—Suit for loss or destruction of goods—Onus of proof—Risk note.

In a suit against a Railway Company for compensation for loss, destruction, etc. of goods entrusted to them for transit, plaintiffs ordinarily need prove only the loss. The Railway may then either show that the loss occurred in circumstances which exempted a cattle from the responsibility for the loss or they may rely upon a special contract which exempts them from liability. When there is a risk note which is a special contract exempting the Railway from all liability except in certain specified cases, the plffs. can succeed only if they establish that their case comes within these exemptions. Under S. 80 of the Railways Act no suit will lie against a Railway Company to whom the goods were not entrusted unless it is shown that the loss occurred while the goods were to their possession. In no case can a decree be passed against both the Companies. AIR (Vol 4) 1917 Nag 119; 14 NLR 122: 48 Ind Cas 294.

——S. 76—Contract under risk note form B.

The burden of proof lies on the plaintiff to prove facts from which it can be fairly and reasonably inferred that loss was due to wilful neglect of Company which cannot be presumed from loss itself. S. 76 does not apply to goods sent under special contract. AIR (Vol 3) 1916 Sind 50: 9 SLR 177: 32 Ind Cas 551 (DB).

——S. 76—Burden of proof as to time of loss.

The burden of proof as to when the the goods were lost is on the Railway Company. (1912) 23 MLJ 511: 17 Ind Cas 419 (DB).

——S. 77.

1. Applicability.
See also N 6 (f).
1A. Cause of action.
2. Claim for compensation.
3. Interpretation.
3A. Liability of Railway administration.
See also N 6. (f).
4. Limitation.
5. Non-delivery.
See also N 6. (f).
6. Notice.
See also S. 140 and Civil P. C., S. 80.
7. Object.
8. Overcharge.
9. Scope.

1. Applicability.

See also N. 6 (f).

——S. 77—Case of non-delivery of consignment.

Section 77 of the Railways Act requiring a formal claim to be made within six months of the despatch of goods relate only to compensation for loss, destruction or deterioration of goods and would not seem to apply in cases where there was, for example, a detention by the Railway. If the Railway wished to oppose a suit on the ground that the plaintiff had submitted his claim beyond six months of the date of delivery of the goods for carriage by the Railway, it would be incumbent on them to show that plaintiff's claim was beyond six months from the date of entrustment of the goods and also that the goods had been lost or destroyed or deteriorated. S. 77 of the Railways Act does not apply to non-delivery when it is not known what happened to the goods. AIR (Vol 38) 1951 Mad 327 : 63 LW 1173: 1950 MWN 684: (1950) 2 MLJ 506.

——S. 77—Short delivery of goods.

Section 77 of the Railways Act has no application to a case of short delivery of goods where the short delivery is not due to loss. But if short delivery is the result of loss, notice under S. 77 must be served. AIR (Vol 36) 1949 Cal 420: 83 CLJ 165.

——S. 77—Suit for non-delivery of consignment—Notice—Necessity—"Loss."

Section 77 of the Railways Act does not apply to a case of non-delivery of a consignment; the word "loss" does not include non-delivery. Hence no notice under S. 77 is necessary to be served where the suit is for non-delivery or a consignment. AIR (Vol 36) 1949 Pat 268:29 PLT 477 (DB).

——S. 77—Applicability—Notice, when necessary.

Where the goods had never been lost, but had reached their destination and were in the Lost Property Office and were sold by public auction against the express direction of the plaintiff who thereupon brought a suit for damages against the Railway Company:

Held, that S. 77 did not apply and that no notice under it was necessary. AIR (Vol 22) 1935 All 601: 1935 ALJ 793: 1935 AWR 918: 57 A 843: 157 Ind Cas 1080 (DB).

——S. 77 — Conversion—S. 77 refers only to loss, destruction or deterioration of goods and has nothing to do with detention or conversion of goods.

P despatched to himself as consignee some bundles of goat skin from C to H. Later on he went to H and having paid the freight demanded the goods. The railway officers refused to hand them over on the ground that one of the bundles appeared to be different from the one despatched and was 30 seers short in weight. Thereupon P's pleader wrote to the Commercial Chief Manager and H setting out the facts drawing attention to the falling market and to the fact that the skins were getting damaged and worthless in the goods office and demanding price. The Manager replied that the consignment had been handed over to Government Railway Police asking P to communicate with the Sub-Divisional Officer.

Held: that the railway authorities not only broke their contract of carriage and committed the tort of detinue but were guilty of conversion of P's goods. S. 77 is not therefore applicable. AIR (Vol 17) 1930 Cal 332.

——S. 77—Quaere—Whether a case of non-delivery is not governed by S. 77 of the Railways Act. AIR (Vol 14) 1927 Pat 335 : 8 PLT 767 : 103 Ind Cas 383 (DB).

——S. 77—Notice necessary.

S. 77 applies to a suit to recover compensation for the non-delivery of goods consigned to a Railway Company for carriage. AIR 1922 Pat 106, Diss. AIR (Vol 11) 1924 Pat 315 : 73 Ind Cas 642.

1A. Cause of action.

——S. 77— Under S. 77 claim should be preferred in writing to the agent of the railway at its Head Office and this fact is a part of cause of action. (1941) I L R (1941) 2 Cal 160.

——S. 77—Conversion of goods.

Where goods were consigned for carriage to railway, but they were not delivered to the consignee even on demand and further there was refusal on the part of railway to give information as to the fate of the goods, a suit by consignee for damages is one for conversion and S. 77 does not apply. Cause of action for a such a suit arises when the railway refused, after reasonable time, to deliver the goods. AIR (Vol 14) 1927 Lah 471 : 8 Lah 555 : 28 P L R 665 : 102 Ind Cas 149 (DB).

2. Claim for compensation.

——S. 77 — A suit for damages in respect of certain bales of piece goods which at the end of the transit were found tampered with is a claim for compensation for the loss of goods within the meaning of S. 77 for which notice is necessary. AIR (Vol 18) 1931 Cal 306 : 34 C W N 1079 (DB).

3. Interpretation.

——S. 77—"Loss"—Meaning—Notice is necessary.

The word "loss" in S. 77 of the Railways Act has to be given a broad meaning and must be taken to cover both loss by the Railway and loss to the owner. 1950 All L J 41.

——S. 77—"Deterioration."

The word "Deterioration" does not cover the fall in the market value of the goods which is due to the delay in delivery. 21 Mad 172; 233 P L R 1912, Not foll. A I R (Vol 16) 1929 All 597 : 1929 A L J 859 : 51 All 895 : 119 Ind Cas 95.

——S. 77 — To prefer claim in writing to a person, within the meaning of S. 77 clearly means that it must reach him. A I R (Vol 14) 1927 All 215 : 99 Ind Cas 622 (DB).

——S. 77 — The word "loss" in S. 77 includes "non-delivery" or loss to the plaintiff. A I R (Vol 13) 1926 All 698 : 49 All 236 : 25 A L J 89 : 97 Ind Cas 474 (DB).

3A. Liability of Railway Administration.

See also N. 6 (f).

——S. 77—Suit against Railway Company — Consignee imposing unauthorised conditions.

A Railway Company is not responsible for non-delivery of goods if it was due entirely to the imposition of a condition by the consignee which he had no right to impose. (1912) 15 C L J 211 : 16 C W N 356: 13 Ind Cas 509 (DB).

4. Limitation.

——S. 77—Date of delivery of goods — Computation of period of six months—Goods not claimed after arrival at destination and sent to Lost Property Office — Subsequent re-booking of goods at request of consignor or consignee — Effect of — Suit within six months of re-booking—If barred.

After a reasonable time after the arrival of goods at their destination, the Railway Company ceases to be responsible as a carrier; when, due to failure to take delivery of the goods at destination the goods are sent to the Lost Property Office of the Railway, the Railway is not liable as a carrier; at best it is only a warehouser. But when, thereafter, the Railway Company re-book the goods at the request of the consignor or consignee, there is a fresh contract by the Railway as a carrier and it continues to be a carrier until the goods arrive at the new destination and for a reasonable time thereafter. The original contract of carriage having come to an end, a fresh contract comes into existence at the time of the re-booking, and the period of six months fixed by S. 77 of the Railways Act has to be calculated from the date of the re-booking in the case of a suit for damages for loss occurring in the course of the carriage of the goods after the re-booking. The delivery of the goods within the meaning of S. 77 must be deemed to be made to the Railway Company as carrier when a fresh railway receipt is prepared at the time of the re-booking of the goods. I L R (1950) All 132.

——S. 77—Limitation of six months—Computation.

The period of six months contemplated by S. 77 of the Railways Act for serving a notice of claim runs not from the date of the delivery of the goods to the consignee but from the date of delivery to the railway for the purposes of carriage. A IR (Vol 36) 1949 Cal 420 : 83 C L J 165.

——S. 77—Limitation of six months from delivery of goods for prefering claim — Time taken in correspondence with Railway for obtaining open delivery which was refused—If can be deducted.

Section 77 of the Railways Act makes it absolutely clear that the claim against the Railway must be preferred in writing within six months from the date of the delivery of the goods for carriage by the Railway and no allowance can be made for the period taken in correspondence between the plaintiff and the Railway administration in his attempt to obtain open delivery which was refused by the Railway authorities. AIR (Vol 34) 1947 Pat 118 : 12 B R 612 : 225 Ind Cas 502.

——S. 77—Notice—Six months, calculation of.

A notice under S. 77 relating to the overcharge in respect of consignment must be given within six months of the date on which the consignment was delivered to the Railway for being carried to its destination. The section is not concerned with the accrual of the cause of action to the claimant and there can be no justification for introducing into the section certain words after "overcharge" so as to limit it to an overcharge made at the despatching station. AIR (Vol 26) 1939 All 649 : 1939 A L J 582 : 1939 A W R 595 : 186 Ind Cas 801.

——S. 77— A claim preferred by posting a registered letter within six months is good although the letter is received by the Agent after the expiry of six months. A I R (Vol 14) 1927 Pat 241 : 6 Pat 256 : 8 P L T 575 : 102 Ind Cas 607 (DB).

——S. 77—Under S. 77 it is not sufficient if the notice is posted within limitation. If the notice is so posted that in the ordinary course of post it would be delivered to the Railway Company within six months, it would be a sufficient compliance with the law. A I R (Vol 13) 1926 All 214 : 24 A L J 360 : 93 Ind Cas 96.

——S. 77 — The notice required by S. 77 has to be given within six months from the date of delivery of the goods for carriage by railway and not from the date on which goods ought in the ordinary course to be delivered to the consignee. AIR (Vol 13) 1926 Pat 413 : 5 Pat 488 : 8 P L T 401 : 98 Ind Cas 767 (DB).

——S. 77 — As regards compensation for pilfered goods a notice is necessary. The time of six months does not commence from the date of delivery of the damaged parcel by the Company to the consignor, but from the time of delivery of the goods to the Company by the consignor for carriage. AIR (Vol 12) 1925 All 144: 22 A L J 897: 5 L R A Civ 665 : 80 Ind Cas 725.

——S. 77— Where consignee does not get delivery of goods until 6 months have expired from the date of consignment his remedy is when the six months are about to expire and the goods have not been delivered to him to give notice to the agent under S. 77 and so preserve his right of suit. A I R (Vol 11) 1924 All 617 : 5 L R A Civ 334 : 79 Ind Cas 893.

——S. 77—Where plaintiff suing a Railway Company gave 15 days' notice under S. 77, Railways Act.

Held, he was entitled to deduct the time of notice from the period of limitation. A I R (Vol 9) 1922 Pat 549 : 3 Pat L T 643 : 1922 P H C C 254 : 70 Ind Cas 109 (DB).

——S. 77—Railway—Misdelivery— Suit for damages —Notice of claim for compensation essential.

In a suit by the plaintiff as endorsee of the Railway receipt against the defendant Railway Company for damages for misdelivery :

Held that it was barred by limitation because the notice prescribed by S. 77 of the Railways Act had not been given to the defendant within 6 months. A I R (Vol 6) 1919 Mad 140 : 41 Mad 871 : 35 M L J 35 : 24 M L T 38 : 8 L W 340 : 49 Ind Cas 69 (DB);

See also AIR (Vol 6) 1919 Pat 42 : (1919) Pat H C C 150 : 49 Ind Cas 498.

——Ss. 77, 80 — Suit against Railway Company — Notice of claim — Notice to be given to the Company which it is intended to sue.

Under S. 80 when goods are booked through over the lines of two or more Railway Administrations and are lost or damaged in transit it is at the option of the person damnified to sue either the Railway Administration to which the goods were delivered by the consignor or the Railway Administration on whose line the loss occurred. But under S. 77 it is a condition precedent to the filing of such a suit that notice of the plaintiff's claim must be given within six months from the date of the delivery of the goods for carriage to the Railway Administration which the plaintiff seeks to render liable. In default of such notice the plaintiff will not be entitled to a decree against the Railway Company. (1903) AWN 235 (236).

5. Non-delivery.

See also Note 6 (f).

——S. 77—Notice not necessary.

In the case of damage claimed for non-delivery of a consignment no notice is necessary under S. 77 as the word "loss" in the section does not include non-delivery. AIR (Vol 16) 1929 Pat 109 : 10 PLT 88 : 8 Pat 545 : 115 Ind Cas 893 (DB).

——S. 77—Notice not necessary.

When compensation is asked by a person from a railway company for non-delivery and nothing more than mere non-delivery is pleaded, no notice under S. 77 is required though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. AIR 1925 Pat 727, Not Foll.

Non-delivery is not co-extensive with loss as it includes much more than loss, which is only one of several possible cases. Non-delivery may be due to mis-delivery or to wilful detention by the Railway Company as well as to loss. AIR (Vol 15) 1928 Pat 270 : 7 Pat 192 : 9 PLT 163 : 107 Ind Cas 540 (DB).

——S. 77—Notice not necessary.

No notice is necessary under the provisions of S. 77 in a suit against a Railway Company, for compensation for non-delivery of goods, where it is not certain that there has been any loss, destruction or deterioration and the goods may still be in possession of the Railway Company. A letter to the Agent of the Railway Company asking open delivery was held a perfectly good business notice. AIR (Vol 14) 1927 Oudh 478: 4 OWN 909 : 106 Ind Cas 311 (DB).

——S. 77—Where detention is not pleaded or put in issue a claim simply for compensation for non-delivery must be understood as including or involving a claim for the loss of goods within the meaning of S. 77 and notice is necessary. AIR 1922 Pat 106; AIR 1924 Nag 288. Diss. from. AIR (Vol 12) 1925 Oudh 419 : 12 OLJ 162 : 2 OWN 251 : 29 OC 80 : 89 Ind Cas 139.

——S. 77—Notice necessary.

Non-delivery constitutes 'loss' within the meaning of S. 77 and therefore the service of notice under the provisions of that section is essential even in cases of non-delivery : 3 PLT 215, not Foll. AIR (Vol 12) 1925 Pat 727 : 5 Pat 106 : 6 PLT 565 : 1926 P H C C 114 : 90 Ind Cas 374 (DB).

——S. 77—Notice necessary.

A claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of detention of the goods. Where detention is not pleaded or put in issue, a claim simply for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of S. 77. The word 'loss' used in S. 77 is wide enough to include all cases where the goods are not forthcoming and therefore includes a case of non-delivery. AIR (Vol 10) 1923 Cal 397 : 28 CWN 438 : 72 Ind Cas 714 (DB).

6. Notice.

See also S. 140 and Civil P. C., S. 80.

(a) Notice to whom.
See also Note 6 (d).
(b) Necessity of notice.
(c) Mode of service of notice.
(d) Notice to agent.
See also Note 6 (a).
(e) Sufficiency of notice.
(f) Notice must be proved.
(g) Contents of notice.

(h) Separate notices.
(i) Plea of notice.
(j) Second notice.
(k) Combined notice.
(l) Notice—By whom to be served.

(a) Notice to whom.

See also Note 6 (d).

——Ss. 77 and 140—Scope—Compliance with—What amounts — Notice to Chief Commercial Manager or Subordinate Railway Official—Sufficiency.

The requirements of S. 77 read with S. 140, Railways Act, are satisfied by serving a notice within the prescribed period on the Chief Commercial Manager or any other subordinate officer of a railway owned by the Government provided it is established as a fact that the railway company by its course of business or the terms of the contract between the parties has held out a particular official as competent to deal with the claims on receipt of notice to him. 50 Bom 84; 45 All 353, diss.; 5 Pat 488 Overruled. AIR (Vol 36) 1949 Pat 347 : 28 Pat 178 (FB).

——S. 77—Notice of claim — Validity—Notice given to officer who was expressly authorised to receive such notice only subsequently.

The question whether a particular officer is authorised by the Agent to receive notices on his behalf is a question of fact to be determined in each case. Agency may be proved by direct evidence of authority or by a course of conduct justifying the inference of authorisation. Where the Superintendent-General was in the course of the business always held out as the person competent to receive claims and enquire into them so as to lead the public to believe that he was the officer appointed to receive notices under S. 77 of the Railways Act, a notice of claim given to him is sufficient to bind the Railway Company in terms of that section even though he was expressly authorised to receive such notices only subsequent to the giving of such notice. AIR (Vol 35) 1948 Nag 17: ILR (1947) Nag 369 : 1947 NLJ 267.

——Ss. 77 and 140 — Notice — Validity — Railway owned and administered by Government — Notice of loss to General Traffic Manager — Sufficiency.

A notice in respect of loss of a consignment would be a valid notice under S. 77 read with S. 140, Railways Act, if given to the General Traffic Manager of the Railway administration which is owned and administered by Government. Such a notice would be in substantial compliance with Ss. 77 and 140. AIR (Vol 34) 1947 Bom 169 : 48 Bom LR 698 : 231 Ind Cas 367.

——Ss. 77, 140—Notice of claim—Service on Traffic Manager of Company, whether sufficient.

Notice required by Ss. 77 and 140 must be served on the agent of the company and not on the Traffic Manager. The mere fact that in practice claims such as the one put forward are dealt with by the Traffic Manager will not, by itself, be sufficient to make a notice to the Traffic Manager valid in law unless it is shown that the Agent had authorised the Traffic Manager to receive such notice on his behalf. AIR (Vol 18) 1931 Lah 606: 32 PLR 163: 133 Ind Cas 283.

——S. 77—Agent's power of delegation.

S. 77 read with S. 3, sub-S. (6) of the Indian Railways Act views the Agent of a railway as a principal and not as a delegate; and the maxim which prohibits, subject to certain exceptions, a delegation by a delegate, in other words, a second delegation, cannot be invoked for the purpose of preventing the principal himself from delegating his power. The doctrine is well recognized that whatever a person has power to do himself he may do it by means of an agent. Qui facit per alum facit per se. AIR (Vol 13) 1926 Lah 253 : 7 Lah 238 : 8 L L J 206 : 27 P L R 356 : 95 Ind Cas 808 (FB).

——S. 77—Notice served on Government.

Notice of a claim against a State Railway under S. 77 of the Act is effective if served on Government. AIR (Vol 4) 1917 Cal 640 : 44 Cal 16 : 23 CLJ 547 : 34 Ind Cas 130 (DB).

——Ss. 77 and 140 — Notice — Service on Officer other than Agent — Agent's knowledge of claim — Legality of notice—Maintainability of suit.

A suit against the Railway company is maintainable even though the notice is served on any officer other than the Agent provided that it is shown that the Agent had knowledge of the claim. (1911) 10 M L T 382 : 21 M L J 1061 : 12 Ind Cas 169.

(b) Necessity of notice.

——S. 77—Cases in which notice is necessary.

Hence, notice under S. 77 is essential in all cases of claims against a Railway Company for compensation except where the suit is for recovery of specific goods or for the recovery of money in consequence of the sale of the goods under S. 55 or S. 56 of the Act. 1950 A L J 41.

——S. 77—Notice under—Necessity for—Suit framed as for non-delivery — Allegation in plaint of loss of goods in transit.

Per F. B. — Where in a suit against the Railway Administration the plaint alleges that the goods in respect of which the claim is made had been lost in transit through the negligence on the part of the servants of the defendant company, the suit is liable to be dismissed for failure of the plaintiff to give the notice required by S. 77 of the Railways Act, although he may have framed the suit as for non-delivery.

Per Manohar Lall J. — It is the settled practice of the Patna High Court that in the cases where the plaintiff's suit is based upon non-delivery of the goods, he is not required to give a notice under S. 77 of the Railways Act. The plaintiff, however, takes a risk in not giving the notice even in cases of non-delivery, because if it is established during the course of the trial that the case is not a case of non-delivery but of loss, then the suit will fail on that ground alone. AIR (Vol 36) 1949 Pat 410 : 28 Pat 552 : 30 P L T 280 (FB).

——S. 77 — Notice for damages for loss of goods is mandatory.

The rule of procedure laid down in S. 80, Civil P. C. is mandatory and admits of no exceptions or implications. A suit against Secretary of State without service of notice under S. 80 is absolutely untenable. Notice under S. 77, Railways Act does not dispense with notice under S. 80, Civil P. C. if Railway administration was taken over by Government before the suit was instituted. AIR (Vol 34) 1947 Cal 26 : 225 Ind Cas 193.

——S. 77—Notice in anticipation.

A notice claiming overcharges upto to a certain date does not operate as notice for similar future claims. AIR (Vol 26) 1939 Nag 141 : 1939 N L J 124: 185 Ind Cas 241.

——S. 77—Notice — Necessity of.

No notice as required by S. 77 is necessary for a suit against a Railway Company for compensation for non-delivery or misdelivery of certain goods consigned to it, as the suit is not one for loss, destruction or deterioration. AIR (Vol 24) 1937 All 632: 1937 A L J 794 : 1937 A W R 613 : 171 Ind Cas 532 (DB).

——S. 77—Notice when necessary.

A notice under S. 77 is necessary only in the case of loss, damage or deterioration, as the wording of the section itself shows, but it is not necessary in a claim of non-delivery of goods consigned, where there has been no loss, damage or deterioration on account of such non-delivery. AIR (Vol 23) 1936 Nag 21 : 31 N L R 79 Sup : 161 Ind Cas 867.

——S. 77—Applicability—Notice, if essential.

Section 77 refers only to a claim to a refund to an overcharge or compensation for loss, destruction or deterioration of goods delivered to be so carried, that is to say, it refers to a suit against the carrier in his capacity as a carrier for the loss, destruction or deterioration of the goods. This section, therefore, refers to the special liability of the carrier as such; it has no application to the broad liability of the Railway Company as tort-feasors quite apart from their position of Railway carriers and therefore, no notice is necessary before bringing such a suit. AIR (Vol 21) 1934 Pat 507 : 1 B R 5 : 16 P L T 61 : 13 Pat 752 : 151 Ind Cas 995 (DB).

——S. 77—Necessity of notice under S. 80, Civil P.C.

Delivery or service of notice under S. 77 does not obviate the necessity of giving notice under S. 80, Civil P. C. AIR (Vol 20) 1933 All 53 : 1932 A L J 1033 : 143 Ind Cas 298.

——S. 77—Scope—C. P. Code, S. 80.

A notice under S. 77 would not dispense with the necessity of a notice under S. 80, C. P. Code. AIR (Vol 17) 1930 All 476: 124 Ind Cas 711 (DB).

——S. 77—Notice unnecessary—Estoppel of Railway Company.

Where a person whose goods were lost in transit sued the two railway companies by whom the goods were carried jointly, but gave notice to only one of them who forwarded the same to the other upon which, the other railway company made enquiries into the matter and sent reply to the owner of the goods admitting that the loss took place on their line but repudiating their liability on the basis of risk-note.

Held, that as the other railway had taken notice of the plaintiff's claim, made enquiries, and sent him a definite reply repudiating their liability, it would have been futile for the plaintiff to send any separate notice to them and this clearly estopped the railway from pleading absence of notice as a bar to the plaintiff's suit as against them. AIR (Vol 15) 1928 Lah 438 : 110 Ind Cas 718.

——S. 77—Where goods delivered to railway for carriage were delivered to consignee more than six months after delivery to railway and the consignee was overcharged at the time of delivery to him:

Held, that for the maintenance of the claim for this overcharge a notice under S. 77 was not necessary. AIR (Vol 13) 1926 All 698 : 49 All 236 : 25 A L J 89 : 97 Ind Cas 474 (DB).

——S. 77—Notice necessary.

Notice is necessary for a suit for damages on account of non-delivery, as well as on account of "loss" and notice under S. 77 is required whether or not the Railway Company strictly proves that the goods have been lost. AIR (Vol 13) 1926 All 686: 96 Ind Cas 604.

——S. 77—Notice necessary.

It does not make any difference for the purpose of the notice to be given by a plaintiff suing a Railway company, whether the suit is based on non-delivery or loss of goods consigned. A I R 1922 Pat 106, Dissented from. AIR (Vol 12) 1925 All 273 : 47 All 136 : 6 L R A Civ. 59 : 85 Ind Cas 474.

——S. 77 — Where Railway Company alleges non-receipt of articles.

Unless the Railway Company alleges and proves that the package had been lost, no notice would be necessary only on the ground that there had been loss to the consignor whatever may have happened to the package while in the custody of the Railway Company. Where goods have been delivered inadvertently to the wrong person by the Railway Company the case would be different from the case where the Railway Company denies receipt of a package. This enactment of the giving of notice is intended to enable a Railway Company to make enquiry promptly. Where however the Railway Company denies receipt of a parcel there can be no occasion for any inquiry as to what has happened to that parcel in transit and no notice is necessary. AIR (Vol 12) 1925 All 144 : 22 A L J 897 : 5 L R A Civ 665 : 80 Ind Cas 725.

——S. 77—Notice necessary.

Notice under S. 77 is required in all cases where the loss of goods is alleged. If the plaintiff alleges non-delivery without stating what the cause of non-delivery is, and it appears upon trial that in fact non-delivery was due to loss, then the plaintiff fails if he has not given notice under S. 77. A case for non-delivery may or may not be a case of loss. If it is a case of loss, then notice is required. A I.R. 1924 Nag. 288 Diss. A I R (Vol 12) 1925 Oudh 615 : 2 O W N 689 : 90 Ind Cas 572.

——S. 77—Notice necessary.

Notice under S. 77 of the Indian Railways Act is necessary not only in the case of claims for compensation arising out of loss, destruction or deterioration of goods but also in the case of claims arising out of non-delivery or willful mis-delivery. A.I.R. 1922 Pat. 106, Not foll. A I R (Vol 10) 1923 Nag 314: 19 N L R 139 : 73 Ind Cas 1033.

——S. 77—When there is a loss of consignment, notice of loss to the Railway Company under S. 77 is necessary before a suit for compensation is maintainable against the Railway Company. AIR (Vol 9) 1922 Lah 72 : 69 Ind Cas 548.

——S. 77—Notice not necessary.

Section 77 requires notice to be given to the Ry. Co. only in cases of "Loss, destruction or deterioration" of goods consigned to it. Notice will not be necessary in cases of non-delivery. A I R (V 9) 1922 Pat 106 : 1922 P H C C 145 : 3 Pat L T 215 : 69 Ind Cas 103.

——S. 77— Suit against Railway Company — Notice not served according to S. 77.

Where notice of a claim against a Railway Company was not served according to S. 77 and otherwise did not satisfy the requirements of S. 77, the suit against the Company must fail. (1912) 15 C L J 211 : 16 C W N 356 : 13 Ind Cas 509 (DB).

(c) Mode of service of notice.

——Ss. 77, 140 — Notice of claim — Notice actually given — Technical objection as to mode of service — Interference in second appeal.

The plaintiff sued the defendant company to recover the loss of certain piece-goods consigned to them to be delivered to the plaintiff. Although several letters were sent and ample notice was given by the plaintiff to the company so as to enable them to ascertain whether it was an honest claim, the company resisted the plaintiff's suit on the technical ground that no letter was sent to them by registered post so as to constitute legal notice under the provisions of S. 77 read with S. 140. The lower Appellate Court, considering the evidence on the point, came to the conclusion that letter was sent by registered post :

Held, that in view of the fact that the company was resisting plaintiff's claim on a highly technical point, the High Court would not inferfere with the lower Court's finding of fact. A I R (Vol 18) 1931 Cal 306 : 34 C W N 1079 : 132 Ind Cas 162 (DB).

——Ss. 77, 140— Sending notice by post — Registration.

Where notice of claim is given to a Railway by post, it must be forwarded in registered cover. The word 'may' in S. 140 means 'must.' (1910) 12 C L J 14 (14, 15) : 14 C W N 888 : 7 Ind Cas 241 (DB);

See also (1908) 12 C W N 450 : 35 C 194 (196, 197).

——S. 77— Notice, form of — How far knowledge of Company without notice enough.

In May 1890, H delivered to the East India Railway Company at Gaziabad 1,500 bags of wheat for carriage to Bombay. The Railway receipts for the consignments were sent to plaintiffs by H who drew hundis against the receipts. The plaintiffs accepted and in due course paid the hundis. On presentation of the receipts at Bombay, the Bombay Baroda and Central India Railway Company delivered 875 bags only and granted certificate of short delivery respecting the rest. On the 25th July 1898, plaintiffs wrote to the B. B. & C. I. Ry. asking for damages for short delivery. On the 22nd September 1898, the Railway Company wrote to the plaintiffs saying the Company was advised by the East Indian Railway Company to repudiate the claim and desiring plaintiffs to address further correspondence to the latter Railway Company. As a result of further correspondence, the B. B. & C. I. Ry., on the 27th October 1898, wrote to plaintiffs intimating that the E. I. R. Co., repudiated their claim. The plaintiffs did not write directly to the E. I. Ry. Co., and it was not alleged that a claim was ever preferred by them or on their behalf to the E. I. Ry. Administration Plaintiffs ultimately filed a suit to recover damages for short delivery :

Held, that the suit was barred by S. 77 as no claim on the E. I. Ry. Administration was preferred in writing by plaintiffs nor did the plaintiffs intended that the claim preferred by them to the B. B. & C. I. Ry. Co., should either be preferred by that Company on the E. I. Ry. Co., or be treated as a claim on the E. I. Ry. Co. Under S. 77 knowledge by a Railway Company is of no avail unless it be communicated to it in the prescribed mode. (1902) 4 Bom L R 495 (501, 502, 503) : 26 B 669 (DB).

(d) Notice to agent.

See also N. 6 (a).

——S. 77—Notice to "Manager."

The agent of the Eastern Bengal Railway is the Manager within the meaning of the Act, and the notice under S. 77 must be given to the Agent and not to the Traffic Manager. AIR (Vol 5) 1918 Cal 539: 21 C W N 751 : 38 Ind Cas 844 (DB).

——S. 77—Suit against Railway for loss of goods — Notice on Agent — Service on Goods Superintendent if sufficient.

Where in a suit against a Railway for loss of goods consigned, notice was served on the Goods Superintendent, but which never reached the Agent, the service of notice was bad and it affected the maintainability of suit for under S. 77 of Railways Act notice had to be served on the Agent. A promise by the Goods Superintendent to pay liquidated sum without the knowledge of the Agent is not binding on the Company. AIR (Vol 2) 1915 Cal 584 : 19 C W N 62 : 21 Ind Cas 970 (DB).

——Ss. 77 and 140 — Claim for damaged goods — Notice.

Notice of a claim under S. 77 of the Act in respect of goods delivered in a damaged condition must be served under S. 140 on the Agent and not on the Traffic Manager. (1913) 18 C L J 147: 17 C W N 1134: 19 Ind Cas 673 (DB).

——S. 77 — Notice to Traffic Manager if notice to Agent.

A notice to a Traffic Manager making claims on the Company is a claim preferred "to the Railway Administration" within the meaning of S. 77 of the Act and notice of the claim to the Traffic Manager is equivalent to notice to the Agent. (1912) 13 Ind Cas 297 (Ajmer).

——Ss. 77 and 140 — In the case of a Railway Company, the notice under S. 77 to be served under S. 140, must be on the Agent; but the notice need not be physically thrust in the Agent's hand. It is sufficient if it is found that the Agent had full knowledge of the notice. The notice to the Traffic Manager was sufficient where it was clear that the Traffic Manager in the claims department (settles) all claims and the Agent also referred to him claims for disposal. (1909) 13 C W N 24 : 4 M L T 427 : 3 Ind Cas 479 (DB).

——S. 77 — Notice of claim — Statement of fact in a letter — Evidence.

Held, that the notice of the claim must be in exact compliance with the terms of the section. It must, therefore, be delivered to the Agent at his office. The statement of a fact in a letter is not proof of the fact itself. (1907) 9 Bom L R 942 : 31 B 534 (543) (DB).

(e) Sufficiency of notice.

——S. 77—Notice of claim for compensation—Form and requisites — Mere letter intimating that goods had not arrived and asking that enquiries may be made—If sufficient as notice.

A mere letter by a consignee to the Railway Company stating that the goods had not arrived and asking that enquiries might be made, cannot be regarded as a notice satisfying the requirements of S. 77 of the Railways Act, when no claim for compensation was made in that letter.

The fact that in a short note to another Railway administration (G. I. P.) the Railway administration to whom the consignee's letter was addressed (S. I. R.) referred to the letter as if it were a claim cannot possibly amount to a proper notice to that Railway (G. I. P.) of a claim for compensation by the consignee.

Quaere.—Whether knowledge on the part of one Railway administration that notice had been served on another Railway administration can be sufficient to amount to a notice under S. 77 of the Railways Act. AIR (Vol 34) 1947 Mad 362 : 60 L W 95 : 1947 M W N 134 : (1947) 1 M L J 152.

——S. 77—Postal receipt of acknowledgment of document transmitted to Railway, inference from.

Because a certain postal receipt of acknowledgment has been filed by the plaintiff which purports to be with reference to some document transmitted to a Railway authority, it cannot be predicated with certainty that the document in question was a notice which fulfilled the requirements of S. 77. AIR (Vol 20) 1933 All 53 : 1932 A L J 1033 : 143 Ind Cas 298.

——Ss. 77 and 140—Dismissal of suit for want of proper notice.

If the notice given by the plaintiff in a suit against a Railway Administration substantially complies with the requirements of Ss. 77 and 140 of the Railways Act, the suit cannot be dismissed merely because the notice purported to be one under S. 80, Civil P. C., and the fact that a notice under S. 77, Railways Act, had been given was not mentioned in the plaint. AIR (Vol 19) 1932 All 381 : 1932 A L J 405 : 137 Ind Cas 205.

——S. 77—'Loss', whether includes non-delivery—Notice of claim—Merely forwarding copy of notice sent to another company, whether sufficient.

Section 77 contemplates that there should be a proper notice of the claim preferred in writing to the Railway Administration from which the compensation is sought or which is asked to settle the claim. Notice under S. 77 to one Railway Administration cannot avail a party for a claim against another Railway Administration.

The plaintiff consigned goods from Howrah (E. I. Railway) to Amritsar (N. W. Railway). The goods were lost owing to the neglect of the E. I. Railway. The plaintiff sent his claim under S. 77 to the Traffic Manager of the N. W. Railway holding it liable for damages and sent a copy of it to the Agent of E. I. Railway "for his information" :

Held, that there was no notice to E. I. Railway and the plaintiff's claim was, therefore, barred under

that section. AIR (Vol 18) 1931 Cal 585 : 35 C W N 338 : 134 Ind Cas 93 (DB).

——Ss. 77 and 140—Notice to Claims Superintendent. Notice of a claim against a Railway Company served on the Claims Superintendent of the Company, who generally settles such claim is not a sufficient notice under S. 140, unless it is proved that the officer was authorised by the Agent to receive such notices. AIR (Vol 4) 1917 Cal 103 : 20 C W N 696 : 38 Ind Cas 502 (DB).

——Ss. 77, 140—Claim for compensation for short delivery—Notice of claim on whom to be served—Service on Traffic Manager.

The notice of claim under S. 77 must be served under S. 140 on the Agent of the company. But the law does not require that the notice should be physically thrust in the Agent's hand. It is sufficient if it appears from the findings that the Agent has had full knowledge and notice of the claim. Where from the rules of the Railway Company it appeared that the Traffic Manager in the Claims Department settles all such claims and the Agent also refers to him his claims for disposal :

Held, that the notice to the Traffic Manager was sufficient. (1908) 13 C W N 24 (25, 26) : 4 M L T 427: 3 Ind Cas 479 (DB).

——Ss. 77, 140—Goods lost in transit — Notice of claim—Sufficient notice.

Notice of claim for goods lost in transit given to Railway Company A with whom they were originally booked is not sufficient notice within Ss. 77 and 140 to Railway Company B on whose line the goods were subsequently lost. (1907) 12 C W N 165 (166) (DB).

(f) Notice must be proved.

——S. 77—Railway company admitting loss of goods —Validity of notice of claim—If material.

An admission by the Railway Company of the loss of goods dispenses with the enquiry into the validity or invalidity of the notice of claim made by the plaintiff, since S. 77 of the Railways Act is only intended to give an opportunity to the Railway Company to make satisfactory investigation. AIR (Vol 35) 1948 Nag 17 : ILR (1947) Nag 369 : 1947 N L J 267.

——S. 77—Evidence Act — S. 114.

There was evidence of the plaintiff's son that notices were sent by registered post to the Agents of all three Railways; and there was on the record the registered receipt of the Agent of the B. N. Railway, and plaintiff swore that the receipt was for the notice sent and there are letters on the record from the B. and N. W. Railway actually making an admission that they were prepared to pay a small sum in full satisfaction of the plaintiff's claim.

Held, it seems impossible to hold that notice was not sent within the meaning of S. 77 of the Act. AIR (Vol 10) 1923 All 145 : 4 L R A Civ 48 : 73 Ind Cas 440.

——S. 77—Notice of claim—Proof of—Offer by Railway Company to pay—Estoppel — Limitation Act, Art. 31.

For a suit for compensation for non-delivery of goods consigned to a Railway Company for carriage, notice of claim as contemplated in S. 77 must be proved. The fact that an offer was made by Railway Company to pay a certain amount in satisfaction of the plaintiff's claim would not estop the Railway Company from raising the plea of notice. (1911) 33 All 544 : 8 A L J 543 : 10 Ind Cas 122 (DB).

(g) Contents of notice.

——S. 77—S. 77 merely requires that a demand for compensation shall be made but it nowhere prescribes that the money value of the claim shall be stated. S. 77 does not require the claimant to notify that he intends to bring an action. It merely requires that a claim for compensation should be preferred. It might have been otherwise if the statute had expressly required that notice of action shall be given as in certain classes of suits referred to in the Civil Procedure Code and the Bengal Wards Act. AIR (Vol 11) 1924 Pat 98 : 3 Pat 76 : 5 P L T 42 : 1923 P H C C 284 : 74 Ind Cas 993 (DB).

——S. 77—Section 77 merely requires that a demand for compensation must be made and does not enact that the money value of the claim must be stated in the notice of demand. AIR (Vol 12) 1925 Nag 405: 89 Ind Cas 490.

(h) Separate notices.

——S. 77 and C. P. Code (V of 1908), S. 80 — Notice under S. 80, C P. Code—If sufficient for purpose of S. 77, Railways Act also.

Two separate notices, one under S. 80, C. P. Code and another under S. 77 of the Railways Act would be necessary before a plaintiff can sue a Railway Company for compensation for loss, destruction or deterioration. 1950 A L J 41.

——Ss. 77, 140—Notice under S. 80, Civil P. C., on Collector — Whether dispenses with notice under S. 77, Railways Act.

For purposes of S. 77, a notice to a Collector under S. 80, Civil P. C., cannot be considered to be a notice to the Government, in the case of a State Railway. Two separate notices are necessary before the suit can be maintained. AIR (Vol 22) 1935 All 900 : 1935 A L J 908 : 1935 A W R 1010 : 156 Ind Cas 541 (DB).

(i) Plea of notice.

——S. 77 — Plea as to absence of notice cannot be taken for the first time in second appeal. AIR (Vol 10) 1923 Lah 609 : 72 Ind Cas 779.

(j) Second notice.

——S. 77—Notice properly given — Railway taken over by Secretary of State—No second notice necessary.

The plaintiff, who consigned at Bombay some goods, brought a suit against the G.I.P. Ry. Co., and the Secretary of State for loss of goods in transit. He gave a notice, as required under S. 77, Railways Act, within six months of the loss, that is, on 20th February 1925. The Railway Administration was taken over by the Secretary of State for India on 1st July 1925, and the suit was filed on 18th August 1925. It was contended that the suit was bad by reason of the want of notice under S. 80, C. P. Code.

Held, that the contention could not be upheld as the Secretary of State having taken over the administration of the Railway Company stood in the shoes of the Railway Administration which he took over and, therefore, the suit which was good against the Railway Administration was also good against him. AIR (Vol 15) 1928 Mad 599: 1928 MWN 218: 109 Ind Cas 406.

(k) Combined notice.

——S. 77 — Combined notice under S. 77 and C. P. Code, S. 80 can be given.

In the case of a State Railway it is open to a party to give a combined notice which would satisfy all the requirements of S. 77, Railways Act, and S. 80, C. P. Code. But if a party does not do that he must give a notice under S. 77 within six months in order to enable him to claim compensation for loss of goods and he must also give a notice under S. 80, C. P. Code in order to enable him to file a suit against the Secretary of State. AIR (Vol 15) 1928 Mad 599 : 1928 M W N 218 : 109 Ind Cas 406.

——S. 77—Goods consigned over several railways—Notice only to one—Liability of others.

The plaintiff consigned certain goods to be carried along three Railways. By mistake of one Railway they were taken to a wrong place from which place they were at last brought back in damaged condition.

The plaintiff gave notice within six months to one of the Railways and after six months to the others. The plaintiff contended that no notice was necessary as the Railways were guilty of tortious act and the Small Cause Court referred the question to the High Court for opinion whether notice under Section 77 was necessary.

Held, that the plaintiff could not recover damages from the Railways to which he has failed to give notice within six months as required by Section 77 : that the company which had received notice within time was not liable for the mistake of the Railway which gave the plaintiff cause for claiming damages; that the diversion of goods by one of the Railways amounted to a breach of contract; it could not be called a tortious or wrongful act. Section 77 applies to the plaintiff's claim for damages as it deals with "claim for deterioration of goods delivered to be carried by Railway," under which class his claim falls. A I R (Vol 9) 1922 Bom 157 : 46 Bom 176 : 23 Bom L R 866 : 64 Ind Cas 390 (DB).

(l) Notice—By whom to be served.

——S. 77—Under Section 77 of the Railways Act, read with Section 140 of that Act, it is not absolutely necessary that a person who puts forward a claim against the railway should himself give notice to the manager or agent of the Railway; but if he elects to take the risk of giving the notice to any person other than the Manager or the Agent, it is necessary for him to show that the notice was delivered on his behalf to the proper person, that is to say, to the Manager or the Agent as the case may be within six months. AIR (Vol 12) 1925 Sind 62 : 78 Ind Cas 735.

7. Object.

——S. 77—Notice—Object of.

The object of S.77 is to prevent stale and dishonest claims for loss and not as a means to enable the Railway authorities to deprive their customers of just dues; but the Railway authorities are entitled to have due notice of the total extent of the claim preferred against them. AIR (Vol 26) 1939 Nag 141: 1939 N L J 124 : 185 Ind Cas 241.

——S. 77—The object of S. 77 is to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It is intended as a weapon of defence against fraud not as a means to enable the railway authorities to deprive their customers of their just dues. AIR (Vol 17) 1930 Cal 332.

——S. 77—The object of S. 77 is to give the company prompt notice of the claim so as to prevent stale claims and to enable it to make prompt enquiry. AIR (Vol 9) 1922 Mad 362: 42 M L J 202 : 45 Mad 135 : 30 M L T 112 : 14 M L W 684 : 1921 M W N 878: 69 Ind Cas 59 (DB).

8. Overcharge.

——S. 77—Applicability — "Overcharge"—Meaning —Freight paid by consignor before booking and collected again from consignee at destination by mistake — Suit by consignee for refund — Notice — Necessity — Double collection of freight — If overcharge.

Where freight in respect of goods consigned by a Railway Company is prepaid by the consignor before they are booked, but owing to the non-receipt of the railway receipt, the consignee is made to pay the freight again at destination, the consignee being ignorant of the prepayment of freight by the consignor, a suit by the consignee for recovery of the freight paid by him by mistake is not barred by reason of failure to give a notice under S. 77, Railways Act. The amount sought to be recovered is not in the nature of an overcharge within the meaning of S. 77 of the Act, and hence no notice under that section is necessary. The amount can be recovered under S. 72 of the Contract Act, as money paid under a mistake.

Ayyar, J.: "Overcharge" in S. 77 must be interpreted in its natural and ordinary sense of charge in excess of that prescribed or permitted by law. (1947) 13 Cut L T 60 (DB).

——S. 77—Rate of consignment at despatch—Higher rate at destination — Suit for refund on ground that Chief Traffic Manager has given lower rate.

When the clerk at the place where the consignment was booked stated that the consignment would be charged at a certain rate per maund, it is open to the consignor not to consign the goods at all. If no further amount is demanded at the place of destination before delivery of goods, the consignor cannot then sue for refund of the excess amount on the ground that the Chief Traffic Manager had given him a lower rate per maund. AIR (Vol 30) 1943 All 158 : ILR (1943) All 223 : 1943 A L J 1 : 1943 A W R 8 : 206 Ind Cas 372.

——S. 77—Overcharge, claim for.

Section 77 assumes the possibility of claims for overcharge, but where such a claim lies in law, then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act; it only cuts down the remedy in cases where claims would lie according to the general law. AIR (Vol 26) 1939 Nag 141 : 1939 N L J 124 : 185 Ind Cas 241.

——S. 77—"Overcharges," what are.

An overcharge is simply a charge of more than is permitted by law. The word should be interpreted in a wide sense. AIR (Vol 26) 1939 Nag 141: 1939 N L J 124 : 185 Ind Cas 241.

——S. 77—An overcharge is a charge of more than is permitted by law. As such it is not confined to an overcharge recovered before the delivery of the goods to the consignee at destination, but must necessarily cover a case of an overcharge which might be discovered on reweighment, or in other words which the Company is not permitted by law to keep to itself in good conscience whenever recovered. AIR (Vol 14) 1927 Nag 77 : 100 Ind Cas 406.

——Ss. 77, 140 - Consignment—Overcharge.

The plaintiffs sued the defendant Railway Company to recover the excess amount claimed and received by the Company as carrier after the delivery of the goods to the consignee.

Held, that the notice prescribed by S. 77 was necessary the overcharge referred to in the section is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination; Held further, that the delivery of a latter under S. 140 must be in exact compliance with the terms of the section and it must be delivered to the Agent at his office. (1907) 9 Bom L R 942 : 31 Bom 534 (543).

——S. 77—Railway Company — Receipt of goods by one company for carriage over its own and another company's line—Liability in respect of overcharge made by delivering company — Bye-laws— Power of Railway Company to alter the principle of calculation of rates: -See 1907 A W N 21 : 4 A L J 80 : 2 M L T 42 : 29 All 228 (231, 232) (FB).

9. Scope.

——Ss. 77 and 140—Relative scope and object of.

Section 77, Railways Act, is obviously a limitation section, while S. 140, is merely an enabling section; the word "may" in the section does not mean "must." The object of the notice on the manager is simply to give an opportunity to the railway administration that they may inquire immediately into a claim. AIR (Vol 36) 1949 Pat 347 : 28 Pat 178 (FB).

——S. 78.

——S. 78 (2)—False declaration— S. 78 (2), if applies —Consignor, if debarred from recovering more than value of goods.

Where the declaration given for the purposes of S. 75 is false and when that representation is the basis of calculation of percentage payable by way of compensation for increased risk, this is material part of the declaration account and description of the goods and hence the second part of S. 78 applies and the consignor cannot recover more than the value of goods actually lost in accordance with the valuation. AIR (Vol 23) 1936 Pat 393 : 2 B R 633 : 17 P L T 268 : 15 Pat 394 : 163 Ind Cas 685 (DB).

—S. 80.

1. **Agreement between railways.**
2. **Form of suit.**
3. **Liability of railways.**
   See also Ns. 1, 5 and 7.
4. **Non-delivery.**
5. **Open delivery.**
6. **Parties to appeal.**
7. **Proof of loss or damage.**
8. **Principle and scope.**
9. **Suit for refund of overcharges.**

1. Agreement between railways.

——S. 80 — Agreement between two companies — Liability.

Notice of an agreement between two Companies that each is responsible to the other but not to the public would not relieve the Company with whom the goods were at the time of loss from liability to the public. 233 P L R 1912 : 111 P R 1912 :224 PWR 1912 : 15 Ind Cas 12 (DB).

2. Form of suit.

——S. 80— Frame of suit — State-owned railway — Suit against—Proper form of—Suit against Governor-General merely—Propriety of.

Under the Railways Act, the scheme is that a plaintiff suing for compensation for loss must sue a particular railway administration. In the case of state-owned railways the notice to the railway administration would include the Government; similarly a suit against a railway administration would also include the Government, but not vice versa. Merely suing the Governor-General as representing the entire state-owned railways (at least before the Indian Independence Act) is not a proper form of suit. That would render S. 80 otiose and meaningless, as such a suit does not make the railway administration a party to the suit. AIR (Vol 37) 1950 Nag 85 : ILR (1950) Nag 212 : 1950 N L J 128 (DB).

3. Liability of railways.
See also N. 1, 5 and 7.

(a) Where booked or where loss occurred.
(b) Where loss caused is not known.
(c) Option to plaintiff.

(a) Where booked or where loss occurred.

——S. 80 — Receiving Railway different from delivery Railway — Relative positions of — Damage to goods while in the possession of the delivering railway — Delivering railway, if and when liable.

Under S. 80 of the Railways Act the receiving railway is the principal and the delivering railway is its agent and the delivering railway can therefore be held liable for damages only if it is responsible for it. Where goods were handed over to one railway for delivery to the consignee at a station on a different railway and the goods were damaged by fire while in the possession of the delivering railway, held, that in the absence of proof of negligence the latter Railway was not liable. AIR (Vol 33) 1946 Mad 227 : (1946) 1 M L J 68 : 1946 M W N 58 : 59 L W 39 : 225 Ind Cas 481.

——S. 80 — Goods consigned at railway of one administration and delivered at railway of another administration — Their liability for loss of goods is joint and several.

Where goods are consigned at the railway of one administration and are carried over and delivered at the railway of another administration both the administrations are jointly and severally liable. Therefore the former is equally liable to make good the loss by payment of compensation to the same extent as the latter. AIR (Vol 33) 1946 Pat 336:223 Ind Cas 236 : 12 B R 348 (DB).

—— S. 80—Essentials for liability.

When goods are delivered to one railway administration to be carried by it and beyond its limits by another, the other railway administration can only be sued if the "loss" occurred on its railway. AIR (Vol 13) 1926 Lah 116 : 6 Lah 499 : 26 P L R 853 : 92 Ind Cas 332 (DB).

——S. 80—Both Railways responsible.

Goods were booked on A Railway to be sent to a station on B Railway. Goods were despatched but the invoice relating thereto was not sent to B railway for over six months. As the goods were lying, they deteriorated and the consignee sued for damages. B Railway too did not take care to ascertain whose goods they were.

Held, that both Railways are liable. AIR (Vol 13) 1926 Pat 395 : 1926 P H C C 220 : 96 Ind Cas 1037 (DB).

——S. 80—Negligence — Compensation — Liability of one Railway for loss taking place on another Railway.

If a Railway Company receives goods for carriage over a foreign Railway, it is liable for loss of the goods though the loss did not occur upon their line. Certain packages were delivered to a Railway Company for carriage to Howrah. The consignor signed a risk note whereby the Company was not liable except for wilful negligence. The doors of the waggons being carelessly fastened, some of the packages were lost. Held, that the Company were liable for the loss. (1910) 7 A L J 833 : 7 Ind Cas 160 (DB).

——S 80—Goods consigned to one Company—Goods transmitted through another Company to destination — Short delivery — Liability.

Where goods are accepted by a Railway Company for delivery at a particular place and have to be transmitted through other Railway Companies before they reach their destination, these latter companies are not liable for short delivery, unless the goods are proved to have been lost by them or the company which accepted the goods and issued the ticket did so as partners or agents of the other companies also. The mere fact of the companies being in the habit of issuing tickets and receipt does not make them partners or agents. (1901) 3 Bom L R 260 (267, 268).

(b) Where loss caused is not known.

——S. 80—Through booking Goods found damaged at destination—Remedy of consignee.

Certain goods were delivered to the Bengal Nagpur Railway for carriage to a station on the South Indian Railway. When they arrived at the destination, it was found that they were in a damaged condition. The consignee sued the South Indian Railway for damages. It appeared that the goods had to pass through other Railways and there was no evidence to prove at what stage of the transit the damage occurred :

Held, that where there is no evidence to prove on which Railway the damage occurred, the plaintiff's remedy under S. 80 was to sue the Railway to which the goods were delivered. The action against the South Indian Railway was not maintainable AIR (Vol 21) 1934 Mad 652 : 40 L W 625 : 1934 M W N 1127:151 Ind Cas 774.

——S. 80 — **Where loss occurred not known.**

Where goods were handed over to B. N. Ry. and travelled over E. I. Ry., O. R. Ry. and B. N. W. Ry. also, but it was not proved that the loss was caused while passing over the latter, held, B. N. Ry are liable for the damage caused to the goods. AIR (Vol 10) 1923 All 145 : 4 L R A Civ 48 : 73 Ind Cas 440.

(c) Option to plaintiff.

——S. 80—Scope—Option of plaintiff—Suit against agent railway without impleading contracting railway—Burden of proof.

In the case of a consignment of goods booked through over the railways of two or more railway administrations each Railway Administration has to be treated as a separate entity with separate existence and personality. The injured party has an option to sue either the railway administration with whom the contract was made or the railway administration on whose railway the loss occurred. The administration with whom the contract has been made is the principal and the other railway merely acts as agent of the principal. Section 80 saves the agent unless the agent is responsible for the loss. But a plaintiff who, having his rights against the principal, that is to say, the administration with whom he entered into the contract, chooses to omit that administration and sues only the agent administration undertakes a burden which he must discharge strictly. AIR (Vol 37) 1950 Nag 85:I L R (1950) Nag 212:1950 N L J 128 (DB).

——S. 80—Goods carried over different railway administrations — Short delivery — All the administrations concerned—If liable.

It is not correct in law to say that where a consignment of goods have to traverse different railway administrations in order to reach its destination, all the railway administrations concerned in the carriage of goods are jointly and severally liable for any loss that has occurred. There is no warrant for this conclusion in the provisions of S. 80 of the Railways Act. That section gives the owner of the goods the choice of claiming his remedy for short delivery either against the railway administration to which the goods were consigned or against the railway administration on which the loss occurred. The remedy is alternative, and not cumulative. A railway administration to which the goods were not consigned or on which the loss did not occur cannot be sued for damages for short delivery on the basis of the doctrine of agency or of partnership. AIR (Vol 36) 1949 Pat 329 : 27 Pat 996 (DB).

——S. 80—In a suit for compensation for loss of through-booked goods involving transit over two or more railway administrations, it is open to the plaintiff to sue either the company with whom he originally made the contract for the carriage of goods or the company actually responsible for the loss of goods. Where the plaintiff has chosen to sue the latter, it is not competent to the defandant that the other company ought to have been as well impleaded It is open to the defendant for themselves to take proper steps to bring in the other Railway Company (i.e. the company with whom the contract was in the first instance entered into) as a party who might be liable in the alternative to themselves or as a party liable to indemnify them against any loss which they might suffer by reason of being obliged to pay compensation to the plaintiff. Apart from this course, they can only confine themselves as against the plaintiff to the merits of the case regarding their own responsibility for the alleged loss of goods. AIR (Vol 18) 1931 Cal 306 : 34 CWN 1079 (DB).

——S. 80 — Although S. 80 gives plaintiff the option to sue any of two companies through whom the goods have been carried, it by no means prohibits him from impleading both the companies in a suit. Indeed, in many cases it may be difficult for the plaintiff to know before the institution of the suit on which line the loss actually occurred. AIR (Vol 17) 1930 All 132: 1930 ALJ 297 : 121 Ind Cas 828 (DB).

——S. 80—When a consignment is to run over two consecutive railways the first railway to which the goods are consigned is the agent of the second railway by which the goods are to be delivered to the consignee, who has a right of suit against both for any loss occurred as the principal is ordinarily liable for the negligence of his agent. AIR (Vol 11) 1924 Pat 811 : 75 Ind Cas 18.

——S. 80—Consignment of goods—Loss.

Where goods were consigned at a station under one Railway Administration and the loss of the goods consigned occurred at a place under another Railway administration, a suit for damages for the loss of the goods can be brought against either of the Railway Administrations. AIR (Vol 1) 1914 All 524 : 12 ALJ 339 : 25 Ind Cas 77.

4. Non-delivery.

——S. 80—Through booking—Mere non-delivery of goods, whether amounts to 'loss'—Refusal of consignee to take delivery unless condition of bags is noted —Duty of company.

A consignment of goods was sent from Mysore in the Mysore Railway to Palghat in the S. I. Ry. The consignee, on examining the bags at Palghat, found that the bags had been tampered with and refused to take delivery unless the bags were re-weighed and their condition was noted and a record of the condition of the bags was handed over to him. The clerk refused to accede to this demand and the goods were sold by the Railway Company. The consignee then sued the S. I. Ry. Co. for value of the consignment and damages for loss of profits :

Held, (1) that the refusal of the Railway Co., to deliver the goods on the consignee's terms was not a loss within the meaning of S. 80 and the liability in respect of the goods arose from breach of contract and not from a tort, and the plaintiff was, therefore, entitled to sue only the Company to whom the goods were consigned, viz., the Mysore Railway.

(2) that the request of the consignee to give him a record of the condition of the bags was not a reasonable request and the S. I. Ry. Co. were not guilty of any breach of duty in refusing delivery under these conditions. AIR (Vol 23) 1936 Mad 878 : 44 LW 313: 71 MLJ 325 : 1936 MWN 979 : 164 Ind Cas 903.

——S. 80—Claim for compensation for non-delivery of goods—Against whom to be made.

A suit under S. 80 for compensation for loss may be brought either against the company with whom the contract for carriage was directly made or against the Railway Administration on whose railway the loss occurred. If the latter course be taken, it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant to the suit. AIR (Vol 20) 1933 Pat 45 : 13 PLT 695 : 12 Pat 67 : 141 Ind Cas 813 (2) (DB).

——S. 80—Carriage of goods—Non-delivery —Different Railways carrying goods—Consignment — Bags torn—Refusal to re-weigh.

Where the consignment was booked in one Railway and was to be delivered at a station belonging to another Railway, the latter were agents of the former and are not liable to be sued for non-delivery. Where the consignee on finding the bags loose and torn, requested the Railway staff to re-weigh them and on refusal by the staff did not take delivery or pay freight. Held, that railway authorities were right in selling the bags after due notice to the consignee. The plaintiff's suit for damages was unsustainable. (1913) 11 ALJ 775 Note : 21 Ind Cas 428 (DB).

5. Open delivery.

——S. 80—Open delivery— Consignment not hampered with – Damage.

Where the consignment was intact so far as the seals and package was concerned but some little metal clips on the edges were loose, the plaintiff could not compel the Railway Company to give open delivery, though there may be some difference in weights and so the Company's refusal to give such open delivery did not make it liable for damages. (1913) 11 ALJ 772 : 21 Ind Cas 448.

6. Parties to appeal.

——S. 80—The plaintiff had a bale of cloth consigned from Bombay to Daltonganj. The bale of cloth was never delivered and he instituted a suit joining the G. I. P. Railway Co. and the E. I. Railway Co , as defendants since part of the route from Bombay to Daltonganj would lie over the E. I. Railway. In the plaint the plaintiff stated that the non-delivery was due to the wilful negligence and misconduct on the part of the employees of the railways. The suit was dismissed and in the appeal by the plaintiff, he made only the E. I. Ry. Co., as respondent. There was no finding and allegation that the bale was in fact lost in course of transit on E. I. Railway.

Held, that the contract being with the G. I. P. Railway Co., and the complaint being that the goods had not been delivered, the E. I. Ry. Co. alone could not be made liable, and therefore, the G. I. P. Ry. Co. was a necessary party to the appeal. AIR (Vol 14) 1927 Pat 344 : 6 Pat 105 : 8 PLT 358 : 100 Ind Cas 889 (DB).

7. Proof of loss or damage.

——S. 80—Goods consigned for transport over two railways—Evidence showing loss of goods on the railway of the delivering company—Suit for compensation under S. 80 is maintainable against delivering company.

When goods have been consigned for transport from one place to another over two railways and there is evidence to show that they reached a particular midway station from where the jurisdiction of the delivering railway company commences and they were duly handed over to delivering company in good order and the goods have not reached the destination, the only possible conclusion is that the goods were lost and that they were lost on the railway of the delivering company. A suit claiming compensation in respect of short delivery is, therefore, maintainable against the delivering company under S. 80. AIR (Vol 33) 1946 Mad 133 : 1945 Mad M N 667 : 1945-2 Mad L J 448 : 58 Mad L W 592.

——S. 80—Damage to goods in transit—Suit against two companies for damages—Proof.

Where a suit for recovery of damages on account of the damage caused to the consignment is instituted against two Railway companies under S. 80, Railways Act, one of them being one on whose Railway the goods were delivered by the plaintiff and the other being one on whose Railway the damage has occurred, and the suit fails against one of the defendants, the plaintiff can only succeed against the other company if they are able to show that the goods were damaged while they were in transit on the line of that company. AIR (Vol 26) 1939 Cal 377 : 189 Ind Cas 56.

——S. 80—Burden of proof.

Where plaintiff sues only one out of many Railway Companies over whose lines the particular goods passed, he must prove that the defendant Company is responsible for the damage or loss. AIR (Vol 9) 1922 All 514: 44 All 763: 20 ALJ 761 : 68 Ind Cas 961 (DB).

——S. 80—Carriage of goods by different Railways—Loss of goods—Liability of particular Railway.

Where goods carried by different Railways were lost in the course of the transit, it is necessary for attaching liability on any particular Railway to prove that the loss occurred on the line of that Railway. AIR (Vol 1) 1914 Cal 623 : 19 CLJ 434 : 23 Ind Cas 22 (DB).

——S. 80—'Deterioration'—Meaning of.

"Deterioration" in S. 80 included decrease in market value consequent on detention. 233 PLR 1912 : 111 P R 1912 : 224 PWR 1912 : 15 Ind Cas 12.

8. Principle and scope.

——S. 80—Principles and scope of.

The principle underlying S. 80 is that the Railway which takes delivery of goods with an undertaking to carry it safe is an agent for the Railway over which the goods have to pass in order to reach its destinction and vice versa. The consignor is a third person. He contracts with the particular Railway to deliver to him at a particular station the goods consigned and the arrangement of carrying the goods is between the Railways over which the goods have to pass and has nothing to do with the consignor. AIR (Vol 20) 1933 Pat 630 : 148 Ind Cas 396.

9. Suit for refund of overcharges.

——S. 80 — Where goods are carried over two railways, and the transferee railway overcharges the goods, a suit to refund does not lie against transferring railway. 97 Ind Cas 474 : 49 All 236 : 25 A L J 89 : AIR (Vol 13) 1926 All 698 (DB).

——S. 80—Receipt of goods by one Company for carriage over its own and another company's line—Liability in respect of overcharges made by delivering Company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates.

Two waggon loads of chillies were received by the Station Master at Bezwada on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsular Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsular Railway Company's Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges.

Held, that the contract for carriage of the goods for the whole distance was one entire contract with the receiving Company who were liable for the overcharge, if any, wrongfully demanded from the consignees.

Held also, that a bye-law of the Great Indian Peninsula Railway Company which reserved to the Railway the right of remeasurement, reweighment recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered, any amount that may have been omitted or undercharged did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of waggon rates. 1907 A W N 21 : 4 A L J 80 : 2 M L T 42 : 29 A 228 (231, 232) (FB).

——S. 82A.

——S. 82A—Liability for negligence of the Railway Company if the door of a carriage is open – Breach of statutory duty—Railway Company bound to carry passengers inside the carriage—Putting an arm on the window sill of a carriage amounts to contributory negligence.

If the door of a carriage of a Railway Company is open, it is evidence of negligence on the part of the Company but not conclusive proof of it. Where there is a statutory obligation. any breach of that which causes an accident is conclusive against the defendant, apart from special proof of negligence. But the breach of the duty must in itself be the cause of the accident, and the rule does not extend so far as to

exclude the defence of contributory negligence. A Railway Company contracts to carry passengers inside and not outside their carriages. A passenger who puts any part of his person outside the carriage of a Railway Company in which he was travelling and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage, but of contributory negligence which disentitles him to recover against the Company, provided that no matter what negligence the Company has been guilty of that could not have caused the passenger any injury so long as he remained inside the carriage. (1909) 12 Bom L R 73 : 34 B 427 (439, 440) : 5 Ind Cas 676.

——S. 84.

—— S. 84 – Rules under.

The railway police, if they have completed an investigation before the time mentioned in the proviso to sub-R. 1 to R. 26 under S. 84, Railways Act, are not impliedly prohibited from exercising the ordinary powers which the officer in charge of a police station has of making a report as to the result of his investigation under S. 173, Cr. P. Code. The provisions of the Criminal Procedure Code apply, unless there is anything in any enactment for the time being in force regulating the manner of investigating offences connected with railway accidents to the contrary. There is nothing that clearly frustrates the authority of the police officer mentioned in S. 173, Cr. P. Code who has completed his investigation at the time an enquiry under R 20 is commenced or ordered. 109 Ind Cas 487 : 52 Bom 238 : 30 Bom L R 392 : 29 Cr. L J 551 : 10 A I Cr R 308 : A I R (Vol 15) 1928 Bom 162 (DB).

——S. 84. – Power of Magistrate to inquire about heirs of deceased Railway servant

The Railways Act does not empower a Magistrate to make an inquiry as to the true heirs of a deceased Railway servant. 10 S L R 64 17 Cr L J 368 : 35 Ind Cas 672 : AIR (Vol 3) 1919 Sind 34.

——S. 100

——S. 100—Rule 100 — Object of rule — Breach—Punishment.

The object of S. 101 and rule 100 is to lessen the risk of accidents through shunting on a through line after the line-clear has been given, and a breach of the rule will render the rule-breaker liable to punishment even though no accident might have occurred. In determining the punishment, the gravity of the offence should be estimated not by the ultimate consequences but by the risk involved. (1913) 37 Bom 685 : 15 Bom L R 702 : 14 Cr L J 460 : 20 Ind Cas 620 (DB).

——S. 100—Procedure under first part of S. 100—Conviction under second part.

The Magistrate proceeded against an accused as if the case was under the 1st part of S. 100, Railways Act, and eventually convicted him under the latter part of S. 100 which was a warrant case ; the procedure for warrant cases was not however followed. The conviction was illegal. (1909) 5 M L T 204 : 11 Cr L J 191 : 4 Ind Cas 1115 (DB).

——S. 101.

——S. 101 — Station master satisfying himself that all points were correctly set – Goods train allowed to pass on to loop line—Train going into blind siding and collision caused—Offence.

A station master of a wayside station, after receiving an "all right' signal allowed a goods train to pass over the loop line even though the main line was clear. On the day in question, before the goods train was allowed to run on to the loop line, point No. 2 on this line was not properly adjusted with the result that the train ran into a blind siding and collided with two trucks there. As a result of the collision, considerable damage was done and the driver and certain persons on the goods train sustained simple injuries :

Held, that in allowing the goods train on to the loop line, the station master did nothing to endanger the safety of any person as the loop line was clear. The switching of the train on to the loop line was not the proximate cause of the accident. Though according to the rules the station master must be satisfied that the points are correctly set before he allows a train on to the loop line, it is not the duty of the station master himself to go and examine the points and see for himself that they are correctly set before allowing a train to proceed on to the loop line. He has to trust the pointsman, and the practice is to receive a signal from the pointsman that the points are all correctly set before allowing the train on to the loop line. AIR (Vol 23) 1936 All 745 : 1936 A L J 951 : 1936 A W R 877 : 38 Cr L J 227 : ILR (1937) All 133 : 166 Ind Cas 455.

——S. 101, R. 187, Cl. 8 (3)—Station Master opening lock but leaving it unlocked — Assistant Station Master relieving him, if guilty.

Where, a Station Master opens a lock but leaves it unlocked when he is relieved by the Assistant Station Master and there is nothing to make the Assistant Station Master know that it is left unlocked, he cannot be guilty of an offence under S. 101, Railways Act. AIR (Vol 22) 1935 All 121 : 36 Cr L J 630 : 4 A W R 1413 : 154 Ind Cas 1059.

——S. 101 (c) —Duty of driver.

An engine driver of a Railway train is not bound to stop a train merely because way-farers shout to him. AIR (Vol 20) 1933 Pat 94 : 34 Cr L J 576 : 148 Ind Cas 220.

——S. 101 (a)—Rules under R. 101—Non-compliance —Prosecution of driver—Evidence of fireman.

When an engine-driver is prosecuted under S. 101, Railways Act, for breach of R. 101 for disobedience of the guard, the mere ground that the fireman is subordinate of the driver does not render the former's evidence worthless, but he is to be treated as an important witness in the case, AIR (Vol 20) 1933 Pat 94: 34 Cr LJ 576: 143 Ind Cas 220.

——S. 101 (a)—Rules under, R. 131—Duty of driver —Minor bridges.

It is not fair on the happening of an accident to charge a driver with breach of S. 101 on the ground that the accounts and engineering departments regard comparatively small bridges as major bridges, inasmuch as engine derivers regard R. 131 as being applicable to important bridges. AIR (Vol 20) 1933 Pat 94: 34 Cr LJ 576: 143 Ind Cas 220.

——S. 101 — Charge under — Conviction on other count not charged—Legality.

Where a person is charged under S. 101, Railways Act, for disobedience of Railway Rules requiring him to stop the engine near the signal, he cannot be convicted for disobeying rules regarding the vacuum to be maintained in the engine. AIR (Vol 20) 1933 Sind 225: 35 Cr LJ 582: 148 Ind Cas 66 (DB).

——S. 101—Omission to set points.

Under R. 12 of the rules framed under the Railways Act, it was the duty of the accused, who was a station master when he knew that a train was approaching the station to send the passed porter to to the facing points with instruction for him to set and lock the points for the line on which the train was to come. The station master neglected to send the porter to the points. The signals were down to allow the train to pass into the station. But under the rules the engine driver would have stopped the train when he found that there was no porter at the points signalling him to pass on. The points were not properly locked and the consequence was that some of the carriages of the train were derailed. No person

was hurt but the derailment of part of the train caused danger to persons travelling therein.

Held, that it was not quite clear whether the engine driver could have avoided the derailment by stopping the train in time because the signals were in his favour. But if the station master had complied with the rules and had sent the passed porter out to the points to properly set and lock them, no accident would have occurred. Hence the disregard by the accused of R. 12 enhanced the danger to the persons travelling in the train and therefore the accused was liable. AIR (Vol 12) 1925 Lah 423: 6 Lah 324: 26 Cr LJ 685: 26 PLR 44: 86 Ind Cas 61.

——S. 101—The duty of a person in control of a railway station is first to give the fundamental orders regulating the arrival of a train and secondly to see that they are accurately carried out. Where such an order was given to set the points to the loop but the slides showed main, the failure to act upon a defect in the working of the machinery is an act of grave negligence. Omitting to set the points, which would prevent a train after a clear line signal is given, from running into another train is an act endangering the safety of the persons in either of the two trains. AIR (Vol 11) 1924 All 438: 22 ALJ 20: 5 LRA Cr 105: 25 Cr LJ 993: 81 Ind Cas 705.

——S. 101—Essentials for conviction.

Breach of a rule of the railway company without evidence that it endangered the safety to passengers is not sufficient for conviction. AIR (Vol 11) 1924 Oudh 250: 26 OC 363: 25 Cr LJ 1093: 81 Ind Cas 917.

——S. 101—"Endangering"—Meaning of—Shunting train to a wrong line.

In every case where a travelling train is unexpectedly shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of the persons in the train or about the yard is endangered within the meaning of that term in section 101; and if the error in the points is due to such disobedience as referred to in the Act, an offence punishable under the Act is committed. From the facts of one case, no safe analogy can be drawn as to whether danger has arisen in the other case. AIR (Vol 3) 1916 Nag 26: 13 NLR 90: 18 Cr LJ 822: 41 Ind Cas 646.

——S. 101—Offence falling under two enactments—Punishment under both, whether legal.

When an accused by one act endangered the lives of the public and committed an offence under S. 101 of the Act and S. 353 of Penal Code he can be punished under one Act only and not under both. AIR (Vol 3) 1916 Pat 86. 1 Pat LJ 373: 1 Pat LW 340: 16 Cr LJ 321: 38 Ind Cas 433 (DB).

——S. 101 — Disobedience without endangering human life—Whether punishable injury.

To hold a person guilty under S. 101, it must be proved that the Act of the accused did actually endanger the safety of a particular person. A mere disobedience of rules without endangering any person's safety is not actionable. 8 PLR 1910: 11 Cr L J 362: 39 PWR 1910 Cr: 6 Ind Cas 483 (DB); See also 7 L B R 72: 15 Cr LJ 17 : 7 Bur LT 101 : 22 Ind Cas 161 ; A I R (Vol 1) 1914 L B 137.

——S. 101—Sub-ss. (a), (b) and(c)—"General Rules and Regulations" apply to all Railways, R. 86—G. I. P. Ry. Working Instruction, R. 9—Protection of trains standing outside distant signal—Breach of R. 9, whether to be under Sub-S. (a) or (b) of S. 101—Construction of rules framed by Railways.

Where a train is stopped outside a distant signal, the omission of the guard to place detonators to protect the train is a disobedience under R. 9 of G. I. P. Ry., Working Instructions and punishable under S. 101 (a). Where a Guard is charged under S. 101 (b) the onus of proving that he did not comply with general Rules 86 is on the prosecution, which burden can be discharged by the Ry. Authorities inspecting the line to see if any metallic remnants are formed there. The standing of a train outside the distant signal is "authorized" detention and not due to "accident, failure or obstruction." The wording of G. I. P. Ry., rule 9 is somewhat inappropriate and allowance should be made, considering that even a District Traffic Superintendent misreads the rule. (1913) 14 Cr LJ 676: 21 Ind Cas 996.

——S. 101—G. I. P. Ry. Time Table Rules—Part 2, O. 7, R. 1—Duty of Guard.

Under Rule 1, the Guard of a train standing in a Railway Station is responsible for the pair of points immediately leading to the line occupied by his train and for no other points. Conviction of a Guard, therefore, for failure to see the main-time points should be set aside but it is doubtful whether the accused can be convicted under S. 101 for endangering safety of the people by disobeying a rule in the subsidiary rules of a Railway Company. (1910) 12 Bom LR 930: 11 Cr LJ 568: 8 Ind Cas 134 (DB).

——S. 101—Rash or negligent act—Act endangering safety of a person.

Under S. 101 the offence consists in (1) disobeying rules or doing any rash or negligent act and (2) thereby endangering the safety of any person. It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety. (1910) Pun LR No. 8 page 19 (22): 1910 Pun WR 39 (Cr): 6 Ind Cas 483.

——S. 101—Endangering safety of persons—Death by rash or negligent act—Contributory negligence—Indian Penal Code (Act XLV of 1860), S. 304A.

The Bengal-Nagpur Railway is worked on the "line clear and caution message" system, no train being allowed to leave a station without a "line clear" certificate in a prescribed form, to the effect that the line is clear up to the next station. The petitioner, the assistant station master of Gomharria station who was on duty and busy issuing tickets to passengers wrote out in the prescribed form book the following conditional line clear message, although he had received no message from Sini station; "on arrival of 15 down passenger at Gomharria, line will be cleared for No. 80 up goods train from Gomharria to Sini." All the particulars required by the rule were not filled in, no number was entered on it, nor was the time of arrival of the train filled in. The form-book was left in the station master's room.

The guard on No. 80 up goods train which was waiting at Gomharria entered the station master's room in his absence, took the imperfect certificate out of the book and without reading it appended his signature passed it on to the driver and gave the signal for the train to start—all without the knowledge of the petitioner. The result was a collision between the 15 down passenger train and the 80 up goods train causing the death of several persons.

The petitioner was convicted under S. 304-A of the Penal Code, and S. 101 of the Indian Railways Act of 1890 and sentenced to rigorous imprisonment:—

Held, that the act of the petitioner did not in itself endanger the safety of other persons and that the effect was too remote to be attributable to such a cause. (1905) 32 Cal 73 (78, 79) : 8 CWN 645 : 1 Cr LJ 634.

——S. 102.

—Ss. 102, 108 and 109—Passenger, meaning.

A tickect-holder is a passenger even before he has actually boarded the train. 26 PR Cr 1910: 31 PWR

Cr 1910: 200 PLR 1910: 12 Cr LJ 451: 7 Ind Cas 355.

——S. 104.

——S. 104—Notice—Service on Traffic Manager, if sufficient.

Notice required by Ss. 77 and 104, Railways Act, must be served on the Agent of the Company, and not on Traffic Manager. The mere fact that the claims such as one put forward are dealt with by the Traffic Manager will not by itself, be sufficient to make a notice to the Traffic Manager valid in law unless the Agent authorises the Traffic Manager to receive such notice on his behalf. AIR (Vol 18) 1931 Lah 606: 32 PLR 163: 133 Ind Cas 283.

——S. 107.

—— S. 107—Fireworks—False declaration.

A person making a false declaration in respect of fireworks consigned is punishable under S. 107, even though no injury results. (1905) 2 Cr LJ 207 (209, 210): 1905 Pun Re Cr No. 22.

——S. 108.

——S. 108 — "Reasonable and sufficient cause," is a question of fact — Accident taking place in running train through fault of passenger.

"Reasonable and sufficient cause" under S. 108, Railways Act, is a question of fact to be determined according to the circumstances of each particular case. No hard and fast rule can be laid down. It cannot be held that if an accident takes place through the fault or neglect of a passenger himself, he is not entitled to pull the alarm signal if there is a reasonable and sufficient cause for doing so.

While a passenger was standing near the door of the compartment, his thali and gold kantha worth about Rs. 125 fell down. He pulled the chain and the train stopped :

Held, that there was reasonable and sufficient cause. AIR (Vol 23) 1936 Pat 499 : 17 P L T 569 : 3 B R 83 : 38 Cr L J 77 : 165 I C 815.

——S. 108—Additional reasons.

The accused is not deprived of the defence under S. 108 of the Act of sufficient and reasonable cause merely because there was an additional reason for pulling the chain which in the opinion of the Magistrate was not sufficient and reasonable. AIR (Vol 17) 1930 Bom 160 : 32 Bom L R 111 (DB).

——S. 108 — Pulling chain — Nature of offence—Obstruction to railway servant in discharge of duties —Pulling chain does not amount to.

Where a person without sufficient and reasonable cause pulls the emergency chain, he renders himself liable for prosecution under S. 108 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty. AIR (Vol 17) 1930 Bom 160 : 32 Bom L R 111 (DB).

——S. 108—Sufficient cause—To remove overcrowding.

Pulling the communication chain of a railway compartment to remove the overcrowding, which it was the duty of the railway administration to prevent under S. 93 is a reasonable and sufficient cause under S. 108 of the Act. AIR (Vol 17) 1930 Bom 160 : 32 Bom L R 111 (DB).

——S. 108—Test.

The risk of danger, of loss and of discomfort to the other passengers on a train by stopping the train by pulling the communication cord is one element that has to be considered for the purpose of deciding whether there was reasonable and sufficient cause to stop the train by pulling the communication cord. But this must be considered in relation to the risk arising from the circumstances to the person pulling the cord. In other words if the risk to the passenger pulling the cord is incommensurate with the risk and discomfort, etc., to the other passengers, he cannot be said to have had just and reasonable cause. But where the risk to the passenger is very great as compared to the risk to the other passengers, he must be said to have just cause for pulling the cord.

Another element of great importance is whether the necessity or occasion for pulling the cord has arisen from the fault of the railway administration.

The third element to be considered is the importance of the line and train. AIR (Vol 14) 1927 All 647 : 8 L R A Cr 132: 8 A I Cr R 290: 25 A L J 975 : 28 Cr L J 967 : 105 Ind Cas 679.

——S. 108—Books thrown out.

A who had instituted a civil suit against B was travelling with the latter in the same compartment with his account books. While the train was in motion B seized the account books and threw them through the window. A pulled the alarm chain and stopped the train.

Held, that A had sufficient and reasonable cause for getting alarm signal and could not be convicted under S. 108. AIR (Vol 14) 1927 Lah 476 : 8 Lah 196 : 28 Cr L J 603 : 28 P L R 485 : 102 Ind Cas 779.

——S. 108 — Insufficient cause.

Primarily, S. 108 is intended for the protection of the personal safety of passengers who are travelling by train. The mere fact that the accused left his coat even though it contains valuables is not a reasonable and sufficient cause within the meaning of S. 108. Accordingly if he pulls the communication cord for that purpose he can be convicted under the section. AIR (Vol 13) 1926 Bom 288 : 28 Bom L R 486: 27 Cr L J 730 : 95 Ind Cas 58 (DB).

——S. 108—To remove overcrowding.

Where a passenger in the Inter class pulled the chain because it was overcrowded and because III class passengers had entered in,

Held : he was justified in pulling the chain and in stopping the train for enforcing his right to have the compartment vacated so as to bring down the number of passengers therein within the maximum limit prescribed by Section 63 of Railway Act. AIR (Vol 9) 1922 Pat 8 : 1 Pat 260 : 23 Cr L J 257 : 1922 P H C C 63 : 3 Pat L T 195 : 66 Ind Cas 321.

——Ss. 108, 121, 128 and 131—Liability of Railway Company – Assault by railway servant.

Where the driver and guard of a Railway Company assaulted the plaintiff a passenger, for stopping a running train by pulling the alarm chain :

Held, that the Railway Company itself had no power to arrest the passenger for pulling the chain and consequently the Company was not liable for the tort on its servant. AIR (Vol 5) 1918 Bom 129 : 43 Bom 103 : 20 Bom L R 126 : 45 Ind Cas 715 (DB).

— S. 109.

——S 109—Ice-vendor's compartment — Passenger insisting on entry i it—Offence.

Ice-vendor's compartment is a reserved compartment and is not meant for the use of travelling passengers. A passenger insisting on entry in it and refusing to leave it in spite of being warned that it was a reserved compartment is guilty of an offence under S. 118 and not under S. 109. A I R (Vol 23) 1936 All 439 : 1936 A L J 117 : 1936 A W R 196 : 37 Cr L J 388 : 161 Ind Cas 17 (DB).

——S. 109—Passenger.

The expression "passenger" in S. 109 includes a class of passengers AIR (Vol 11) 1924 Cal 687 : 51 Cal 168 ; 28 C W N 388 : 39 C L J 107 : 25 Cr L J 1012 : 81 Ind Cas 788 (DB).

— S. 109 — Reservation of Railway compartment for Europeans — Whether company can remove a passenger entering a reserved carriage.

Section 109 of the Act confers a general power on the Railway Company to reserve a compartment to passengers of a particular class, community or race

and there is nothing illegal in such a provision. The removal of a person by a threat to use force, is a forcible removal. The Railway authorities are not entitled to remove a passenger from a compartment which is reserved for another passenger or class of passengers. (1912) 5 S L R 140 : 13 Ind Cas 237.

——Ss. 109 and 120—Penal Code S. 352 — Forcible removal.

If a person objects to the coming in of a more passengers and stands against the door he commits an offence falling under Ss. 109 (2) and 120 (c) of Railways Act and is liable to removal not only from the carriage, but also from the Railway by any Railway Servant, who is therefore not guilty of assault under S. 352 I. P. C. or any other offence, if in doing so he does not use more force or violence than is actually necessary for the purpose. 26 P R 1910 Cr : 51 P W R 1910 Cr : 200 P L R 1910 : 11 Cr L J 451 : 7 Ind Cas 355.

——Ss. 109 (1), 120 (c)—Unreserved compartment — Berths reserved — Passenger occupying berths reserved for another—Offence.

A Railway Company would have the right under its general power of managing its own concern, to reserve seats for particular passengers. But the power to punish for breach of any of the regulations or arrangements made by a Railway Company forms no part of the general powers of such company, and must be conferred by statute or rules made thereunder either by express words or by necessary implication.

Unless the Railway Company has made rules to that effect, they cannot either under S. 109 (1) or under S. 120 (c), impose any penalty upon a passenger who occupies a seat in an unreserved compartment which seat the company have purported to reserve for some other passenger and refuses to vacate it. AIR (Vol 30) 1943 Bom 52 : 44 Bom L R 916 : 44 Cr L J 236 : 205 Ind Cas 159 (DB).

——S. 112.

——S. 112 — Scope of — What is penalised by the section — Proof of intent to defraud Railway Administration — Necessity.

Section 112 of the Railways Act does not penalise mere ticketless travelling. What it penalises is ticketless travelling with a particular intent, namely an intent to defraud a Railway Administration. This intent to defraud is an essential ingredient of an offence under S. 112 of the Act. Where no such intent is alleged in complaint, it should be rejected immediately. AIR (Vol 38) 1951 All 410 : 1950 ALJ 529.

——Ss. 112 and 113 — Applicability—Offence under S. 112 — Main ingredient — Charge under S. 113 (4) —Conviction under S. 112 — Legality.

In order to make out an offence under S 112 of the Railways Act, the main ingredient of that offence, namely, the intention to defraud a railway administration has to be established. Before a person can be convicted of an offence under S. 112, he has to be charged and tried for the offence. Hence, where a person is charged and produced before a Railway Magistrate under S. 113 (4) of the Railways Act, it is not open to the Magistrate to convict him under S. 112 of the Railways Act. AIR (Vol 37) 1950 All 441 : 51 Cr LJ 1174.

——S. 112 (as amended by Burma Act XVIII of 1939) —Whipping, in default of payment of fine imposed under S. 112.

Burma Act XVIII of 1939 must be read as enacting only that a substantive sentence of whipping may be imposed when the person convicted is unable to pay a fine. Hence a sentence of whipping in default of payment of a fine imposed under S. 112, Railways Act, is illegal. AIR (Vol 38) 1941 Rang 181 : 1941 Rang LR 234 : 42 Cr LJ 641 : 195 Ind Cas 4.

——S. 112—Effect of Burma Act (XVIII of 1939) on S. 17, Burma Prevention of Crime (Young Offenders) Act (III of 1930).

Section 17, Prevention of Crime (Young Offenders) Act, must be taken as having been modified by Burma Act (XVIII of 1939) and can no longer affect the punishment to be awarded for offences by juveniles under S. 16 against S. 112, Railways Act. AIR (Vol 28) 1941 Rang 181 : 1941 Rang L R 234 : 42 Cr LJ 641 : 195 Ind Cas 4.

——S. 112 — Season ticket in name of one person used by his brother—Offence.

Where a season ticket issued in the name of a person was used by his brother, and it was not contended that the brother had taken the ticket without his consent or knowledge :

Held, that his conduct clearly amounted to abetment of the offence under S. 112 which was committed by his brother. AIR (Vol 20) 1933 Bom 412 : 35 Bom LR 875 : 34 Cr LJ 1257 : 146 Ind Cas 162 DB).

——S. 112—Essentials.

To constitute an offence under S. 112 (b) it is not necessary that the used ticket should be relevant to the journey which the passenger wished to undertake : 11 CWN 100, Diss. from. AIR (Vol 15) 1928 Sind 191 : 23 SLR 39 : 30 Cr LJ 3 : 11 A I Cr R 538 : 112 Ind Cas 771.

——S. 112—Conviction—Legality.

A person charged under S. 112 for entering a railway carriage without a ticket pleaded guilty as to entering the carriage but said that he did not purchase the ticket because the train was about to start:

Held, that this conviction is bad as his statement amounts to a positive denial of an intention to defraud. AIR (Vol 7) 1920 All 203 : 57 Ind Cas 825.

——Ss. 112 and 68—Wrong ticket.

Where passenger travelling by a Railway train on being called upon, produces a ticket bearing date of a previous day throwing away another in his possession, he cannot be held to have dishonest intention so as to justify a conviction under S. 112 as the essence of the offence under that section is an intent to defraud the Railway Company. Unless there is clear evidence to show that a passenger knows that the ticket he is holding has been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger knows that he is committing a breach of the Railways Act or rules framed under the Act. If the ticket does not show to its holder that, under the Railway rules it is only available for a particular train or on a particular day, his knowledge of the Railway rules posted on the Stations will not be assumed unless it is proved that the attention of the traveller was drawn to them. AIR (Vol 3) 1916 Cal 880 : 17 Cr LJ 361 : 35 Ind Cas 665 (DB).

——S. 113.

——S. 113 — Liability of passenger — Nature of — Right to refund of fare collected under section on ground that fare had already been paid.

Under S. 113 of the Railways Act the liability of a passenger to pay the excess charge and fare prescribed therein on failure to produce his ticket on requisition by a Ticket Inspector, is a statutory liability, pure and simple, and is independent of contract. The passenger has, therefore, no right to a refund of either the excess charge or of the fare collected from him on the ground that it had already been paid.

The omission to produce a ticket on demand by the proper authority is a statutory offence governed by its own conditions and rules as laid down in S. 113 of the Railways Act, though not an "offence" within the meaning of General Clauses Act. ILR 947 Nag 970, Overruled AIR (Vol 33 1949 Nag 330 : 1949 NLJ 251 : I L R (1949) Nag 506 (DB).

——S. 113 — Fare recovered from passenger who lost his ticket — Right of passenger to claim refund on proof that he purchased ticket.

Section 113 of the Railways Act merely deals with a situation created by an accident or a mishap where a passenger who was supplied with a ticket and was travelling lawfully has not, at a particular time, the ticket with him. It is clear from the section that what is demanded and recovered from a passenger—leaving aside the excess charge—is a single railway fare for the distance the passenger has travelled. This is not recovered as a penalty or a fine and not even as an excess charge. It is recovered as a fare because the passenger has not at the time the evidence of his having paid the fare for the journey. Rather than obliging the railway administration to enquire if the passenger has committed a fraud or not, and then in the case of fraud to seek out the passenger and to recover fare from him, the legislature empowered the railway administration to cover the fare leaving it to the passenger to prove his bona fides and to put forward his claim for refund on that ground. Section 113 no doubt places the passenger under an obligation to pay the fare for the time being, but it does not take away his right to claim a refund and does not create any right in the railway administration to retain fare realised twice for a single journey. In fact, it may be said that the statutory obligation created by the section in the matter of payment of fare is temporary, i.e., so long as the passenger has not satisfied the railway administration that he had paid the fare and secured a ticket : ILR (1949) Nag 506 (DB), Overruled. AIR (Vol 25) 1948 Nag 106 : 1947 NLJ 438 : ILR (1947) Nag 970.

——Ss. 113, 112 — Travelling by higher class on tickets for lower class — Liability for excess fee

The intention to defraud is not necessary to enable the Railway Administration to proceed under S. 113. The section provides a summary remedy to recover charge incurred by the passenger together with a penalty and not for the prosecution of an offence. Section 113, cl. (2) is clear and explicit, and admits of no implications or exceptions. A passenger cannot travel by a higher class merely because there is no accommodation in the class for which he holds the ticket. AIR (Vol 20) 1933 Bom 59 : 34 Bom LR 1666: 34 Cr LJ 239 : 141 Ind Cas 794 (DB).

——S. 113 —Proceedings under S. 113, whether judicial proceedings—Revision.

A proceeding under S. 113 is a judicial proceeding and the High Court has the power to revise any order passed by a Magistrate under S 113 (4). AIR (Vol 20) 1933 Bom 59 : 34 Bom L R 1666 : 34 Cr L J 239 : 141 Ind Cas 794.

——S. 113—Order under S. 113 (4)—Nature of.

Order of a Magistrate under S. 113 (4), Railways Act, is merely an administrative or a ministerial order and the proceedings before him are not criminal proceedings in a criminal Court within the scope of the Criminal Procedure Code and is not subject to revision under S 439. A I R (Vol 17) 1930 Sind 162 : 1930 Cr C 646 (DB).

——S. 113—Revision.

A person travelled without a ticket but with guard's permission. He was asked to pay extra charge which he refused. Application to a Magistrate under S. 113 (4) Railways Act, was rejected.

Held, that High Court could not go into the merits of the order when it had no jurisdiction to revise that order A I R (Vol 17) 1930 Sind 162 : 1930 Cr C 646 (DB).

——S. 113—Essentials for arrest.

To justify an arrest without a warrant much more than trespass or travelling without ticket would be necessary. In the case of trespass it must be shown that there was reason to believe that the person to be arrested would abscond or that his name and address were unknown and he refused to give his name and address or that there was reason to believe that the name or address given to him was incorrect. In the case of travelling without ticket it must further be shown that there was refusal to pay the sum charged. AIR (Vol 16) 1929 Cal 730 : 33 C W N 751 : 29 Cr C 366.

——S. 113—Nature of proceedings.

An application under S. 113 (4) is not a prosecution for criminal offence and on such application the Magistrate has no power to fine the defaulter or to order a sentence of imprisonment in default of such fine. The Magistrate can only direct him to pay the fare and the excess charge under sub-s. (3) and then proceed to recover it as if it were a fine. AIR (Vol 16) 1929 Rang 11 : 6 Rang 619 : 30 Cr L J 57 : 113 Ind Cas 73.

——S. 113 - Inability to produce ticket.

The words "with him" must be construed as meaning that the tickets are on the passenger's person, Passengers should realize that they must have in their possession immediately available throughout the journey the tickets, which entitle them to travel. The rule has been framed with a view to preventing the enormous inconvenience and trouble which would otherwise arise in the matter of checking and collecting tickets from passengers by railway.

The Plaintiff with some 34 other people had booked from D to N. On arrival at the latter station, he found that seven tickets were missing. He accordingly was charged with excess fare and penalty. The plaintiff, no sooner he came out into the station yard, on enquiry, from his companions, found the missing tickets and took them back to the ticket collector for refund. The refund was refused. He therefore filed a suit and got a decree for the amount.

Held, in revision, that the amount was properly realized from the plaintiff and that the mere fact that he produced or was willing to produce the tickets later does not entitle him to a refund.

Held, further that the railway company might well have made ex gratia without any sacrifice of principle a refund in the peculiar circumstances of the case. A I R (Vol 15) 1928 Nag 30 : 23 N L R 121 : 106 Ind Cas 420.

——S. 113 — Suit for refund — Ordinary or excess fare.

Where a general obligation is created by statute and a specific statutory remedy is provided, that statutory remedy is the only remedy.

The claim in respect of fare and excess charges due and payable by a passenger according to law, he having travelled without having with him a proper pass or ticket can only be entertained by a Magistrate under S. 113 and a suit to enforce such a claim is not one for debts or damages and a civil Court has no jurisdiction. AIR (Vol 13) 1926 Bom 266 : 50 Bom 215 : 28 Bom L R 443 : 94 Ind Cas 742 (DB).

——S. 113—Essentials for penalty.

Before the penalty imposed by S. 113 (1) can be enforced under sub-s. 4, there must be requisition on the passenger under S. 69, and a failure or refusal to present for examination or to deliver up his pass or ticket. AIR (Vol 13) 1926 Bom 266 : 50 Bom 215 : 28 Bom L R 443 : 94 Ind Cas 742 (DB).

——S. 113—Conviction—Liability to pay higher fare —Distress warrant.

The petitioner was prosecuted for an offence under S. 113 of the Railway's Act i. e., travelling without a ticket and he pleaded in defence that he had not travelled by the train. The Magistrate without any enquiry issued distress warrant for the amount of penalty imposed.

Held, the Magistrate could pass orders only after taking evidence on the question whether the accused

was liable to pay and how much was payable by him. AIR (Vol 7) 1920 Cal 261 : 24 C W N 195 : 21 Cr L J 321 : 55 Ind Cas 593 (DB).

——S. 113—Imprisonment in default of fine.

Imprisonment in default of payment cannot be inflicted under S. 113 of the Railways Act. The amount can be recovered only by attachment and sale of movable property. (1909) 5 N L R 151 : 10 Cr L J 519 : 4 Ind Cas 236.

—S. 114.

——S. 114—Punishment.

Offences under S. 114 are easy to commit but not easy to detect. When detection has been successfully effected, an offender should not go scot-free even if he has not been convicted before. AIR (Vol 22) 1935 Sind 90 : 36 Cri L J 827 : 155 Ind Cas 697 (FB).

——S. 114—Applicability.

Section 114 applies to purchasers and transferees of tickets and not to the transferors alone. AIR (Vol 15) 1928 Sind 191 : 23 S L R 39 : 30 Cr L J 3 : 112 Ind Cas 771, Overruled. A I R (Vol 22) 1935 Sind 90 : 36 Cr L J 827 : 155 Ind Cas 697 (FB).

——S. 114—Scope.

Section 114 refers to persons who sell or attempt to sell or part or attempt to part with the possession of any halt or a return ticket. Section 114 does not apply to the purchasers or transferees of tickets, the transferors alone being punishable under that section. (AIR (Vol 22) 1935 Sind 90 : 36 Cr L J 827 : 155 Ind Cas 697 (FB), Overruled.). A I R (V 15) Sind 191 : 23 S L R 39 : 30 Cr L J 3 : 11 A I Cr R 538 : 112 Ind Cas 771.

—S. 118.

——Ss. 118, 109 — Ice-vendor's compartment—Passenger insisting on entry in it—Offence.

An ice-vendor's compartment set apart by the Railway authorities for supplying drinks to the passengers is not meant for the use of travelling passengers. Hence a passenger who enters into the ice-vendors compartment, and refuses to leave in spite of being warned that it was a reserved compartment commits an offence under S. 118 and not under S. 109. A I R (Vol 23) 1936 All 439 : 1936 A L J 117 : 37 Cr L J 388 : 1936 A W R 196 : 161 Ind Cas 17 (DB).

——S. 118—Passenger, meaning of.

The word "Passsenger" in S. 118 of the Railways Act is, used in a restricted sense and denotes a person who without permission of a Railway servant enters any Railway carriage for the purpose of travelling as a passenger. (1913) 15 Bom L R 996 : 14 Cr L J 654 : 21 Ind Cas 894 (DB).

——S. 118 (1)—Offence not mentioned in complaint —Conviction—Legality.

Where the attention of the accused is not directed by the complaint to an offence under S. 118 (1), Railways Act, he cannot be convicted of that offence. A I R (Vol 22) 1935 Sind 91 : 29 S L R 27 : 36 Cr L J 1345 : 158 Ind Cas 212 (DB).

—S. 119.

——S. 119—Scope — Interference by railway police.

A person who entered a lady's compartment for assisting his wife was interfered with by railway police constable. An altercation ensuing, he was challaned and convicted under S. 332, I. P. C.

Held on revision that (1) the legislature deliberately refrained from allowing railway police constables from interfering in such matters until called upon by railway authorities and (2) that the provisions of S. 119 was overlooked while considering the case in that the fact that the accused was having lawful excuse to enter the compartment and also that he was not desired by railway servant to leave it. 1903 Pun L R 76 P 304 (306).

——S. 120.

——S. 120 — Liability under section — Railway servant throwing down passenger's goods and damaging them.

A person, even if he is a railway servant, hurling down a bundle of bangles belonging to a passenger and breaking them will be liable under S. 120 of Railways Act as such an act is not an act done or doable by a Railway servant as such. A I R (Vol 37) 1950 Mad 406 : 63 L W 66 (2) : 1950) 1 M L J 82 : 1950 M W N 302 (1) : 51 Cr L J 1003.

——S. 120 — 'Person' includes railway servants, whether on or off duty.

The word 'person' in S. 120 includes railway servants whether on or off duty. A I R (Vol 33) 1946 Nag 200 : 1946 Nag L J 161 : 47 Cr L J 383 : 223 Ind Cas 227.

——S. 120 — S. 120 applies to railway servants also.

The words "a person" in S. 120 are unqualified and, therefore, wide enough, to include railway servants as well as all other individuals. A I R (Vol 33) 1946 Nag 150 : I L R (1946) Nag 282 : 1946 Nag L J 78 : 47 Cr L J 397 : 223 Ind Cas 400.

——S. 120 — Platform Inspector exchanging abuse and blows with another railway servant in parcel office and on railway platform is guilty of nuisance.

A Platform Inspector in the service of the G. I. P. Railway exchanged abuse and blows with another railway servant in the parcel office and on the railway Platform :

Held that as the word 'nuisance' in S. 120 (b) means that which is offensive or annoying, it would apply to the unseemly incident which took place between the Platform Inspector and other railway servant in the course of which there were abuse, grappling and blows in the parcel office and on the railway platform. The Platform Inspector was therefore guilty of 'nuisance' under S. 120 (b).

Held further that even if the conduct of this kind could not be regarded as a nuisance, cl. (b) of S. 120 also penalised the use of abusive language. A I R (Vol 33) 1946 Nag 150 : I L R (1946) Nag 282 : 1946 Nag L J 78 : 47 Cr L J 397 : 223 Ind Cas 400.

——S. 120 — Unreserved compartment — Berths reserved — Passenger occupying berth reserved by another :

Held that the company may have right under its general power to reserve seats for passengers. But the power to punish for the breach of any of the regulations forms no part of the general powers of such company and must be conferred by statute or rules made thereunder either by express words or necessary implication. Unless the company has made rules to that effect, they cannot, either under S. 109 (1) or S. 120 (c), Railways Act, impose any penalty upon a passenger who occupies a seat reserved by the company for some other passenger. A I R (Vol 30) 1943 Bom 52 : 44 Bom L R 916 : 44 Cr L J 236 : 205 Ind Cas 159 (D B).

——S. 120 — Scope — Assistant Station Master abusing passenger — Whether can be convicted under S. 120.

Taking the sections of the Railways Act as a whole, there can be no doubt that S 120 is not intended to include any act done by a Railway servant acting as such. The offences specified in S. 120, if committed by Railway servants, can well be dealt with by departmental action. Therefore, an Assistant Station Master who while on duty, abuses a passenger, cannot be convicted under S. 120. A I R (Vol 24) 1937 Bom 357 : 39 Bom L R 610 : 38 Cr L J 962 : I L R (1937) Bom 666 : 170 Ind Cas 575 (D B).

——S. 120 — 'Person,' meaning of.

The word 'person' in S. 120 includes an employee of the Railway and the section does apply to Railway

servants. A I R (Vol 21) 1934 Pat 52 (1) : 14 P L T 652 : 35 Cr L J 205 (1) : 146 Ind Cas 937 (1).

——S. 120 — Applicability — Railway servants.

The latter portion of S. 120 has a reference to the forfeiture of fares and of passes or tickets and to the removal of the offender from the railway by any railway servant, and thus shows its inapplicability to railway servants. A I R (Vol 16) 1929 Sind 249 : 23 S L R 409 : 1929 Cr C 542 : 30 Cr L J 879 : 118 Ind Cas 197 (D B).

——S. 120 — Essentials for conviction — Using abusive language.

Conviction for using obscene or abusive language cannot be had where alleged particular expression has not been proved by the witness, since it is possible that witnesses may have considered certain expressions to amount to abuse, which the Court may not. A I R (Vol 12) 1925 Lah 151 : 6 L L J 469 : 26 Cr L J 417 : 85 Ind Cas 33.

——S. 120 — Travelling without ticket.

Travelling without a ticket is not one of the circumstances mentioned in Section 120 of the Act as justifying removal from a Railway by a Railway servant where there is no evidence that the persons were travelling without tickets with fraudulent intent. A I R (Vol 10) 1923 Lah 71 : 23 Cr L J 622 : 68 Ind Cas 846.

——S. 120 — Nuisance — Sale of fish in Railway shed.

Where in a Railway shed reserved for the delivery of fish, the accused sold fish in retail contrary to the orders of the Railway authorities and the retail sale of fish made the place offensive.

Held, that the accused committed nuisance within Railways Act, Section 120 (b). A I R (Vol 8) 1921 Cal 537 : 48 Cal 1042 : 33 C L J 293 : 25 C W N 603 : 22 Cr L J 604 : 62 Ind Cas 876.

——S. 120—Railway official—Removal of passenger.

The word "person" in S. 120 of the Act includes railway official and a railway guard who removes a passenger from a compartment which they are entitled to occupy is guilty of an offence under S. 120. A I R (Vol 6) 1919 Mad 971 : 19 Cr L J 313 : 44 Ind Cas 329 (D B).

——Ss. 120 and 122 — Removal of passenger.

There is no provision in the Railways Act for ejecting passengers except in certain circumstance specified in S. 120 of the Act and the expression 'railway' in S. 122 does not include a railway carriage. A I R (Vol 4) 1917 Cal 105 : 44 Cal 279 : 25 C L J 610 : 18 Cr L J 647 : 40 Ind Cas 295 (D B).

——S. 120 (b) — Applicability — Use of abusive language.

S 120 (b) of the Railways Act penalises the use of abusive language. A I R (Vol 33) 1946 Nag 150 : I L R (1946) Nag 282 : 47 Cr L J 397 : 1946 N L J 78 : 223 Ind Cas 400.

——S. 120 (b) — Conviction, legality of.

It is unreasonable to expect any person who has been well abused to remember the exact words used. It is not likely that he will take them down in writing and yet he will certainly very well know whether the language was abusive or not. In a case under S. 120 (b) it cannot be said that a conviction of an accused person is illegal unless the exact words were proved. A I R (Vol 23) 1936 All 140 : 1936 A L J 82 : 37 Cr L J 385 : 1936 A W R 195 (1) : 160 Ind Cas 1088.

——S. 121.

——S. 121 — Refusal to pay excess fare—Offence.

Refusal to pay excess fare is no offence since it does not amount to obstructing or impeding a railway servant in discharge of his duty. (1933) 1933 M W N 874.

——S. 121 — Pulling chain.

Where a person without sufficient and reasonable cause pulls the emergency chain, he renders himself liable for prosecution under S. 108 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty. A I R (Vol 17) 1930 Bom 160 : 32 Bom L R 111 (D B).

——S. 121 — Essentials for conviction.

Before a person can be convicted of wilfully obstructing or impeding a railway servant in the discharge of his duties, it must be shown that the obstruction or resistance was offered to such railway servant in the discharge of his duties as authorized by law. A I R (Vol 12) 1925 Lah 650 : 6 Lah 467 : 7 L L J 622 : 26 P L R 715 : 27 Cr L J 1 : 91 Ind Cas 33.

——S. 121 — Abuse.

Abuse or insult does not necessarily constitute obstruction or impediment to Railway servant in the discharge of his duty. A I R (Vol 10) 1923 Lah 71 : 23 Cr L J 622 : 68 Ind Cas 846.

——S. 121 — Station Master — Delegation of duties to Signaller — Obstruction—General Rules 229, 231 and 244.

Rules 244, 229 and 231, of the General Rules empower a Station Master to appoint a Signaller temporarily to do the duties of a Ticket Collector. When a Signaller so appointed undertakes such duties and acts in the discharge thereof, he is a "railway servant" within S. 121 of the Railways Act. Obstruction to him is punishable under that Section, A I R (Vol 7) 1920 Mad 154 : 37 M L J 656 : 10 L W 669 : (1920) M W N 156 : 21 Cr L J 62 : 54 Ind Cas 414 (D B).

—S. 122.

——S. 122 — Offence under — Passenger travelling inter class on third class ticket.

A passenger who travels inter class on a third class ticket does not commit an offence under S. 122 of the Railways Act. As he is in possession of a ticket authorising him to travel by the railway, he is a bona fide passenger, and he cannot be considered to have unlawfully entered upon the railway or to have refused, to leave the railway when asked to do so. (1949) 53 C W N (1 D R) 70.

——Ss. 122, 132—Complaint by Railway authorities, if necessary.

An accused who is found guilty of an offence under S. 122, cannot be acquitted on the ground that the prosecution was not on the complaint of the Railway authorities as required under S. 132 of the Act. AIR (Vol 27) 1940 Mad 268 : 1939 M W N 876 : 41 Cr L J 393 : 187 Ind Cas 118.

——S. 122—Scope.

Railway authorities establishing right under S. 122, Railways Act, to eject trespasser on railway property —Person ejected, held cannot be said to have been forcibly and wrongfully dispossessed within the meaning of S. 145, Criminal P. C. AIR (Vol 27) 1940 Sind 167 : 42 Cr L J 27 : ILR (1940) Kar 504 : 190 Ind Cas 746 (DB).

——S. 122—Passenger with ticket—Entry on railway line—Trespass.

A lawful entry by a person on to one part of the railway, e. g., entry of a passenger with a ticket on to the platform does not entitle the person to enter on any part of the railway premises, e. g., to trespass on the line. AIR (Vol 22) 1935 Mad 3 : 40 L W 664 : 36 Cr L J 128 (1) : 1934 M W N 1320 : 152 Ind Cas 615 (1).

——S. 122—Unlawful entry, what is.

If a person enters upon the Railway premises in contravention of the provisions of any statute, or of any rule made in exercise of statutory powers, the

entry would undoubtedly be "unlawful" within the meaning of S. 122. If the entry constitutes an actionable trespass, it would also be "unlawful" within the meaning of S. 122. An entry upon Railway premises may be held to be unlawful if it constitutes an actionable trespass. His entry will not become "unlawful" merely because he subsequently did something which was not an offence but which was understood to be prohibited by the Railway Authority.

Any entry upon the property without the permission express or implied, of the owner or occupier would constitute an actionable trespass and any such entry would amount to an unlawful entry within the meaning of S. 122. But where there is implied permission to enter upon the property, the entry is not unlawful.

Where a railway porter who has been dismissed is found on the station platform carrying a passenger's luggage without wearing any badge he cannot be held to be guilty of any offence. AIR (Vol 20) 1933 All 891 : 1933 A L J 1432 : 56 All 254 : 35 Cr L J 165 (2) : 146 Ind Cas 684 (DB).

——S. 122 (1) — Crossing railway line to enter platform, whether offence.

Where, in order to reach a railway platform, the accused crossed the line instead of entering it by the ordinary route, and the evidence showed that there was a notice board put up at the station prohibiting such trespass, and the accused was convicted under S. 122 (1), and fined :

Held, that the conviction was not illegal. AIR (Vol 20) 1933 Mad 372 : 34 Cr L J 291 (1) : 142 Ind Cas 202 (2).

—— S. 122—Essentials for liability.

Two things are necessary to bring a man under that section: (1) that the place of entry must be "railway" as defined in S. 3 (4) of the Act, and (2) the entry should have been unlawful in the inception. AIR (Vol 14) 1927 All 646 : 103 Ind Cas 104 : 25 A L J 710 : 8 A I Cr R 181 : 28 Cr L J 648 : 8 L R A Cr 120.

——S. 122 —Unlawful entry.

The most important words in S. 122 are the words "unlawfully enters," for unless and until a person has made an unlawful entry upon the railway premises he cannot be brought within this penal provision. The word "unlawful" means "contrary to the law laid down in the statute."

If the railway made a general rule under the Act (by virtue of S. 47 (1) of the Act) that nobody should enter upon railway platforms except passengers with tickets, any other persons entering upon the platform might be guilty of unlawful entry. But where no such rule exists, and where the Station Master leaves the platform gate open, those who enter upon the platform can hardly be considered to be other than licensees. A person whe enters in this manner may be quite lawfully ordered to leave the railway premises, but as he has not entered unlawfully he can never be brought within the mischief of S. 122 of the Railways Act. AIR (Vol 12) 1925 Pat 535 : 88 Ind Cas 522 : 6 P L T 437 : 26 Cr L J 1162.

——S. 122—Unlawful entry—Essence of offence.

Unlawful entry is the essence of the offence under both the clauses of S. 122 of the Railways Act. If the entry was lawful, refusal to leave on being desired to do so would not make the original entry unlawful. Nor would it make a person guilty under cl. 2 which is but an aggravated form of the offence under cl. (1). AIR (Vol 6) 1919 Cal 718 : 22 C W N 575 : 19 Cr L J 878 : 47 Ind Cas 74 (DB).

——S. 122 —Scope of — Original entry lawful — Subsequent breaking lock of wagon.

Subsequent unlawful act i. e. breaking lock of a wagon does not make the original entry itself unlawful under S. 122 of the Act when it was found that the Dalals like the accused were freely allowed to enter the station premises. AIR (Vol 5) 1918 Nag 49 : 20 Cr L J 96 : 15 N L R 34 : 48 Ind Cas 896.

——Ss. 122 and 47 (g) — "Unlawful" — Meaning — Trespass on railway line — Offence under S. 122 or S. 47.

The word "unlawful" in S. 122 means without the leave of the Railway Administration and a person entering the railway line without such leave is guilty under S. 122. Section 47 or the bye-laws made under Cl. (g) thereof have no reference to this offence of trespass. AIR (Vol 1) 1914 Lah 358 : 4 P R 1914 Cr : 155 P L R 1914 : 15 Cr L J 468 : 24 Ind Cas 348 (DB).

——Ss. 122 (2) and 3 (4) — Railway employee, ejection of, from staff quarters—If section applicable.

Section 122 (2) of the Railways Act cannot be applied to eject a Railway employee from the staff quarters occupied by him while under service, as they are not part of a Railway within the meaning of S. 3 (4) of the Act. AIR (Vol 1) 1914 Mad 196 : 15 Cr L J 225 : (1914) M W N 124: 23 Ind Cas 177 (DB).

——S. 122 — Reservation of compartment— Trespass —Removal by Company.

There is nothing in the Railways Act to forbid the reservation of compartment for different communities and any member of any other community entering such compartment becomes a trespasser and could therefore be removed under S. 122. (1913) 7 SLR 42 : 21 Ind Cas 499 (DB).

—S. 125.

——S. 125— Crossing railway line—No fence — Regular track.

Where a person was driving some herd of cattle across the railway line at a place where there was no fence and where there was a regular track it was held that such person cannot be convicted under S. 125 (2). AIR (Vol 17) 1930 Oudh 250.

——S. 125—Keeper's negligence—Owner's liability.

The owners of cattle straying on a Railway line cannot be convicted of an offence under S. 125 for the negligence of their keeper. (1911) 34 All 91 : 8 A L J 1249 : 12 Cr L J 614 : 12 Ind Cas 990.

—S. 126.

——Ss. 126 and 128—Lying on rails.

The offence of lying on the rails cannot be said to endanger the safety of persons travelling on the railway and comes under S. 128 and not under S. 126. Where several persons are charged with having conspired for the purpose, the proper conviction will be under S. 129 (b) of the Penal Code for conspiring to commit an offence under S. 128 of the Railways Act. 1930 MWN 1264 (DB).

—S. 127.

——Ss. 127 130—Applicability— Throwing stones at railway train by boys of eight and five years— Offence — Conviction under S. 127—Legality.

The offence of throwing stones at a railway train committed by boys of eight and five years old would ordinarily be protected under Ss. 82 and 83, Penal Code, and would not be punishable as an offence under S. 127, Railways Act, or under any provision of the Penal Code. But such act would be deemed to be an offence under the special provisions of S. 130, Railways Act and punishable under that section. AIR (Vol 23) 1936 Sind 185 : 30 SLR 9 : 38 Cr L J 83: 165 Ind Cas 642.

——S. 127—Obstruction by assembly—Conviction of member of the assembly—Legality.

The term "offence" in S. 149, Penal Code, is confined to offence under the Penal Code and so a conviction under S. 128, Railways Act, with reference to S. 149 is illegal and cannot be sustained.

Where a large body of men set out to obstruct a railway line and throw stones at trains they form an unlawful assembly and if in carrying out their com-

mon object they commit offence under Ss. 127 and 128, Railways Act, only those of them who are proved themselves to have committed these offences under Ss. 127 and 128 can be convicted under those sections. The rest are not constructively guilty as S. 149 cannot be invoked against them although the offences committed by them are the very offences they set out to commit and committed in prosecution of their common object. AIR (Vol 16) 1929 Mad 880 : 57 M L J 114 : 118 Ind Cas 68 : 52 Mad 882 : 30 M L W 108 : 1929 M W N 522 : 2 M Cr C 173 : 30 Cr L J 869 : 1929 Cr C 624 (DB).

——S. 128.

——S. 128—Excessive over-crowding—Pulling communication cord and sitting before engine—Offence—Punishment.

The accused was travelling in an Intermediate Class compartment in a Railway, which was licensed to carry 22 passengers. Owing to the failure of the Railway Company to provide sufficient accommodation, no less than 52 passengers travelled in the accused's compartment. The accused pulled the communication cord several times and stopped the train. The Company, however, refused to put on extra carriages. The vacuum brake had in the meantime broken and the accused, after warning the authorities, sat before the engine and began to play music, thereby delaying the train :

Held (i) that the accused was guilty of an offence under S. 128 as his act amounted to a criminal trespass and obstruction of the rolling stock of the Railway.

(ii) that in assessing the sentence, however, the Court had to consider the fact that the accused was making a protest in the interests of the public against the gross mal-administration of a Railway Company. AIR (Vol 18) 1931 Oudh 85 : 32 Cr L J 547 : 8 OWN 99 : 6 Luck 485 : 130 Ind Cas 384 (DB).

——S. 130.

——Ss. 130, 127—Throwing stones at railway train by boys of eight and five years—No offence under S. 127, but an offence under special provisions of S. 130. AIR (Vol 23) 1936 Sind 185 : 30 S L R 9 : 38 Cr L J 83 : 130 Ind Cas 642 (DB).

——S. 130—Jurisdiction.

In view of provisions of S. 29-B of C. P. Code, a Magistrate other than a District Magistrate has no jurisdiction to try an offence under S. 130 of Railways Act: 43 Bom 888, Diss. from. AIR (Vol 15) 1928 Lah 909 : 110 Ind Cas 589 : 29 P L R 536 : 10 A I Cr R 499 : 29 Cr L J 733.

——Ss. 130 and 126 (a)—Minor offender — Forum of trial.

An offence punishable under S. 130 read with S. 126 (a) of the Railways Act, 1890, is not exclusively triable by a Court of Session, but can be tried by a competent Magistrate. A I R (Vol 6) 1919 Bom 173 : 43 Bom 888 : 21 Bom L R 768 : 20 Cr L J 699 : 52 Ind Cas 667 (DB).

——S. 131.

——S. 131—Agent, powers of.

An Agent of Railway Company possessing power of arrest under S. 131 of the Railways Act has no power to place a person in confinement and hence, is not a public officer. AIR (Vol 26) 1939 Cal 386 : 43 C W N 664 : ILR (1939) 2 Cal 46 : 182 Ind Cas 870.

——S. 132.

——S. 132—Requirements of.

Section 132 does not require that either the name or the address should be, in fact, correct.

Section 132 does not require that both the name and address should be believed to be incorrect but either the name or address. A I R (Vol 28) 1941 Sind 117 : 42 Cr L J 786 : 195 Ind Cas 833 (DB).

——S. 132—Requirements of.

An accued who is found guilty of an offece under S. 122 cannot be acquitted on the ground that the prosecution was not on the complaint of the Railway authorities as required under S. 132 of the Act. AIR (Vol 27) 1940 Mad 268 : 41 Cr L J 393 : 1939 M W N 876 : 187 Ind Cas 118.

——S. 133.

——S. 133 — Applicability — Offence under S. 130—Jurisdiction—Magistrate not empowered under Sch. II, Criminal P. C.—Competency to try.

In the absence of any express provision relating to trial of offences under S. 130 by any particular class of Magistrates, the provisions of S. 133 cannot be invoked so as to confer jurisdiction upon a Magistrate to try an offence or this nature when no such jurisdiction is conferred upon him by Sch. II, Criminal P. C., more so when S. 29-B of that Code provides for an adequate machinery for trial of such offences. AIR (Vol 23) 1936 Sind 185 : 30 S L R 9 : 38 Cr L J 83 : 165 Ind Cas 642 (DB).

——S. 135.

——S. 135—Notification of 24th August, 1911, B. B. and C. I. Railway — Liability for tax on wheeled vehicles plied by it within Delhi Municipal limits.

After the issue of the notification, dated 24th August, 1911, which expressly superseded all previous notifications as affecting the B. B. and C. I. Railway, the Municipal Committee of Delhi ceased to have power to levy wheel tax in respect of wheeled vehicles owned by that Railway Administration and plied within the limits of the municipal area. After 24th August, 1911, that Railway Administration could not be held liable for any tax imposed by any local authority except that specifically mentioned in the schedule. AIR (Vol 36) 1949 E P 280.

——S. 135 — Railway Company, if liable to pay house tax.

Where a notification under S. 135 directed the Railway Company to be assessed to house-tax by a local authority under the Madras Local Boards Acts XIV of 1920 and that Act was amended by Act of 1930 under which although there was not substantial change in the name of tax, important changes in the nature, incidence and the method of assessment of the tax were introduced, the Railway Company is not liable for house-tax under the Act as amended in the absence of fresh notification under S. 135 directing the house-tax to be levied under the Amendment Act as the issue of a notification under S. 135 constitutes a condition precedent to the liability of the Railway Company to pay the tax. A I R (Vol 30) 1943 Mad 733 : 1943 M W N 782 : (1943) 2 M L J 307 : 212 Ind Cas 147.

——S. 135—Liability of Railway to pay license fee.

A license fee payable in respect of a warehouse under the provisions of Bengal Act, I of 1893 is a tax in aid of the funds of local authority and hence the railway administration is not liable to pay the license fee unless a notification has been issued by the Central Government declaring the railway administration liable to pay the license fees in respect of their warehouses situated in any of the Municipalities to which the provisions of Bengal Act, I of 1893 apply. A I R (Vol 28) 1941 Cal 319 : 1 L R (1941) 1 Cal 345 : 45 C W N 347 : 42 Cr L J 855 : 196 Ind Cas 394.

——S. 135—Land belonging to the administration, of G. I. P. Railway is subject to the charge for Municipal taxes and S. 135, Railways Act has no application to such cases. A I R (Vol 22) 1935 Bom 352 : 37 Bom L R 513 : 59 B 714 : 158 Ind Cas 824.

——S. 135—Condition for liability.

According to S. 135, specific notification imposing liability for the property tax on the Railway Administration is necessary, and so the Railway Adminis-

tration is never liable without such specific. notification notwithstanding previous notification for other taxes. A I R (Vol 16) 1920 Mad. 746 : 57 M L J 471 : 121 Ind Cas 839 : 52 Mad 779 : 30 M L W 236 (DB).

——S. 135 (2)—Variation of order under.

Order under S. 135 (2) cannot be validly cancelled by a subsequent order.

Action under S. 135 (2) can be taken after the collection by the local authority of the assessment levied by it under cl. (1) of S. 135. The wording of cl. (2) does not imply any condition that the order made thereunder shall apply only in respect of future.

Liability to pay tax mentioned under cl. (1) disappears once an amount is fixed under cl. (2) and a fresh liability takes its place which is not a tax collectable under the District Municipalities Act but an amount collectable under an order under S. 135 (2). If the amount levied is in excess of the amount payable under cl. (2) and a suit is filed for the refund, provisions of S. 354 (2) of the Madras District Municipalities Act do not apply to such a suit. AIR (Vol 31) 1944 Mad 355 : 57 L W 55 : 1944 M W N 44 : (1944) 1 M L J 76 : I L R (1944) Mad 802 (DB).

——S. 137.

——S. 137 (3)—Money-lending business—What is.

An isolated transaction of money-lending is not sufficient to constitute business of money-lending so as to contravene the statutory provisions of S. 137 (3) or in agreements executed by the railway servants. A person does not become a money-lender merely because he may, upon one or several isolated occasions, lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition and continuity. AIR (Vol 28) 1941 All 318 : 1941 A L J 370 : 1941 A W R R 224 : 195 Ind Cas 695

——S. 138.

——S. 138—Discharge, what is.

Agreement by Railway, permitting a person to perform service of providing meals for passengers—Person occupying Railway premises — Person having no free hand in service—Termination of his services :

Held, that he must be deemed to be a Railway servant within meaning of S. 3 (7), Railways Act. Termination of his services by the Railway amounted to discharge within the meaning of S. 138, and he was liable to dispossession of the premises which he was occupying as a servant of the Railway. AIR (Vol 24) 1937 Lah 547 : 38 Cr L J 793 : 169 Ind Cas 649.

——S. 138 — Possession of staff quarters by Railway employee—Whether dismissal puts an end to possession.

Possession of staff quarters lawfully obtained by a Railway employee can be determined only by steps taken under S. 138 and for that possession to become unlawful, there must have been an interruption thereof and a re-entry. The fact of dismissal of the servant by itself does not put an end to his right of possession. Staff quarters for residence are not part of a Railway within S. 3 (4) of the Act. AIR (Vol 1) 1914 Mad 196 : (1914) M W N 124 : 15 Cr L J 225 : 23 Ind Cas 177 (DB).

—S. 140.

See also Civil P.C., S. 80 and Railways Act, S.77.

1. Applicability and Scope.
2. "May be served."
3. Mode of service.
4. On whom to be served.

See also N. 2.

1. Applicability and scope.

——S. 140—Scope of—Notice under S. 80 C.P.C. and notice under the Act.

Notice served under S. 80 C. P. Code, on the Collector within six months, may be considered to be a good notice under S. 77 of the Railway Administration by virtue of the extended definition of Railway Administration including the Government under S. 3, Cl. (6). The notice, however, to be served under S. 140, Railways Act, on the manager of a railway administered by the Government is a notice required or authorized by the Railways Act to be served on a railway administration and would not be a substitute for a notice necessary to be given before institution of a suit against the Secretary of State under S. 80, C. P. Code :

Obiter.—It is a matter for the legislature to consider whether, in the case of the suit against a railway belonging to the State, it is necessary to give notice under S. 80, C. P. Code, when notice of claim is given under Ss. 77 and 140, Railways Act. A I R (Vol 15) 1928 Bom 421 : 52 Bom 543 : 30 Bom L R 970 : 113 Ind Cas 511.

——S. 140 – Applicability to documents.

Section 140 refers not only to notices but to documents which have to be served on the Company and when a claim is made under S. 77, it is a claim in writing to be preferred to the Railway Administration which involves the service of the document on the Company. (1928) 112 Ind Cas 616 : 10 Pat L T 24 (DB).

——S. 140—Suit against agent—Proper defendant.

A suit against a Railway Company is not properly framed when the suit is brought against the Agent of the Company. The frame of the suit can only be amended by substituting the name of the Company as defendant in place of the Agent. Such an amendment will not be allowed if it would prejudice the rights of the opposite party, e. g., to raise the plea of limitation, existing at the date of the proposed amendment.

Sections 140 and 141 of the Act merely set forth the manner of service of notice. They have nothing to do with the manner in which the suit itself is to be framed. AIR (Vol 8) 1921 Pat 485: 2 P L T 679: 64 Ind Cas 125.

2. "May be served."

——Ss. 140 and 77—Service of notice — State-owned Railway—"May"—Meaning of.

A notice of claim must be preferred in writing to the Railway Administration under S. 77 of the Railways Act and S. 140 of the Act is an enabling section enacted by way of giving consignors a greater degree of facility than they would have in S. 77. Taking state owned Railways it is clear enough if the notice is served on the Government in the manner that notices are required to be served on the Government apart from S. 140. To that extent the word "may" occurring in S. 140 is permissive and not compulsory for if the consignor does not choose to take advantage of S. 140 he can proceed to serve notice under S. 77. But if he desires to take advantage of S. 140, clearly he must follow the modes of service prescribed therein and no others. To that extent, it may be correct to say that the word "may" should be read as "must." (1950) 2 D R 35.

——S. 140—"May," meaning of.

The word "may" in S. 140 is the equivalent of the word "must." AIR (Vol 22) 1935 All 900 : 1935 A L J 908 : 1935 A W R 1010 : 156 Ind Cas 541 (DB).

——S. 140—Interpretation—"May" if means 'must.'

Per Costello, J.—There are a number of authorities which have decided that the word "may" in the section is to be read as if it were the word "must" and accordingly it is obligatory upon the person who is making a claim under S. 77 to put forward that claim and to give notice in one or other of the three ways indicated in S. 140. If the matter had been an open one personally I should have been more disposed to take the view which was enunciated in the case of 42 M. L. J. 202, F. B., in which Kumaraswami Sastri J., observed that S. 140 is merely an enabling provi-

sion and that the word "may" does not mean "must."

However, on the facts of the case, it was held there was a valid service of notice by registered post. AIR (Vol 8) 1931 Cal 306 : 34 C W N 1079 (DB).

——S. 140—"May" and not "must."

Word "may" in the section cannot be interpreted as the equivalent of "must." A. I. R. 1923 All. 301, Diss. When the Agent of a railway has directed the public to serve notice of claims, not on him but on his Traffic Manager, Claims, and notice has been served on that Traffic Manager, that service constitutes a service on the Agent and is a sufficient compliance with the provisions of S. 77 of the Indian Railways Act, and equivalent to a notice to the Railway Administration. A I R (Vol 13) 1926 Lah 253 : 7 Lah 238 : 8 L L J 206 : 27 P L R 356 : 95 Ind Cas 808 (FB).

——S. 140—"May" means "must."

Section 140 of the Railways Act is not merely an enabling provision and is exhaustive of the class of persons on whom notice may be served. The word 'may' is used because the law allows notice to be served in one of three modes laid down in the section. It gives an option to the person who is required to issue the notice to choose any one of the three modes prescribed therein. To express that option the legislature has used the word 'may.' If a notice is not served in compliance with any of the three modes mentioned in the section it must be held that there is no notice in law. AIR (Vol 12) 1925 Oudh 419 : 12 O L J 162 : 29 O C 80 : 2 O W N 251 : 89 Ind Cas 139.

——S. 140—"May" means "must."

The language of Section 140 is imperative and the word "may" must be read as "must." What the section lays down is that where any notice or document has to be served on a railway administration such service may be had in one or other of three ways. The meaning of the section clearly is that service must be made in one or other of the ways referred to in clauses (a), (b) and (c) of the section. It is one thing to say that a subordinate official had been entrusted with authority by the Agent to dispose of claims brought against the company and another thing to say that there was delegated to him the power to receive a notice of suit such as is required by Section 77. No notice given to the Deputy Traffic Manager "Commercial" of the G. I. P. Railway, Bombay is good and sufficient notice within the meaning of the Act. A notice stated that the claim by plaintiff had been referred to the General Traffic Manager who had full powers to deal with such matters on behalf of the company and by the post card the plaintiff company was invited to send any further communications on the subject of their claim to the General Traffic Manager.

Held, all that is stated in the notice is that the General Traffic Manager has authority to deal with the claims. That does not indicate that the General Traffic Manager or any one who was subordinate to him in his office had authority to receive the statutory notice which the Act prescribes. AIR (Vol 10) 1923 All 301 : 21 A L J 223 : 45 All 353 : 4 L R A Civ 371 : 71 Ind Cas 614 (DB).

——S. 140—'May' not 'must.'

Section 140 is an enabling provision and the word 'may' does not mean 'must' so as to make the other modes of service ineffectual even in cases where the notice has actually reached the Agent or where the contents of the notice have been communicated to him by the subordinate who receives the notice. AIR (Vol 9) 1922 Mad 362 : 45 Mad 135 : 30 M L T 112 : 42 M L J 202 : 14 M L W 684 : 1921 M W N 878 : 69 Ind Cas 59 (FB).

—— S. 140—Notice of claim letter to be registered — 'May,' means 'must.'

A notice of claim must be given by registered letter. The word 'may' in S. 140 means 'must.' (1910) 14 C W N 888 : 12 C L J 14 : 7 Ind Cas 241 (DB).

——S. 140—"May" means "must"—Notice of claim under S. 77 on whom to be served — Service on Traffic Manager insufficient.

The word "may" in S. 140 means "must" and notice of the short delivery of goods under S. 77 must be served, where the railway is administered by a Railway Company, on the Agent in India of the Railway Company. (1907) 12 C W N 450 : 35 C 194 (196, 197) (DB) ; See also (1909) 13 CWN 24 (25, 26): (1908) 4 M L T 427 : 3 Ind Cas 479 ; (1910) 12 C L J 14 (14, 15) : 14 C W N 888 : 7 Ind Cas 241.

3. Mode of service.

——S. 140—Notice — Service of.

The question whether the notice was duly served upon the manager within the meaning of S. 140, as a general rule cannot be said to be a question of law at all, but is a question of fact depending upon the evidence in each case. AIR (Vol 14) 1927 All 215:99 Ind Cas 622 (DB).

——S 140—Quaere: Whether it is open to the plaintiffs claiming compensation from the railway company for loss of goods consigned to serve the notice in a manner for which no provision is made in S. 140. AIR (Vol 14) 1927 Oudh 1: 3 O W N 869: 98 Ind Cas 742 (DB).

——S. 140—Burden of proof.

The difference between Clauses (b) and (c) of S. 140 is this: If a person chooses to send the notice otherwise than by a registered letter addressed to the Agent at his office, it is for him to prove that the letter was received and that its contents came to the knowledge of the Agent. If he sends a registered letter addressed to the Agent, it is only necessary for him to prove that he forwarded it in this manner. It is unnecessary for him to prove that the Agent received it. AIR (Vol 14) 1927 Oudh 1 : 3 O W N 869: 98 Ind Cas 742 (DB).

4. On whom to be served.

See also N. 2.

——S. 140 — Scope and object—Government owned railway — Notice under S. 77 on Chief Commercial Manager or any subordinate officer—Requirements of Ss. 77 and 140.

The requirements of S. 77 read with S. 140 are satisfied by serving a notice within prescribed period on the chief commercial manager or any other subordinate officer of a Railway company owned by the Government provided it is established as a fact that the Railway company by its course of business or the terms of the contract between the parties has held out a particular official as competent to deal with the claims on receipt of notice to him: AIR (Vol 13) 1926 Pat 413 : 5 Pat 488 : 98 Ind Cas 767 and 112 Ind Cas 616 : 10 P L T 24, Overruled. AIR (Vol 36) 1949 Pat 347 (FB).

——Ss. 140, 77—Notice—Validity.

A notice of claim addressed jointly to the Superintendent General and the Agent is not invalid. AIR (Vol 31) 1944 Nag 362 : I L R (1944) Nag 612 : 1944 N L J 353.

——S. 140—Scope of — Service of notice.

Section 140 merely provides a safe and unanswerable method for serving a claim upon the Railway Administration and enacts, in effect, that service upon the agent is service upon the company, if the company by its course of business, holds up any particular official, e.g., the District Traffic Superintendent as competent to deal with claims, then service of notice upon such an official must be taken as against the company to be service upon the company. AIR (Vol 20) 1933 Pat 45:12 Pat 67 : 13 P L T 695 : 141 Ind Cas 813 (2) (DB).

——S. 140—Notice—Mode of service.

A copy of notice under S 77, Railways Act, was addressed to the Traffic Manager, N. W. Ry. and a copy of it was sent to the E. I. Ry. :

Held, that there was no valid notice to E. I. Ry. within meaning of S. 77, Railways Act. AIR (Vol 18) 1931 Cal 585 : 35 C W N 338 : 134 Ind Cas 93 (DB).

——S. 140—Legal notice.

Suit against state-owned railway — Description of defendant as 'Railway Administration through Agent' — Statutory notice to Secretary of State :

Held, that the suit was a proper suit against Secretary of State and was instituted against a wrong person. Notice to Agent or manager of the Railway Administration was not sufficient. AIR (Vol 18) 1931 Pat 328 : 10 Pat 466 : 13 P L T 86 : 133 Ind Cas 451 (DB).

——S. 140—Commercial manager.

In the case of a railway administered by Government there being no such official called as the Manager, a notice sent to the Chief Commercial Manager is sufficient and fulfils the requirements of S. 77. AIR (Vol 17) 1930 Cal 332.

——S. 140—Commercial Superintendents.

Notice required under S. 77 read with S. 140 must be given to the agent concerned. Notice of suit against a railway company could only be served in one of the three ways described by S. 140. A notice of the claim against the railway company, even within the statutory period to the Divisional Commercial Superintendent as per R. 6, Goods Traffic. N. W. Ry. (1924) is no notice as required by the Railways Act. AIR (Vol 16) 1929 Sind 238:117 Ind Cas 769.

——S. 140—Delegation of authority.

Claim for compensation in writing must be preferred to the agent of the railway administration and even if the power of dealing with claims for compensation has been delegated by the agent to the Divisional Traffic Manager it does not meet the question; what has to be shown is that the power to receive notice on behalf of the agent had been delegated: AIR 1949 Pat 347 (FB), Overruled. (1928) 112 Ind Cas 616 : 10 P L T 24.

——S. 140 — On receipt of a claim which should by S. 140 be addressed to the Agent, the Chief Commercial Manager has a choice of two alternatives, he can decline to deal with it on the ground that it has not been addressed to the Agent, and in the ordinary course, if he does so, his duty is to return it to the sender with a request that it shall be addressed in accordance with the Statute to the proper person. If he does not do so but retains it and either hands it to the Agent, or deals with it himself he must be taken to do so as the subordinate and agent of the Agent and on the strength of the old maxim that "everything is presumed to be done correctly," it must be presumed that, if he does so he does it with the implied consent and therefore, with the authority of the Agent; and therefore, where conduct of that kind is established, the ordinary inference may be drawn and should be drawn, and by the conduct of the Chief Commercial Manager, acting under the authority of the Agent, the Railway Administration have in fact waived compliance with the statutory requirement with regard to the person to whom the prepaid letter should be addressed. AIR (Vol 14) 1927 All 215 : 99 Ind Cas 622 (DB).

——S. 140—Subordinate Officer.

That some subordinate official is entrusted with authority by the Agent to dispose of claims brought against the Company does not amount to delegation to such subordinate official of the power to receive the notice as required by Ss. 77 and 140, Railways Act : AIR 1924 Nag 288, Diss from.

The provision contained in S. 140 must be strictly construed and notice given to any official other than the agent or the manager is an insufficient fulfilment of the requirements of S. 140. AIR (Vol 14) 1927 Nag 276 : 103 Ind Cas 213.

——S. 140—Notice to whom— Traffic Manager.

Where the plaintiff, claiming compensation for loss from the Oudh and Rohilkhand Railway for loss of goods consigned addressed a notice in writing of his claim to the Traffic Manager to whom letters containing claims against the Railway were transmitted for enquiry under the authority of the Agent and the notice was delivered by post in the block of buildings, which contained both the office of the Agent and that of the Traffic Manager :

Held, the agent must be considered, to have constructive notice of a notice received by the Traffic Manager's Department and therefore there was a proper service as contemplated by the section.

So far as notices of section are concerned, the substantial point is whether they reached the person to whom the law requires notice to be given, and the method by which he received it is a matter which is of comparative unimportance. AIR (Vol 14) 1927 Oudh 1 : 3 OWN 869 : 98 Ind Cas 742 (DB).

——S. 140—A notice given to the Deputy Traffic Manager is not a notice to the railway administration on the ground that there is a department in the Traffic Manager's office which deals with claims, to which claims addressed to the Agent would be sent for disposal. AIR (Vol 13) 1926 Bom 138 : 50 Bom 84: 27 Bom L R 1500 : 92 Ind Cas 548 (DB).

——S. 140—A notice to the Traffic Manager is sufficient for the purpose of S. 77. AIR (Vol 13) 1926 Lah 572 : 96 Ind Cas 144 (DB).

——S. 140—Per Shadi Lal, C. J. and Broadway, J. contra Harrison and Fforde, JJ.— The Rule No. 7 in the Goods Traffic Pamphlet 1, page 16 of the N. W. Ry. cannot be said to have been issued by the Secretary of the Railway Board and, therefore, the Traffic Manager, Claims Section, of the North-Western Railway at Lahore should not be treated as a delegate of the Government of India for the purpose of entertaining claims for compensation, and that the communication of the claims to that officer does not amount to a communication to the Government of India. AIR (Vol 13) 1926 Lah 253 : 7 Lah 238 : 8 LLJ 206 : 27 PLR 356 : 95 Ind Cas 808 (FB).

——S. 140—Notice to a subordinate officer of a railway company is not a sufficient compliance with the provisions of the law; but if it can be shown by the plaintiff that a notice of claim for loss of goods, although addressed to a subordinate officer of the Railway Administration, did actually reach the Agent within the time prescribed by law it would be a sufficient compliance with the requirements of the law. AIR 1949 Pat 347 (FB) Overruled. AIR (Vol 13) 1926 Pat 413: 5 Pat 488: 8 PLT 401: 98 Ind Cas 767.

——S. 140—A delegation of authority by Agent to receive notice under S. 77 will be presumed from rules framed by the Railway Company or from the course of conduct of the Railway Company which might lead the public to believe that notice given to a particular officer of the Company would be a valid notice under S. 77 of the Act. But the fact that a particular officer is appointed by the Agent to investigate into and settle claims for loss of goods does not show that the Agent delegated his powers to receive notice to such officer. AIR 1949 Pat 347 (FB) Overruled. AIR (Vol 13) 1926 Pat 413 : 5 Pat 488 : 8 PLT 401 : 98 Ind Cas 767.

——S. 140—Validity of rules.

Any words in the clause printed on the back of the Railway Receipt cannot be given the effect of overriding the clear words of the statute in the

matter of persons on whom notice may be served. AIR (Vol 12) 1925 Oudh 419 : 12 OLJ 162 : 2 OWN 251 : 29 O C 80 : 89 Ind Cas 139.

——S. 140—Station Master—State Railway.

Under the rules of a State Railway, which had an Agent but no Manager, applications for compensation relating to the station from which the articles were despatched in the present case had to be made to the District Traffic Superintendent of that Station. The plaintiff gave notice of his claim to the station Master of the place to which the articles were sent. But no notice was given to the Agent or to the D. T. S. referred to. The correspondence between the Station Master and the Traffic Superintendent related to the loss of the articles and not to the claim.

Held, that under the circumstances of the case, the provisions as to notice, contained in Ss. 77 and 143 of the Act were not complied with. AIR (Vol 12) 1925 Sind 229 : 18 SLR 25 (DB).

——S. 140—Secretary, Railway Department.

Notice of a claim to the Agent of the Railway though addressed to the Secretary to the Government of India, Railway Department, who in acknowledgment which he sent to the claimant stated that the claimant's letter had been sent to the Agent of the Railway for disposal is a sufficient notice. AIR (Vol 11) 1924 Lah 594 : 6 LLJ 237 : 79 Ind Cas 428.

——S. 140—Service of notice upon a subordinate of the Agent may be sufficient if it could be shown by evidence that the Agent had invested the subordinate with authority to receive on his account.

Where there was no evidence that the Divisional Traffic Manager had been invested with any such authority by the Agent, but on the contrary he had the power to settle claims below Rs. 250 only when a valid notice under S. 77 had been served upon the Agent.

Held, that there was no ground for holding that the subordinate official was authorised by the Agent to receive notices on his behalf, and therefore notice upon the Divisional Traffic Manager was no notice to the Agent within the meaning of Ss. 77 and 140. AIR (Vol 11) 1924 Lah 504 : 76 Ind Cas 1.

——S. 140— A notice under Ss. 77 and 140 given to a subordinate officer like the District Traffic Superintendent is not valid unless there is evidence (1) either that the power of the Agent to receive notices under S. 140 had been delegated to the subordinate officer who actually received the notice, or (2) that the company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the Agent and thus estopped itself from raising a technical defence. AIR (Vol 11) 1924 Mad 567 : 34 MLT 303 : 46 MLJ 302 : 77 Ind Cas 511.

——S. 140—There is nothing in the Act which prevents the railway administration or its Agent or Manager from deputing an Officer to receive the notice required by Ss. 77 and 140 of the Railways Act. Whether the Officer is empowered by the Agent to receive such notice on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority or by course of conduct which in the opinion of the Court would justify the interference that the Subordinate Official was authorised to receive notice on behalf of the Agent. AIR (Vol 11) 1924 Nag 288 : 79 Ind Cas 602.

——S. 140—Notice to the Traffic Manager is not a notice to the Agent. AIR (Vol 10) 1923 Cal 397 : 72 Ind Cas 714 : 28 C W N 438 (DB).

——S. 140—Section 77 of the Railways Act insists that notice shall be given in writing to the Agent of the Railway Company in India and notice to a subordinate of the Agent is not notice contemplated by the section. AIR (Vol 10) 1923 Lah 84 : 5 LLJ 3 : 4 Lah 46 : 9 PWR 1923 : 71 Ind Cas 459 (DB).

——S. 140—The notice in the case of State Railways should be served on the Government or on the Agent of the Company managing the Railways or the Manager of the Government. A direction in the railway receipt given for the goods despatched that all claims should be sent to the Traffic Manager does not dispense with the necessity of giving the notice contemplated by S. 77. 66 Ind Cas 578 : 44 All 645 : 20 A L J 664 · AIR (Vol 9) 1922 All 280.

——S. 140—The notice of claim under S. 77 for the loss, destruction or deterioration of animals or goods must be given to the Agent or Manager of the Railway, or to any officer deputed by the company or its Agent or Manager to receive such notice. There is a sufficient compliance with the requirements of the Act, if the Agent or Manager has knowledge of the claim within the specified time, by the subordinate officer sending notice or informing of its contents or by other means. 69 Ind Cas 59 : 45 Mad 135 : 30 M L T 112 : 14 M L W 684 : 1921 M W N 878 : AIR (Vol 9) 1922 Mad 362 : 42 M L J 202 (FB).

——S. 140—Notice of a suit for damages for loss of goods sent by a Railway should be given to the Agent of the Railway Company and no correspondence carried on with the Traffic Manager or notice sent to him can in law amount to notice sent to the Agent. The condition in the railway receipt about sending claims to the Traffic Manager does not absolve the plaintiff from the duty of sending the notice required by law.

Notice of claims against a Railway must be served on a Railway Administration in the manner laid down by S. 140. Notice sent to the Divisional Traffic Manager is not a proper notice in law. (1922) 93 Ind Cas 22 : 13 O L J 15 : 3 O W N 156.

——S. 140—General Traffic Manager.

Where the Agent of a Railway Company has assigned his powers to deal with claims, to the General Traffic Manager.

Held, that notice to the latter is notice to the "Railway administration". 1922 P H C C 145 : 3 Pat L T 215 : AIR (Vol 9) 1922 Pat 106 : 69 Ind Cas 103.

——S. 140—Object of—Notice on manager—Whether sufficient.

The object of S. 140 of the Act is to provide a convenient course of action for the parties aggrieved. S. 140 of the Act does not mean that the Manager is the only person on whom notice of action against a State Railway can be served ; it only says, if notice is served on him, it must be done in the manner provided.

(Per Chatterji J., Beachcroft J, dubitante). A notice served on the Collector will be treated as equivalent to notice on Government. AIR (Vol 4) 1917 Cal 640 : 44 Cal 16 : 23 C L J 547 : 34 Ind Cas 130 (DB).

——Ss. 140 and 77—Notice to District Traffic Superintendent—Whether notice to Agent.

A notice to the District Traffic Superintendent of a Railway company is not a notice to the Agent. 19 C L J 180 : 23 Ind Cas 142 : AIR (Vol 1) 1914 Cal 645 (DB).

——S. 140—Service of notice—Modes prescribed by rules.

Where a mode of service of notice of a claim is prescribed, the company cannot plead insufficiency of notice. Notice to the Traffic Manager is good notice when allowed by the Rules of the Company. (1912) 23 M L J 511 : 17 Ind Cas 419 (DB).

——S. 140—Suit against Railway Company—Notice to whom should be given.

Under S. 140 of the Act, all notices of claims against Railway Companies should be given to the Agent or any officer designated for the purpose or who, according to the practice of the Company deals with such claims. 36 Mad 65 : 10 M L T 236 : (1911) 2 M W N 195 : 12 Ind Cas 76.

——S. 143.
See S. 47.

——S. 145.

——S. 145—Presentation of memo. of appeal by one of three persons jointly authorised to act on behalf of Governor-General—Validity.

Even if the authority to file an appeal on behalf of the Governor-General of India is given jointly to three persons under S. 145 of the Railways Act, the signing of the memorandum of appeal by one of them is quite enough and the presentation by him is proper. If the other two sign the memorandum after the appeal is filed, it is a mere technical irregularity and cannot be taken as fatal to the filing of the appeal. AIR (Vol 37) 1950 EP 160.

——S. 145 — Representative of railway — Right to conduct prosecution.

Section 145 (2) only entitles a person authorised by the Agent of a railway to conduct prosecutions on behalf of the railway administration without the permission of the Magistrate, which would, except for the provision, be required under S. 495, Criminal P. C., prima facie. Neither S. 145 (2) of the Railways Act, nor S. 495, Criminal P. C., affects S. 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge, is under trial. Where the Public Prosecutor has charge of prosecution the pleader instructed by a private person, including the agent of a railway administration, shall, it is enjoined, act under the directions of the Public Prosecutor AIR (Vol 12) 1925 Pat 755 : 7 PLT 343 : 1926 PHCC 74 : 27 Cr LJ 313 : 92 Ind Cas 697.

——S. 145 — Scope — Section contemplates private prosecutions.

Section 145 (2) of the Railways Act, contemplates mainly if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the railway administration in which the Public Prosecutor does not appear, as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions under the Indian Penal Code. AIR (Vol 12) 1925 Pat 755 : 7 PLT 343 : 27 Cr LJ 313 : 1926 PHCC 74 : 92 Ind Cas 697.

——Sch. 2.

——Sch. 2—Artificial silk, whether silk.

Artificial silk is not silk. AIR (Vol 21) 1934 Lah 186 : 15 Lah 596: 36 PLR 536: 150 Ind Cas 709 (DB).

——Sch. 2—Medicines containing gold and silver.

Medicine containing gold oxide or suplhite of silver and prepared for professional purposes is not gold and silver within the meaning of cl. (a) of Sch. II to the Act. AIR (Vol 12) 1925 Cal 115 : 51 Cal 929 : 84 Ind Cas 239.

——Sch. 2—Wax Pearls.

The lost goods though described in the risk-note given by the consignor as glass beads were really what are called in the vernacular as momimotis, that is wax pearls, whose major portion is wax and there is only a thin covering of glass over the wax :

Held, that they cannot properly be described as articles made of glass, and do not come within clause (k). AIR (Vol 10) 1923 All 538 : 21 ALJ 351 : 45 All 453 : 4 I RA Civ 204 : 74 Ind Cas 300.

RAIN WATER.
See Easements Act.

RAIYAT.
See 1. Landlord and Tenant.
2. Local Tenancy Acts.

RAJASTHAN (ADMINISTRATION OF EVACUEE PROPERTY) ORDINANCE (14 of 1949)

——Unauthorised officer purporting to act under — Certiorari in respect of his acts, if can issue.

A writ of certiorari or prohibition can be issued only against an inferior court which expression includes the bodies created by the acts of the legislature. It can only be issued against such bodies, if a duty has been cast upon them of exercising, after hearing evidence, judicial functions, in the sense that they have to decide on evidence between a proposal and opposition. Where a person is neither a Custodian nor an Additional Deputy or Assistant Custodian, simply because he has been acting on behalf of the Deputy Custodian under an alleged authority which is not warranted by law, it cannot be said that he has been acting as an inferior court because the law has cast no duty upon him to decide the questions under the Ordinance in a judicial or quasi judicial manner. Consequently neither a writ of certiorari nor a writ of prohibition can be directed against such person when he purposts to have acted under Ss. 6 and 7 of the Ordinance. AIR (Vol 37) 1950 Raj 58.

RAJASTHAN HIGH COURT ORDINANCE (1949).

——Power of Rajpramukh to appoint Acting Judges even initially.

In view of the fact that the word "Judge" has been defined in the Rajasthan High Court Ordinance, it is clear that the object and intention were that the appointing authority, viz., the Rajpramukh should have the power to appoint Acting Judges even in the beginning if he chose to do so. 1950 R L W 10 (FB).

——S. 3.

——S. 3 (1) — Judges—If includes acting Judges.

There is no justification for the contention that the word "Judges" in S. 3 (1) of the Rajasthan High Court Ordinance means only "permanent judges" and not Acting Judges. The word would include acting Judges also. 1950 R L W 10 (FB).

——S. 10.

——S. 10 (1) — "Specified period"— Meaning—Fixing of a place as a place of High Court "until further orders" — Legality—Powers of Rajpramukh in the matter.

The phrase "specified period" in S. 10 (1) of the Rajasthan High Court Ordinance has been used in the ordinance in contra-distinction to permanently and therefore only signifies "non-permanently". Hence fixing of place as the one where the High Court of Rajasthan should sit "until further orders" is quite legal. The reason is that the powers of the Rajpramukh are not limited as it is open to him to appoint a bench at any place for any length of time. 1950 R L W 10 (F B).

——S. 28.

——S. 28—Scope of the powers of the High Court under — Issuing a writ of mandamus—Provision of law to be followed.

The power of the High Court under S. 28 of the Rajasthan High Court Ordinance to issue orders in the nature of a writ of mandamus is restricted to the "enforcement of such rights as are given by any law for the time being in force." The aforesaid provision does not lay down the mode or circumstances in which the said power can be exercised S. 45 of the specific Relief Act contains the provisions of law which point out the circumstances in which the writ can be issued, and, therefore, it is that provision which has to be looked into for guidance in this matter. 1950 R L W 19.

——S. 44.

——S. 44 (2)—Construction—Meaning.

According to the plain grammatical construction of S. 44 (2) of the Rajasthan High Court Ordinance, the Chief Justice has to determine which particular Judge shall sit alone and which Judges shall constitute a Division Bench. It has nothing to do with the

allotment of cases to a Judge or Judges. 1950 R L W 10 (F B).

RAKSHASA MARRIAGE.

See Hindu Law — Marriage.

RANBIR PENAL CODE (12 of 1989)

——S. 304.

——S. 304 (II) — Culpable homicide not amounting to murder — Proof.

In the previous case it was found that there was no common intention on the part of these accused to cause the death of the deceased and that the fight or alteration which took place, was not premeditated but sudden. In the latter case against the absconding accused the same witnesses made discrepant statements.

Held, the accused could not be convicted. 5 J & K L R 217.

——S. 304 (II)—Sudden fight—Vicarious liability of accused.

Where there was no common intention on the part of the accused either to cause injuries or the death of the deceased and the fight or altercation which took place, was not premeditated but sudden, there can be no vicarious responsibility for the injuries caused by some of them. 5 J & K L R 217.

RANGOON CITY MUNICIPAL ACT (6 of 1922)

——S. 12.

——S. 12 — Any provision altering or repealing S. 103-A, Presidency Towns Insolvency Act (Rangoon) (III of 1909), is perfectly legal.

Since the previous sanction of the Governor-General, under sub-r. (3) of S. 80-A, Government of India Act, had been obtained to the passing of the Rangoon City Municipal Act and also because the Governor-General afterwards gave his sanction under S. 80A, Proviso, Government of India Act, any provision in the Rangoon City Municipal Act, which alters or repeals S. 103-A, Rangoon Insolvency Act is perfectly legal and must stand. AIR (Vol 29) 1942 Rang 30 : 1941 Rang L R 638 : 199 Ind Cas 274

——S. 12 — Express repeal of S. 103-A, Rangoon Insolvency Act — Disqualification of undischarged insolvent, when ceases.

There has never been any express repeal of S. 103-A, Rangoon Insolvency Act in its application to the Rangoon Corporation as is clear from Sch. V, City of Rangoon Municipal Act. It is quite possible to read S. 12, Rangoon City Municipal Act and S. 103-A, Rangoon Insolvency Act, together by saying that their combined effect is that an undischarged insolvent is disqualified but that his disqualification only ceases when he gets discharge plus the certificate mentioned in S. 103-A. AIR (Vol 29) 1942 Rang 30 : 1941 Rang L R 638 : 199 Ind Cas 274.

——S. 12—No disqualification — Supply of bricks by Municipal Councillor to a firm of contractors constructing market for Corporation.

The mere fact that a Municipal Councillor was a brick merchant and supplied them to a contractor engaged to build a market for the Municipal Corporation does not disqualify him from sitting and acting as a Municipal Councillor, when there is nothing to show that the Councillor had any knowledge that the contract for bricks with the contractors was likely to fall to his share, nor whether and if so when, the possibility would arise when he would have to decide between his duty to the Corporation and serving his own interests. AIR (Vol 12) 1925 Rang 367 : 4 Bur L J 161 : 92 Ind Cas 780.

——S. 12 (b)—Disqualification for employment, what is.

The removal of a Municipal President from the Municipal Committee based solely on the ground that his continuance in office was dangerous to the public peace and order, does not amount to a declaration by the Local Government that he was disqualified for employment in the public service. AIR (Vol 29) 1942 Rang 30: 1941 Rang L R 638: 199 Ind Cas 274.

——S. 12 (b)—Public service, meaning of—President of Municipality, whether in public service.

The words "employment in the public service," and "dismissal from the public service," used in S. 12 (b) contemplate an employment from which a person is capable of being dismissed, and ordinarily, that connotes a relationship of employer and employee with the right on the part of the former to dismiss the latter. Receipt of salary or wages is not the test of a public servant.

A President of a Municipal Committee cannot be said to be employed in the public service, within the meaning of S. 12 (b), and hence his removal from that office does not amount to dismissal from public service. AIR (Vol 29) 1942 Rang 30: 1941 Rang L R 638 : 199 Ind Cas 274.

——S. 13.

——S. 13—Applicability.

Provisions of S. 13 (2), Rangoon City Municipal Act, can be applied in the case of a Mayor as in the case of any other Councillor.

Where a resolution of no-confidence in the Mayor by a member of the Rangoon Corporation is ruled out of order by the Mayor, the member has his remedy under S. 13 (2), Rangoon City Municipal Act. He cannot file a suit under S. 45, Specific Relief Act, making it incumbent on the Mayor to allow the moving of the censure motion. A I R (Vol 25) 1938 Rang 18 : 1938 Rang L R 83 : 176 Ind Cas 158 (DB).

——S. 14.

——S. 14—Revision.

The High Court has no jurisdiction to interfere in revision with the orders passed by the Chief Judge of the Small Cause Court, Rangoon in the exercise of the powers conferred on him by S. 14 of the Rangoon Municipal Act. AIR (Vol 13) 1926 Rang 25 : 3 Rang 560 : 4 Bur L J 202 : 91 Ind Cas 550 (FB).

——S. 15.

——S. 15—Election of one candidate invalid—Whole election, if to be set aside.

If it is found that there is wholesale bribery and corruption which it is not possible to bring home to any particular candidate, then the whole election is void and, if there are two or more seats, the election of both or all of those who were returned will, in such a case, be upset. But in a case where one returned candidate is to be taken to be without blemish, a guilty candidate should not be enabled to upset the result as regards his innocent fellow-candidate. Each case has to be considered in the light of its own particular facts and circumstances. A I R (Vol 29) 1942 Rang 52 : 199 Ind Cas 110.

——S 15—Effect of bribe.

The election of the candidate giving the bribe or on whose behalf it is given, results in his election not being a valid one. AIR (Vol 29) 1942 Rang 52 : 199 Ind Cas 110.

——S. 15—Scope.

Section 15 does contemplate that a candidate who has forfeited his deposit may, in certain circumstances, be deemed to have been elected. AIR (Vol 29) 1942 Rang 17: 1941 Rang L R 603: 199 Ind Cas 257.

——S. 15—Election cases—Costs.

The election cases dealt with by the High Court under the Act are governed by the principle generally applicable to petitions initiating proceedings on the original side of the High Court and hence the High Court can, in those cases, make such order for costs as it thinks proper. AIR (Vol 29) 1942 Rang 17 : 1941 Rang L R 603 : 199 Ind Cas 257.

——S. 15—Personation by voter—Effect.

Personation by a voter, when proved, only results in the striking off of the particular vote so recorded.

It does not necessarily prevent that particular candidate being returned. A I R (Vol 29) 1942 Rang 17 : 1941 Rang L R 603 : 199 Ind Cas 257.

——S. 15 (1)—"Corruption" in S. 15 (1), meaning of.

The word 'corruption', in S. 15 (1) means the doing of an act with a motive or intention by means of it to produce an effect upon the election not going so far as bribery, but with the motive thereby to influence the election; provided that the act done amounts to conduct which it was evidently the intention of the Legislature to discountenance.

A person who himself posed as a Barrister, with a view to influence his election as a Municipal Councillor, while he was discharged for misconduct, was held guilty of 'corruption' within meaning of S. 15 (1). AIR (Vol 29) 1942 Rang 30 : 1941 Rang L R 638: 199 Ind Cas 274.

——S. 15 (1) - Corruption on part of candidate, if invalidates his election—Questions to be considered.

While considering whether corruption on the part of a candidate invalidates his election, it is the duty of the Court in each case to look to the particular circumstances, and especially to the number of votes recorded and to the majority obtained to see whether the result may have been affected by the corruption proved. The absolute majority obtained is an important ingredient in deciding this. The corruption of ten or twelve might be very important if there is a majority of twelve only or some such number, but certainly not so important where the majority is sixty, still less where it is as much as a hundred or a thousand or more. AIR (Vol 29) 1942 Rang 30: 1941 Rang LR 638: 199 Ind Cas 274.

——S. 15 (1)—Scope.

There are three matters upon which the High Court is empowered to adjudicate under S. 15 (1), City of Rangoon Municipal Act; (i) if the order of the Commissioner as to the validity of the nomination of any candidate for election as a councillor is disputed ; (ii) if the qualification of any person declared to be elected a councillor is disputed, such as where the candidate is alleged to be disqualified under S. 12 (a) and (b) of the Act or that he obtained his discharge from insolvency without the certificate mentioned in S 103 A (2) (b), Rangoon Insolvency Act; and (iii) if the validity of any election is questioned such as on the ground that the candidate improperly held himself out to the electorate as a barrister, whereas in truth and in fact he had been disbarred. A I R (Vol 29) 1942 Rang 30 : 1941 Rang L R 638 : 199 Ind Cas 274.

——S. 15 (1)—Words "any election," scope of— Two councillor constituency— Bye-election, if can be held for single councillorship — Election of candidate invalid on ground of corruption and severable from election of other elected candidates for constituency — Election of such candidate alone, should be set aside. A I R (Vol 29) 1942 Rang 30 : 1941 Rang LR 638 : 199 Ind Cas 274.

——S. 15 (1)—Petition under S. 15 (1)—Court adjudicating on qualification or nonqualification of candidate.

Where the matter upon which the Court is adjudicating under S. 15 (1) is the qualification or non-qualification of a candidate declared elected to be a Councillor, the Court ought not to take notice, of anything (such as ground of conviction under S. 12) which would disqualify him, even though it is brought to its notice during the course of the adjudication. AIR (Vol 29) 1942 Rang 17 : 1941 Rang L R 603 : 199 Ind Cas 257.

——S. 15 (1) Sch. I, Chap. III, Rr. 2, 2 (2) (b) — Petition objecting to election of candidate— Procedure to be followed—Amendment of petition - Principles applicable, stated — Petition under S. 15 (1) disputing election on ground of non-qualification under Sch. I, Chap. III, R. 2 (2) (b) — Amendment that candidate was qualified under S. 12, whether can be allowed. AIR (Vol 29) 1942 Rang 17 : 1941 Rang L R 603 : 199 Ind Cas 257.

——S. 15 (1) - Chief Judge's power to declare person duly elected.

The Chief Judge has no power to declare a person duly elected should it turn out that he has the majority of the votes. A I R (Vol 22) 1985 Rang 349 : 13 Rang 310 : 159 Ind Cas 196.

——S. 15 (2)—Construction—Court, if must call for objections to unsuccessful candidate to be elected under S. 15 (2).

The words "and against whose election no cause of objection is found" in S. 15 (2) mean, and against whose election no cause of objection is found by the High Court as a result of adjudicating upon any matter upon which an adjudication has been applied for at any time within eight days after the result of the election has been declared. There is certainly no need, and on the wording of S. 15, it would now be most improper for the High Court to call for objections to an unsuccessful candidate who is to be declared elected under S. 15 (2) on the ground that his nomination was invalid. When, therefore, no objections to such a candidate are filed within eight days after the result of the election has been declared, no cause of objection can be found to his election and the High Court must declare him elected. AIR (Vol 29) 1942 Rang 17 : 1941 Rang L R 603 : 199 Ind Cas 257.

——S. 25.

—— S. 25—Erecting urinals—Statutory duty—Performance of—Liability for nuisance.

On a construction of Ss. 25, 26 and 113 Rangoon Municipal Act, a duty is imposed on the Corporation to erect urinals and water closets for public convenience on municipal lands that the choice of the place where it is to be erected and the time when such water closets and urinals at any particular place became necessary are left to the Corporation since the erection of such structures is not merely a permissive act which it is open to the Corporation to perform or not to perform, the principles applicable are those which apply to the carrying out of imperative duties imposed upon a local body. However the legislature onviously intended that if the act could be performed without creating a nuisance they should be so performed but if some nuisance is inevitable then the least practicable amount of nuisance must be created. In case of a proposed latrine by the Rangoon Municipality on a municipal site it would be a nuisance only if there was bad supervision and insufficient cleansing by the corporation and misuse by an ignorant public. The Corporation could not be sued under S. 203 where it chose the site bona fide and after much consideration and mere amenities of property or depreciation of the value of property owing to loss of amenities could not support a claim for an injunction. A I R (Vol 15) 1928 Rang 87 : 5 Rang 722 : 107 Ind Cas 849.

——S. 29.

——S. 29—Scope.

Per Full Bench — The Corporation is competent to make provision by resolution and regulation for payment of passages to officers in the service of the Corporation under Ss. 29 (3) and 31—(Heald Ag. C. J. contra).

Per Heald Ag. C. J. — The true interpretation of Ss. 29 and 31 read with Ss. 230 and 235 of the Act is that in respect of the matters mentioned in those sections the Corporation, if it makes standing orders at all, must make them in the form of rules, which are subject to the sanction of the Local Government, and cannot make them in the form of regulations so

as to avoid the necessity for that sanction. AIR (Vol 17) 1930 Rang 297 (FB).

——S. 80.

——S. 80—Valuation of hereditament.

It is a cannon of Rating Law that the principle of valuation of any given hereditament is the hypothetical value of the hereditament as it stands to any hypothetical tenant. It is not appropriate to take as a guide the actual rents paid for other and widely dissimilar buildings occupied on different terms of tenancy. AIR (Vol 16) 1929 Rang 92 : 6 Rang 669 : 112 Ind Cas 895 (DB).

——S. 80—Race-Course.

Profits made by the owner of a race-course from the use of the premises is a proper basis for assessing the premises and the contractor's test is not applicable. AIR (Vol 15) 1928 Rang 129 : 6 Rang 75 : 109 Ind Cas 514 (DB).

——S. 80—Assessment of Bazaar.

The method of assessment of a bazaar is to determine the amount of rent which would be paid by a "hypothetical tenant" for the bazaar property as a going concern and a "hypothetical tenant" taking the bazaar on lease, in making his offer for renting the property, calculates the total gross rent which he would receive and then would make allowances for :

(a) Stalls, which would become empty and bad debts.

(b) Necessary expenses which he would incur in the way of cleaning, protecting, etc., the bazaar, the cost of collecting rents and so on.

(c) Necessary outgoings in the way of taxation and then profit and loss arising from the transactions.

In this particular case the deductions allowed from the gross rents recoverable were, license fee, Director's commission, lighting charges, cost of establishment, interest for the sum equivalent to one month's rent payable in advance, a reasonable profit and municipal taxes equal to 16⅔ per cent. AIR (Vol 15) 1928 Rang 98 : 5 Rang 715 : 107 Ind Cas 857 (DB).

——S. 80—Recovery of arrears.

So far as "property-taxes" as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and to a sale held under these sections the provisions of S. 48 of the Act will apply unless the purchaser and the defaulter collude. AIR (Vol 14) 1927 Rang 289 : 5 Rang 458 : 105 Ind Cas 258 (DB)

——S. 80—Machinery and plant.

Machinery and plant in the building can be taken into account in ascertaining the annual value of the premises.

That the machinery belongs to the tenant and not to the owner will not absolve the latter from the responsibility for the tax. Corporation are under no obligation to make any enquiry as to who was the actual owner of that machinery and plant. It is for the owner to make his own arrangements with tenant as to who should pay the extra rate due to the premises having machinery and plant thereon. AIR (Vol 14) 1927 Rang 164: 5 Rang 271: 103 Ind Cas 276 (DB).

——S. 80 Rice mills.

It would be dangerous to make the contractor's test the sole basis of rating of such properties as rice mills, as, indeed, any industrial undertaking capable of being let. Where the hypothetical tenant's theory can be applied, this theory must be followed as it is the one contemplated by S. 80. AIR (Vol 14) 1927 Rang 161 : 5 Rang 161 : 103 1nd Cas 40 (DB).

——S. 80—Gross annual rent.

The lighting, conservancy and water taxes commonly known as occupier's taxes, which average about 16⅔ per cent. of the rental are not part of the gross annual rent of lands and buildings and must be excluded for the purpose of assessment. The deductions allowed by the Commissioner under Schedule III, Chapter II, Section 3 up to 20 per cent. do not relate to these taxes, but are made in respect of matters like vacancies, establishment and management charges. AIR (Vol 12) 1925 Rang 115 : 3 Bur L J 221 : 84 Ind Cas 996 (DB).

——S. 80—Standard rent as basis.

In assessing buildings and lands to taxation in Rangoon under the City of Rangoon Municipal Act, 1922, the Corporation must, in the absence of special circumstances, take as its basis the standard rent in those cases in which the standard rent has been fixed by the Rent Controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts and circumstances including the effect that the Rangoon Rent Act has, or may have, on the matter. In arriving at a decision as to the amount for which the premises may reasonably be expected to let, the Assessor will consider the rent a tenant can extract from his sub-tenants; but this will not be the only matter to be considered in arriving at a decision. AIR (Vol 11) 1924 Rang 194 : 1 Rang 668 : 79 Ind Cas 432 (FB).

——S. 80(2)—Determination of rent which hypothetical tenant would pay — Rent actually paid by existing tenant. if conclusive test — Comparative method. value of.

In deciding the gross rental value, the actual rent paid by an existing tenant is certainly not the final or conclusive test of what an imaginary tenant would pay. In other words, it is only prima facie evidence of value and the special circumstances in which it is paid and in which any collateral engagements are entered into between the parties must be taken into consideration in determining what is the rent a hypothetical tenant might reasonably be expected to pay for the hereditament. It is practically valueless to adopt the comparative mothod, i. e., comparison with assessment in force of similar premises used for a similar purpose in the neighbourhood except in the absence of more direct evidence. AIR (Vol 25) 1938 Rang 173: 1938 Rang L R 154: 177 Ind Cas 406 (DB).

—— S. 80(2) Assessment, when ultra vires.

In assessing rice mills in the District of Rangoon, the contractor's test ought not to be applied, and assessments based upon that principle would be ultra vires. AIR (Vol 22) 1935 Rang 413 : 13 Rang 709 : 159 Ind Cas 996 (DB).

——S. 80(2)—"Gross rent," meaning of.

The term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes and the commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. This definition may be taken as denoting the meaning of "gross annual rent" in S. 80(2). AIR (Vol 22) 1935 Rang 413: 13 Rang 709 : 159 Ind Cas 996 (DB).

——S. 80(2)—Assessment, method of.

In every case, the assessment must depend upon what the Commissioner determines as the rent which a hypothetical tenant might reasonably be expected to give for the property if he paid the usual tenant's rates and taxes and the landlord paid the expenses necessary to enable the mill to earn the rent. It may or may not be that the gross annual rent would be

equivalent to actual agreed rent plus the sum reasonably expended in order that the rent might be obtained, but it does not necessarily follow that these two sums would be the same. AIR (Vol 22) 1935 Rang 413 : 13 Rang 709 : 159 Ind Cas 996 (DB).

——S. 80(2)—Method of assessment.

The correct method of ascertaining the annual value of the Burma Railways under S. 80 (2) is to find out the annual assessable value of the Burma Railways undertaking as a whole and after deducting the annual assessable value of the indirectly productive portion of the whole undertaking, to multiply the resultant figure representing the annual assessable value of the directly productive portion, that is, the running lines by the gross receipts earned in the Municipal area of the City of Rangoon and to divide the said sum by the gross receipts earned by the Burma Railways undertaking as a whole. AIR (Vol 19) 1932 Rang 169 : 10 R 539 : 140 Ind Cas 821 (DB).

——S. 80(2)—Cinema theatre.

The word "houses" in sub-section (2) is restricted to dwellings intended for human habitation. A cinema theatre is not a 'house' but a 'building' and the seating accommodation which is for the comfort and convenience of the audience must be taken into consideration in ascertaining the rateable value. AIR (Vol 13) 1926 Rang 177 : 4 Rang 178 : 97 Ind Cas 238 (DB).

—S. 86.

——S. 86—Machinery and plant.

Machinery and plant can be taken into account in assessing a building— Owner is responsible for extra assessment for machinery although it belongs to tenant. AIR (Vol 14) 1927 Rang 164 : 5 Rang 271 : 103 Ind Cas 276 (DB).

—S. 91.

——S. 91 — Notice — Orders reserved — Failure of Commissioner to inform complainant the date of final disposal — Copy of order sent to party — Date from which fourteen days' period begins is date on which he received copy of the order.

Before advantage could be taken of the requirement of notice within fourteen days of any particular date the requirements of the Act with reference to that date must be fully and properly complied with. When orders are reserved, the complaint is not disposed of within the meaning of the Act until the order is delivered. Where nothing remains but for the order to be written and delivered, the date on which it is disposed of will be the date of the delivery of the order, and notice of that date, the Commissioner is, by the Act, bound to give to the complainant. But where no such notice of the final disposal is given, but notice is served on the complainant, with a copy of the Commissioner's order, the date of receipt of that notice and copy of the order constitutes a sufficient compliance with the requirements of the Act as to notice of the date for final disposal. And if notice of an intention to appeal is served on the Corporation within fourteen days of the date on which the appellants received a copy of the Commissioner's order, the Court would have jurisdiction to entertain the appeal. Otherwise not. AIR (Vol 10) 1923 Rang 193 : 1 Rang 220 : 76 Ind Cas 519 (DB).

——S. 91—Appeal to High Court.

Where it is alleged that the Commissioner has disregarded the provisions of the Act which lay down the procedure to be followed by him in determining the annual value, a question arises as to the basis or principle of assessment, and an appeal lies to the High Court under the provisions of S. 91 (3) of the Act. AIR (Vol 14) 1927 Rang 123 : 5 Rang 38 : 101 Ind Cas 428 (DB).

——S. 91—Appeal to Privy Council.

A decree of the High Court under S. 91 (3) of the Rangoon City Municipal Act is not a final judgment, decree or order within the meaning of Art. 37 of the Letters Patent or S. 109 of the C. P. Code, and is not appealable to His Majesty in Council. AIR (Vol 14) 1927 Rang 88 : 4 Rang 503 : 6 Bur L J 1 : 99 Ind Cas 994 (DB).

—S. 92.

——S. 92 (1) — Applicability — Buildings of Burma Railways undertaking.

Notwithstanding the enactment of S. 92, City of Rangoon Municipal Act, and the transfer of the undertaking to Government the assessment of the Burma Railways by Local Authorities continues to be regulated by S. 135, Railways Act; S. 92 (1) of the City of Rangoon Municipal Act does not apply to the buildings of the Burma Railways undertaking. AIR (Vol 19) 1932 Rang 169 : 10 Rang 539 : 140 Ind Cas 821.

—S. 164.

——S. 164—Power of Local Government in choice of Revenue Officer—Liability of Corporation over acts of agent over whom it has no control.

In the choice of a Revenue Officer, the Local Government is, under S. 164, confined to some one who is an 'officer of the Corporation.' The Local Government's power is to 'prescribe the officer' to perform certain duties not to appoint him. There is a great difference between 'prescribing' what certain persons are to do and appointing certain persons to do those things. The Corporation has no liability for the act of an officer over whom, in the exercise of those duties, it has no measure of control whatever and who is in no sense in his capacity of Revenue Officer, its servant or agent. AIR (Vol 22) 1935 Rang 439 : 160 Ind Cas 90.

—S. 178.

——S. 178—License fee on private market.

Held, (1) that a Municipal Council can levy a licence fee on private markets also ; (2) that such a levy was not rendered invalid by reason of the absence of the sanction of the Local Government ; (3) that the burden of proving that the fee fixed by the Corporation was so excessive as to amount to an abuse of its legal powers is on the party on whom the fee was levied ; and (4) that the license fee need not be restricted to the cost of the paper on which the licenses and receipts were printed but that it may include also the cost of all special services necessitated by the duties and liabilities imposed on the Corporation in respect of the supervision and regulation of private markets. AIR (Vol 17) 1930 Rang 282 : 8 Rang 143 : 125 Ind Cas 352 (DB).

——S. 178 (2) (3)— Private markets — Licence fee — Amount of fee chargeable — Levy in proportion to assessable value.

The license fee for private markets which the Municipal Committee is entitled to charge under S. 178 might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation in respect of the supervision and regulation of private markets and if the Corporation have, in good faith, charged the fees in question and fixed the amount thereof upon the footing that the sums paid would cover the cost aforesaid, it would not be beyond the powers of the Corporation to exact payment of those fees.

Where the Corporation arrived at the total amount of the cost which was to be covered by the sums payable by all the private markets and divided this total sum among all the private markets in proportion to their respective assessable values and a sum which represented the percentage was then charged to each private market as its license fee :

Held, that the fees were charged 'at a rate fixed by the Corporation' within the meaning of S. 178 (3) and were validly charged. A I R (Vol 18) 1931 P C 217 : 9 R 440 : 35 C W N 1005: 34 L W 936: 1931 M W N 824 : 54 C L J 285 : 61 M L J 740 : 58 I A 313 : 133 Ind Cas 724.

—S. 189.

——S. 189—Object and scope.

The primary object of Ss. 189 and 192 of the Act is to authorize certain payments by way of compensation to those who may be affected by the act of the Corporation causing nuisance which but for such authorization will be ultra vires of the Corporation. It is clearly not the intention of the legislature to deprive private persons of their ordinary rights or remedies. If the legislature does not authorize the creation of a nuisance and if the Corporation knowingly creates it, the thing cannot be said to be done with care and attention. Neither S. 192 nor S. 203 of the Act is a bar to suit for injunction against the Corporation. AIR (Vol 15) 1928 Rang 87 : 5 Rang 722 : 107 Ind Cas 849.

—S. 192.

——S. 192—Mortgagee.

A mortgagee who had given no notice of his mortgage to the Municipal Corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47, by the Corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction-purchaser as defendant.

Held, that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the Corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally :

Held further that the doctrine of lis pendens does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. A I R (Vol 16) 1929 Rang 175 : 7 Rang 113 : 117 Ind Cas 575.

——S. 194.

——S. 194 — Applicability — Jurisdiction of Civil Court.

Before S. 194 comes into operation, there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly, the Court may enquire whether a person is in arrear with payment of a municipal tax, for, if he is not, the Land Revenue Acts have no application. AIR (Vol 28) 1941 Rang 97 : 1941 Rang LR 7 : 193 Ind Cas 372 (FB).

——S. 194 — Appointment of Akunwun of Rangoon Corporation, for realising revenue and exercising powers under Ss. 45, 46, 47, Lower Burma Land and Revenue Act (II of 1876) as amended—Akunwun whether servant of Corporation—Akunwun guilty of negligence or dereliction in performance of his duties—Corporation not liable. AIR (Vol 23) 1936 Rang 354 : 14 Rang 160 : 164 Ind Cas 448 (DB).

——S. 194 — Person to whom demand notice is addressed and decree under S. 45, Lower Burma Land and Revenue Act passed, dead at all material times — Such person not a defaulter — Proceedings not valid. AIR (Vol 23) 1936 Rang 202 : 162 Ind Cas 743 (DB).

——S. 194—Rights of purchaser.

A purchaser at a sale for arrears of municipal taxes payable to the Corporation of Rangoon does not take the property free of encumbrances in all cases. Section 46, Burma Land and Revenue Act, can only apply where the dues to the Municipality are in the nature of the land revenue or land rate in lieu of capitation tax. AIR (Vol 14) 1927 Rang 289 : 5 Rang 458 : 105 Ind Cas 258 (DB).

——S. 214.

— S. 214—Continuing offence.

Although the offence of keeping open a private market without a license is a continuing offence, which is freshly committed every day, still if the offenders committing the same for more than six months to the knowledge of the Municipality, S. 214 (2) is a valid defence. AIR (Vol 16) 1929 Rang 122 : 7 Rang 23 : 30 Cr LJ 754 : 117 Ind Cas 250.

——S. 220.

——S. 220—Rules under — Rule 7 to Sch. I, Chap. IX —Notice to convene meeting to consider report of committee called for, as result of resolution to appoint a new Legal Adviser after usual advertisement — Report naming no particular individual nor hinting at his appointment without advertisement— Appointment of named individual without advertisement, held irregular. AIR (Vol 26) 1939 Rang 130 : 1939 Rang LR 454 : 181 Ind Cas 630 (FB).

——S. 230.

——S. 230—Authority of rules.

Rules made under Ss. 230 and 232, by virtue of the Act, are to have the force of law. They cannot be altered or rescinded except by resorting to the same process as is resorted to when they are made, and since many of the matters specified in S. 235 are, or appear to be, of minor importance, it would be unreasonable to hold that the Corporation is precluded from dealing with them otherwise than by rules made under Ss. 230 and 232. AIR (Vol 17) 1930 Rang 297 (FB).

—— S. 230—Nature of provisions.

Although the wording of Ss. 230 and 235 of the Act is permissive, nevertheless there is a duty on the Corporation to make rules for the purposes for which it is empowered to make rules, when circumstances calling for such rules exist. AIR (Vol 17) 1930 Rang 297 (FB).

——S. 230—Sections 230 and 235 are not mandatory, but enabling. The Corporation "may," not "shall" make rules. AIR (Vol 17) 1930 Rang 297 (FB).

——S. 235.

——S. 235—Passage allowance to officers.

Passage allowances to officers in the service of the Corporation may well be said to be ejusdem generis with many matters dealt with in S. 235. AIR (Vol 17) 1930 Rang 297 (FB).

——S. 235 (52) — Words in S. 235 (52) cannot be read ejusdem generis with what has preceded them in S. 235.

The words in S. 235 (52) are wide enough to cover all purposes of Act for which no provision has been made by Legislature. AIR (Vol 29) 1942 Rang 70 : 1941 Rang LR 724.

——Sch. I, Chap. 3, R. 2.

——Sch. I, Chap. 3, R. 2 (2) (b)—"Total".

"Total" connotes, the addition of one thing to another, and the word 'total' is used in R. 2 (2) (b) of Chap. III, Sch. I of the Act in connection with monthly value for purposes of assessment to municipal taxation. "Total monthly value" for purposes of assessment to municipal taxation means therefore the resultant figure obtained by adding together two or more such monthly values. If a building is treated as a whole under R. 3 (1) of Chap. II of Sch. III, there cannot be two or more such monthly values which are capable of being added together so as to make a total monthly value of that one building for

purposes of assessment to municipal taxation. Hence it cannot be said that when once a building as a whole is valued for purposes of assessment to municipal taxation at not less than one hundred rupees, every one who occupies or pays rent for a portion of that building, however small, is qualified under R. 2 (2) (b) to be elected as a candidate. What R. 2 (2) (b) means is that, if a person occupies or pays rent for more than one building or portion of a building in the city, he may add together the monthly values of those buildings or portions of buildings for purposes of assessment to municipal taxation and if the total is not less than one hundred rupees, he is qualified. AIR (Vol 29) 1942 Rang 17 : 1941 Rang LR 603 : 199 Ind Cas 257.

——Sch. 1, Chap. 3, R. 2 (2) (b)—Applicability.

However late in the day any rent is paid, it is sufficient to bring the person within R. 2 (2) (b), the words used therein being "pays rent." AIR (Vol 29) 1942 Rang 17 : 1941 Rang LR 603 : 199 Ind Cas 257.

——Sch. 1, Chap. 6, Rr. 4 (A) and 4 (B).

——Sch. 1, Chap. 6, Rr. 4 (A) and 4 (B) — Held, that the statement by tender did not amount to withdrawal of tender.

One of the tenderers, in the course of inquiry by the Chief Resident Engineer of the Corporation, stated, "I will try and deliver the sleepers within the stipulated time but I am not sure whether I shall succeed." The Engineer took this statement to be a withdrawal of the tender and forfeited the deposit made by the tenderer as earnest money :

Held, that the statement did not amount to a withdrawal of the tender and therefore, the earnest money could not be forfeited under Rr. 4 (A) and 4 (B). AIR (Vol 29) 1942 Rang 70 : 1941 Rang LR 724.

——Sch. 1, Chap. 6—Rr. 4 (A) and 4(B) are not ultra vires.

There is nothing unfair or unreasonable about Rr. 4 (A) and 4 (B) of Chap. VI, Sch. I which have been framed in order to protect the interest of the Corporation and to enable it to discharge the functions entrusted to it by the Legislature and they cannot be declared ultra vires merely because they are to a certain extent repugnant to Ss. 5, 25 and 74 of the Contract Act. Consequently, the Corporation have power under Rr. 4(A) and 4 (B), Chap. VI, Sch. I of the Act to forfeit the earnest money deposited by a tenderer if he withdraws his tender before its acceptance or rejection by the Corporation. AIR (Vol 29) 1942 Rang 70 : 1941 Rang L R 724.

——Sch. 1, R. 6.

——Sch. 1, R. 6 — "Substantive proposition"—Vote of no-confidence, whether such proposition.

Obiter.—The words "substantive proposition" connote the idea of something put forward on which the Council can, if it desires, take subsequent action. A vote of no-confidence is a mere resolution of protest, which by itself admittedly need not necessarily be effective. A vote of no-confidence is not therefore, a "substantive proposition." AIR (Vol 25) 1938 Rang 18 (20, 21) : 1938 Rang L R 83 : 176 Ind Cas 158 (DB).

—— Sch. 2, Chap. 15, R. 2.

——Sch. 2, Chap. 15, R. 2—Validity of rule.

Schedule 2, Chap. 15, R. 2 fixing the rate or amount of license fee to be levied for private markets is ultra vires and invalid, inasmuch as the Corporation has no power under the provisions of the Act to make such a rule and include it in the schedules. Provisions of Ss. 229 and 230 do not debar Court from declaring such a rule to be ultra vires.

It was not the intention of the Legislature to give the Corporation power to impose on the owners of private markets a charge for a license which might extend to any amount for which the sanction of the Local Government could be obtained. The intention was merely to give power to charge a fee which would save the Corporation from being out of pocket by reason of the duties and liabilities imposed on it by Act of the supervision and regulation of private markets. AIR (Vol 14) 1927 Rang 183 : 5 Rang 212 : 102 Ind Cas 878 (DB).

——Sch. 3, Chap. 2, R. 3 (1).

—— Sch. 3, Chap. 2, Rr. 3 (1), 8 (2), Sch. I, Chap. 3, R. 2 (2) (b)—Occupier of portion of building paying larger rent — Value of portion or whole of building for purposes of assessment to municipal taxation, if increased—When can such value be increased.

For the purposes of R. 2 (2) (b) of Chap. 3, Sch. 1. payment of rent by a person is not the test as to his eligibility for election but it is the assessment to the municipal tax that matters. The payment of a larger rent by the occupier of a portion of a building does not of itself increase the value of the portion or whole of the building for purposes of assessment to municipal taxation. That value can only be increased by the assessor increasing the assessment. The monthly value of a particular portion of a building for purposes of assessment to municipal taxation cannot be said to have increased merely because the landlord is receiving a larger rent from it than he did at the time of the last assessment of the whole building. It is only the assessor who can increase the assessment. AIR (Vol 29) 1942 Rang 17 : 1941 Rang LR 603 : 199 Ind Cas 257.

——Sch. 3, Chap. 2, R. 5.

——Sch. 3, Chap. 2, Rr. 5, 6 and 7—Enhancement of assessment.

Commissioner cannot enhance assessment in dealing under Cls. 5 and 6 — If enhancement is thought necessary notice to owner of property about enhancement must be served. AIR (Vol 14) 1927 Rang 123 : 5 Rang 33 : 101 Ind Cas 428 (DB).

RANGOON DEVELOPMENT TRUST ACT (5 of 1920)

——S. 69.

——Ss. 69 (2) (3), 95 — Liability of agents for payment of tax.

Under S. 69 (2), only the owners are liable for collection and payment of tax, and Rr. 1 and 3 of the rules framed under S. 95, except in so far as they refer to owners, are ultra vires, being inconsistent with S. 69 (2). AIR (Vol 19) 1932 Rang 123 (126) : 10 Rang 412 : 139 Ind Cas 566 (FB).

RANGOON HACKNEY CARRIAGES ACT (4 of 1917)

——S. 4.

——S. 4 — License — Granting of—Commissioner of Police, if has unfettered discretion to grant or refuse license.

Section 4 gives the Commissioner of Police an unfettered discretion to grant or refuse a license. If it had been intended by the Legislature that it was to be obligatory upon the Commissioner of Police to grant license in every case, there would have been a section in the Act to say so. AIR (Vol 25) 1938 Rang 69 : 1937 Rang LR 414 : 10 Rang 389 : 174 Ind Cas 161 (DB).

——S. 23.

——S. 23—Rules under, R. 1 — Rule, if ultra vires—Commissioner of Police, if can make rules — Breach of such rule, if entails action similar to penal breach.

Obiter (Per Roberts. C. J.)—When one looks at the objects of the Act, "for the regulation and control of hackney carriages and rickshaws in Rangoon," and when one sees that by S. 23, the Local Government may make rules from time to time for carrying these objects into effect, there is nothing ultra vires in R. 1 so made by them. This rule does not give the Commissioner of Police power to make rules still less

to make general orders, the breach of which is to be treated as though they were breaches of a penal enactment. But the rule is unnecessary since its terms are implicit in the wording of S. 4 of the Act. A I R (Vol 25) 1938 Rang 69 : 1937 Rang L R 414 : 174 Ind Cas 161 (DB).

——S. 23—Rickshaw, license for — Commissioner of Police not exercising discretion vested in him — Power of Court to direct him to issue license.

If a rickshaw complies with the conditions as laid down under S. 23 and is found fit for public use, and if the Commissioner of Police has not issued license up to the maximum number as fixed by him, then he must issue a license whether the rickshaw is old or not.

Where he has not exercised the discretion vested in him, it is open to the Court under S. 45, Specific Relief Act, to direct him to issue the license in accordance with the rules framed under S. 23. AIR (Vol 20) 1933 Rang 37 : 142 Ind Cas 832.

RANGOON HIGH COURT RULES

——Appellate Side Rules.

——R. 5.

——R. 5 — A petition for leave to appeal to Privy Council must comply with R. 5 Rangoon High Court Appellate Side Rules. Copies of judgment and decree must accompany petition for leave. AIR (Vol 28) 1941 Rang 299 : 1941 Rang L R 391: 197 Ind Cas 741 (DB).

——R. 5 — Letters Patent appeals — Limitation Act, Art. 151.

The period of limitation for an appeal from a judgment of the Original Side under Cl. 13 of the Letters Patent is 20 days from the date of the judgment, and in such appeals the memorandum of appeal must be accompanied by a certified copy of the judgment unless the Court dispenses with it, but need not be accompanied by a certified copy of the decree. A I R (Vol 14) 1927 Rang 20: 98 Ind Cas 417: 4 Rang 265 : 5 Bur L J 187 (DB).

——R. 5— Rule 5 of the Rangoon High Court Appellate Side Rules was intended to apply and does apply to appeals against judgments of the Original Side under Cl 13 of the Letters Patent and, therefore, in the case of such appeals the memorandum of appeal must be accompanied by a certified copy of the judgment which is under appeal unless the Court dispenses with it. A I R (Vol 13) 1926 Rang 143: 98 Ind Cas 689 : 5 Bur L J 75 (DB).

——R. 9.

——R. 9—Validity of rules.

Rule 9 (2), Appellate Side Rules of Procedure of the Rangoon High Court is ultra vires in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Limitation Act, 6 Rang 302, Diss. from. AIR (Vol 17) 1930 Rang 228 (FB).

——R 28.

——R. 28—Validity of rule.

Rule 28 is ultra vires so far as it contemplates that a Judge, other than the Judge, who passed the judgment, may declare that a case is a fit one for appeal. A I R (Vol 13) 1926 Rang 1 : 93 Ind Cas 124 : 3 Rang 546 : 4 Bur L J 185 (FB).

——R. 70.

——R. 70—Period for transmission of record.

So long a period as three years was held to be unnecessary and is not justifiable in getting the record ready for transmission to His Majesty in Council. AIR (Vol 11) 1924 Rang 217 : 80 Ind Cas 744: 2 Rang 91 : 3 Bur L J 30 (DB).

——Chap. I

——Chap. I, Part III, Chap. I (A), R. 5.

Judgment on Original Side on 25th July 1933—Period for appeal (20 days) expiring on 14th August—Application for copy of judgment on 3rd August and the copy ready on 10th August—Application for copy of decree on 5th August and copy ready on 23rd August — Long vacation of High Court commencing on 2nd September — Memorandum of appeal filed on 6th September.

Held, that the appeal was in time. A I R (Vol 22) 1935 Rang 65 : 12 Rang 525 : 154 Ind Cas 852 (FB).

——Insolvency Rules.

——R. 189 - Validity of rule.

Rule 189 of the Insolvency Rules of the Chief Court of Lower Burma made under the Presidency Towns Insolvency Act, 1909, is not ultra vires of the powers of the Court and the words "the insolvent's property" include moveable as well as immoveable property. AIR (Vol 11) 1924 Rang 88 : 76 Ind Cas 669 : 1 Rang 433.

——Original Side Rules.

——Filing of award.

Any one arbitrator can on behalf of himself and the others send the award to the Court. A I R (Vol 14) 1927 Rang 197 : 102 Ind Cas 800 : 5 Rang 171.

——R. 233.

——R. 233 — When the Original Side of the High Court executes its own decree, it is at the same time the Court which passed the decree and the Court which executes it; but in no way can the Original Side of the High Court be said to be the Court which passed the decree, which actually was passed by the Court of Small Causes, and the decree cannot be executed in the same manner as if it is passed by the High Court in its original jurisdiction. AIR (Vol 21) 1934 Rang 197 : 149 Ind Cas 763 (DB).

——R. 258.

——R. 258—Acceptance of bid by Judge.

The rules of procedure on the Original Side of Rangoon High Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor do the provisions of O. 21 require a bid to be accepted by a Judge before the contract of sale can be held to be complete. AIR (Vol 16) 1929 Rang 311 : 120 Ind Cas 142 : 7 Rang 425 (DB).

RANGOON INSOLVENCY ACT.

See Presidency Towns Insolvency Act, 1909.

RANGOON POLICE ACT (4 of 1899).

——S. 6.

——Ss. 6, 7, 10, 11, 19 — Prosecution of Sub-Inspector—Sanction of Local Government.

Where it is alleged that a Sub-Inspector of the the Rangoon Police force committed an offence whilst acting or purporting to act in the discharge of his official duty, S. 197, Criminal P. C., applies and sanction of the Local Government is required for prosecuting him. A I R (Vol 22) 1935 Rang 165 : 36 Cr L J 957 : 156 Ind Cas 574.

——S. 30.

——S. 30, sub-s. (a), (b), (c), (d), (e) — Person found on road—Offence.

No offence is committed by a person found on a road unless under the circumstances detailed in subss. (a), (b), (c) and (e), S. 30, armed with a dangerous or offensive weapon or lying or loitering, or with the face covered or disguised, or in possession without lawful excuse, of house breaking implements. And sub-s. (d) only applies to people found within the precincts of any dwelling house or other building or in the back drainage space. "Being by the side of a building is not necessarily" being within its precincts except when there is a suggestion in the record that the person was in a back drainage space. A I R (Vol 20) 1933 Rang 74 : 34 Cr L J 1253 (1) : 146 Ind Cas 233.

——S. 30 (c)—Essentials of offence under.

An accused was charged under S. 30 (c) for "being found between sunset and sunrise with his face covered and being unable to give a satisfactory

account of himself." The record was silent as to what account was given by the accused at the time of his arrest and as to any reason for considering such accounts to be unsatisfactory. Held, that the record omitted a most essential ingredient of the offence. (1911) 4 Bur L T 117 : 12 Cr L J 280: 10 Ind Cas 921.

——S. 41.

——S. 41 (16)—Acquittal under—Effect.

The acquittal on the charge under S. 41 (16) is equivalent to an acquittal on a charge of rioting under S. 147, Penal Code. A I R (Vol 22) 1935 Rang 436 : 37 Cr L J 189 : 159 Ind Cas 967.

RANGOON PORT ACT (4 of 1905)

——S. 65.

——S. 65 — Port Commissioner — Right to exclude persons from public landing places.

The Commissioners for the Port of Rangoon are not the absolute owners of the property vested in them but are in possession thereof subject to the provisions of the Rangoon Port Act and consequently the Port Commissioners have no right apart from the provisions of the Rangoon Port Act and the bye-laws legally made thereunder, to exclude any member of the public from using public landing places, and a person entering such a landing place though in defiance of the Traffic manager, is not guilty of criminal trespass. A I R (Vol 23) 1936 Rang 232 : 37 Cr L J 829 : 163 Ind Cas 235.

——S. 65 — Bye-law promulgated in Notification No. 1, dated 4th January 1923 alleged to be made under S. 65 (1).

It would require a very wide construction of the provisions of S. 65, Rangoon Port Act, to bring bye-law promulgated in Notification No. 1, dated 4th January 1923, and alleged to be made under S. 65 within the powers conferred by any of the clauses of sub-s. (1) of S. 65. A I R (Vol 23) 1936 Rang 232 : 37 Cr L J 829 : 163 Ind Cas 235.

——S. 65 — Bye-law 1, cl. (e), Notification No. 1, dated 4th January 1923 — 'Wharves, definition of— Whether ultra vires.

The definition of 'wharves' in cl. (e) of bye law No. 1 of the bye-laws published in Notification No. 1 dated 4th January 1923, in so far as it differs from the definition of the term contained in S. 4 of the Rangoon Port Act is ultra vires. A I R (Vol 23) 1936 Rang 232 : 37 Cr L J 829 : 163 Ind Cas 235.

——S. 87.

——S. 87 — Payment of port charges before date fixed for sale — Sale by Commissioner — Suit for compensation — Commissioner liable to make good loss. A I R (Vol 18) 1931 Rang 95 : 132 Ind Cas 545.

——S. 101.

——S. 101—"Purporting to be done under the Act".

A suit for damages against the Commissioners for the Port of Rangoon for the loss of goods was dismissed on the ground that the provisions of S. 101 had not been complied with. The plaintiff contended that the section did not apply because the loss or destruction of goods is not anything "purporting to be done under the Act," as provided in the section.

Held, that S. 101 applied and the notice of the suit ought to have been given to the Commissioners and the suit ought to have been commenced within the period prescribed by it. A I R (Vol 15) 1928 Rang 186 : 6 Rang 332 : 111 Ind Cas 478.

RANGOON RENT ACT (2 of 1920)

——As amended by Act 1 of 1922 — Motive in ejectment suit.

In an ejectment suit whatever the landlord's original motive may be the only requirement of the Act is that he should honestly and reasonably require the premises for his own use. If he does so require them, even if he is actuated by a desire to ruin the defendants, he is entitled to a decree. A I R (Vol 11) 1924 Rang 64 : 2 Bur L J 161 : 81 Ind Cas 328.

——Position of Controller.

Controller is not a Court but an executive and administrative officer. A I R (Vol 13) 1926 Rang 33 : 8 Rang 410 : 91 Ind Cas 627 (F B).

——S. 9.

——S. 9 — Salami.

A tenant is entitled to recover the money paid as salami by any methods he might choose to adopt. If he does not deduct it from the rent, he is entitled to recover it by a regular suit. A I R (Vol 14) 1927 Rang 298 : 6 Bur L J 124 : 104 Ind Cas 691.

——S. 9 — A stipulation by the landlord for payment of a premium or salami in addition to the rent in consideration of his granting a lease upon certain special conditions favourable to the lessee, is void as repugnant to Section 9 (1) and is void. A I R (Vol 10) 1923 Rang 80 : 1 Bur L J 143 : 74 Ind Cas 13.

——S. 10.

——S. 10 — Sub-lease — Ejectment of sub-tenant.

The restrictions in S. 10 (5) do not apply to landlords who are such by contractual right The restrictions only apply to those who 'become' landlords within the meaning of S. 2 otherwise than by one of the ways mentioned in S. 10 (5). Hence a tenant who has sub-let the premises to a sub-tenant can sue for ejectment of the sub-tenant. A I R (Vol 12) 1925 Rang 253 : 4 Bur L J 20 : 93 Ind Cas 879 (D B).

——S. 10—A lessee on daily rent is a transferee for value within the meaning of S. 10 (5) and is entitled to the benefit of the proviso to S. 10 (1) against his subtenant. A I R (Vol 11) 1924 Rang 278 : 3 Bur L J 36 : 82 Ind Cas 381 (D B).

——S. 10 — Occupation by servant.

Occupation of the dwelling house necessarily involves occupation of the necessary offices. Where premises are occupied for the purposes of a person's business they are occupied by that person himself even though he may himself only occasionally enter any particular part of them. AIR (Vol 11) 1924 Rang 278 : 3 Bur L J 36 : 82 Ind Cas 381 (D B).

——S. 10 — Premises required for partnership.

Because landlord has a share in the partnership and the partnership proposes to occupy part of the premises for the purposes of its business, the premises cannot be regarded as being required for occupation by landlord himself within the meaning and intention of S. 10. AIR (Vol 11) 1924 Rang 277 : 3 Bur L J 67 : 88 Ind Cas 216 (D B).

——S. 10—Where the landlords wanted the premises for occupation by their servant who was to supervise the erection of another building next door, held, that such use would not be 'occupation by the landlord himself 'or by any member of his family' within S. 10. A I R (Vol 11) 1924 Rang 164 : 1 Rang 634 : 2 Bur L J 252 : 84 Ind Cas 683.

——S. 10 — Object and scope.

Respondent purchased certain premises held by appellant as tenants. He gave notice to the appellant to quit the premises mentioning that he wanted to demolish the old one-storied building standing thereon and to erect a four storied one. He then brought a suit for ejectment.

Held, it is not the object of the Act to interfere with the legal use of private property; it is aimed to protect tenants from ejectment where they are unable or unwilling to pay an enhanced rent. But if the respondent has the means to carry out his purpose and has a bona fide intention to do so if he can obtain possession, he is entitled to a decree for ejectment. It would be for the public benefit that the site should be put to a use that would be to advantage of a large number of persons more particularly at a time when residential premises are scarce. A I R (Vol 10) 1923 Rang 13 : 1 Bur L 70 Ind Cas 834 (D B).

——S. 10 — Interpretation — "Own occupation."

The expression "own occupation" in the proviso is not restricted to "personal occupation," but includes occupation by the employees of the landlord. Where a landlord requires certain premises for lodging his employees for whom he is bound to provide accommodation, he requires the premises "bona fide for his own occupation" within the meaning of the proviso to S. 10 (1). Want of bona fides may be shown by proving either that the premises are as a fact required by him for some purpose other than the one alleged, or that the alleged purpose is so absurd under the circumstances that it cannot possibly be bona fide. A bona fide requirement means that the alleged need is genuine and not a mere fiction: it is not necessary to show that it is reasonable. A I R (Vol 9) 1922 L B 1 : 11 L B R 7 : 64 Ind Cas 290 (D B).

——S. 10 — "Own occupation."

The words 'for his own occupation' do not mean only "for his own residence" and so where landlord requires part of any premises for storage of his goods and part for housing of his assistants for whom it is his practice to provide lodging free of cost, he requires them for his own occupation within the section. So also the word 'required' does not mean absolutely necessary. A I R (Vol 7) 1920 L B 132 : 13 Bur L T 179 : 64 Ind Cas 171.

——S. 10 — Landlord — Guardian of minor is not.

Where plaintiff had been appointed by the Chief Court of Lower Burma as guardian of the minors, held, that the plaintiff is not the "landlord" for the purpose of section 10 and the fact that he requires the premises for the occupation of the minors for whose benefit he holds them does not entitle him to the benefit of the proviso to section 10 (1). He cannot therefore obtain a decree for ejectment on that ground. A I R (Vol 11) 1924 Rang 163 : 1 Rang 772 : 2 Bur L J 280 : 79 Ind Cas 505.

——S. 13.

——S. 13—Enhancement without certificate.

Enhancement of rent by landlord without a certificate from the Rent Controller is illegal and neither acquiescence nor consent on the tenant's part can make the landlord's action legal, and such a tenant is not debarred from claiming a set-off afterwards against the accruing rent subject to the provisions of S. 13. AIR (Vol 12) 1925 Rang 376 : 4 Bur L J 157 : 92 Ind Cas 771 (DB).

——S. 13—Overpayment—Limitation.

The tenant may deduct his over-payments made by him previously from rent payable by him to the landlord within 6 months after the last over-payment made by him; otherwise his claim to set off becomes time-barred. AIR (Vol 10) 1923 Rang 46 : 11 L B R 427 : 1 Bur L J 169 : 70 Ind Cas 112.

——S. 14.

——S. 14—Certificate.

A landlord's remedy for recovery of excess rent received by his tenant from a sub-tenant cannot be exercised unless and until the Controller has granted a certificate certifying the standard rent of the premises leased by the landlord. A I R (Vol 11) 1924 Rang 172 : 1 Rang 687 : 2 Bur L J 235 : 25 Cr L J 482 : 77 Ind Cas 882.

——S. 15.

——S. 15—Appeal and revision.

Controller of Rents is not a Civil Court and a High Court cannot revise his orders either under S. 115 or under S. 107 of Government of India Act. A I R (Vol 13) 1926 Rang 33 : 3 Rang 410 : 91 Ind Cas 627 (FB).

——S. 18.

——S. 18—Nature of jurisdiction on reference.

The first (now Chief) Judge of the Rangoon Small Cause Court, when exercising the powers vested in him by S. 18 of the Rangoon Rent Act, 1920 (S. 20 of Act IX of 1925) exercises those powers not as a Court but as a persona designata and therefore his decision thereunder is not subject to the revisional jurisdiction of the High Court. AIR 1923 Rang 94 (FB), Overruled. AIR (Vol 14) 1927 Rang 1: 4 Rang 304 : 5 Bur L J 117 : 98 Ind Cas 902 (FB).

——S. 18—Limitation.

Section 5 of the Limitation Act does not apply to application under S. 18 of the Rangoon Rent Act to the Chief Judge of the Small Cause Court. AIR (Vol 11) 1924 Rang 377 : 3 Bur L J 157 : 84 Ind Cas 284 (DB).

——S. 18—Nature of application.

Application to Small Cause Court under S. 18 of the Rangoon Rent Act is not an appeal. AIR (Vol 11) 1924 Rang 377: 3 Bur L J 157 : 84 Ind Cas 284 (DB).

——S. 18—Revision and Appeal.

The first Judge of the Court of Small Causes acting under the provisions of the Rangoon Rent Act is a Court subordinate to the High Court within the meaning of Section 115 of C. P. Code.

He decides questions of civil rights in the same manner as a Court exercising civil jurisdiction would do, and he must be regarded as a Civil Court and as a Court subordinate to High Court. Section 18 provides that his decision shall be final, but it only means that his order shall not be appealable. A I R (Vol 10) 1923 Rang 94 : 11 L B R 387 : 1 Bur L J 138 : 70 Ind Cas 135 (FB) overruled in A I R 1927 Rang 1 (FB).

——S. 18 - Powers of Controller—Review, reference and revision.

The Rent Controller, acting as a Civil Court, has inherent power to set aside an ex parte order in a legal manner under C. P. Code. The Controller also has the power to review his order on proper cause shown. A party can impugn the action of the Rent Controller by a reference to the 1st Judge of the Small Cause Court. He may as well move the High Court on revision under S. 115, C. P. Code, but the procedure is merely optional to him. AIR (Vol 10) 1923 Rang 49 : 11 L B R 394 : 1 Bur L J 200 : 70 Ind Cas 144.

——S. 19.

——S. 19—Standard rent not fixed.

There was a contract subsisting between a lessee and a sub-lessee that the sub-lessees should pay to the landlord the daily rent, whatever it was.

Held, in a suit by lessee for reimbursement of rent paid for the sub lessee, that the agreement, the standard rent not having been fixed by the Controller, was not illegal under S. 19 (1) of the Act, and consequently the contract being merely collateral was not avoided by the Act. AIR (Vol 16) 1929 Rang 55 : 6 Rang 691 : 117 Ind Cas 52 (DB).

RANGOON RENT ACT (9 of 1925)

——S. 10.

——S. 10—Suit heard after expiry of Act.

The effect of the expiry of the Rangoon Act, 1925, on the 31st December 1926, on the suit for ejectment of the tenant which was pending at that time and came up for trial after such expiry is that the parties are relegated to the position they held under the general law except in respect of those matters specially provided for in the Act itself, and therefore the defendant-tenant cannot be allowed to raise and rely upon the particular plea on which he seeks to resist the plaintiff's suit, though the suit was instituted prior to the expiry of the Act and was pending when it expired. AIR (Vol 14) 1927 Rang 181 : 5 Rang 139 : 102 Ind Cas 827.

——S. 12.

——S. 12—Applicability.

Section 12 of the Rangoon Rent Act does not apply to suits pending at the time that it came into force.

AIR (Vol 13) 1926 Rang 205 : 4 Rang 221 : 97 Ind Cas 1025 (DB).

RANGOON SMALL CAUSE COURTS ACT (7 of 1920)

——S. 13.

——S. 13—Applicability of explanation.

The application of the "Explanation" to S. 13 should be limited to the valuation of the plaintiff's claim because in the case of set-off the same Act provides for the application of the relevant provisions of the C. P. Code. A I R (Vol 12) 1925 Rang 22: 2 Rang 349 : 84 Ind Cas 956 (DB).

——S. 14.

——S. 14—Bailiff not taking proper security.

Where the Court directed the bailiff to report as to the sufficiency of the security to be furnished as a condition for withdrawing amount from Court and where the bailiff took a wrong bond for appearance of the person, a suit brought against the bailiff and the Secretary of State for loss caused owing to neglect of bailiff to satisfy himself as to the sufficiency of the security falls under S. 14 (c) for though the act of the bailiff is not strict compliance with the order of the Court, it is not an independent act of the bailiff but done in his capacity as bailiff and under or by virtue of the order of the Court. AIR (Vol 16) 1929 Rang 190 : 7 Rang 529 : 119 Ind Cas 751 (DB).

——S. 14—Declaratory suit—Action on tort.

Merely asking for a declaration in a suit in which the real cause of action is one of tort does not necessarily make it a suit for a declaratory decree within the meaning of S. 14 (s) of the Rangoon Small Cause Courts Act, 1920. This applies to suits where only a declaration is asked for. AIR (Vol 10) 1923 Rang 215: 1 Rang 283 : 77 Ind Cas 1021.

——S. 17.

——S. 17—Sub-tenant in possession not impleaded.

Where a landlord obtains an order for ejectment against his tenant under S. 17, Rangoon Small Cause Courts Act and the premises are in the actual occupation of the sub-tenant who was not impleaded in the proceeding, as against the sub-tenant, only symbolical and not actual possession can be granted. In such cases it is not competent to the Court to make an order in execution for actual possession as against the sub-tenant. Orders for possession under S. 17, Rangoon Small Cause Courts Act, are governed by the provisions of O. 21, R 36, C. P. Code. AIR (Vol 12) 1925 Rang 98 : 3 Bur L J 263 : 85 Ind Cas 501 (DB).

——S. 25.

——S. 25—Failure to consider evidence.

Where the Court has not considered the evidence in the case but has based his decision on personal inspection, the proceedings are illegal and materially irregular, and are therefore revisable. A I R (Vol 13) 1926 Rang 205: 4 Rang 221 : 97 Ind Cas 1025 (DB).

——S. 25—Scope.

The power of revision of the Rangoon Court in respect of the Small Cause Court is given by S. 25 of Burma Act VII of 1920 which is not limited to the three grounds specified in S. 115, C. P. Code. A I R (Vol 13) 1926 Rang 205: 4 Rang 221: 97 Ind Cas 1025 (DB).

——S. 35.

——S. 35—Applicability.

Section 35 does not apply where the charge levelled against the bailiff is that he caused loss by neglecting to satisfy himself regarding the sufficiency of the security offered. A I R (Vol 16) 1929 Rang 190 : 7 Rang 529 : 119 Ind Cas 751 (DB)

——S. 35—Suit for compensation from bailiff.

Where special rights are created by statute and a special tribunal created for the enforcement of those rights, the ordinary tribunals have no jurisdiction in the matter. The negligence in performing the duties imposed by statute or omission to perform the same is undoubtedly a breach of that duty.

As S. 35, Rangoon Small Cause Courts Act, provides a special remedy for the recovery of compensation in cases where a party finds himself unable to execute an order on account of the bailiff's breach of duty, the ordinary Civil Courts have no jurisdiction to entertain a suit for the same relief. AIR (Vol 15) 1928 Rang 172 : 6 Rang 263 : 110 Ind Cas 626.

——Sch. 1, R. 73.

——Sch. 1, R. 73—Setting aside ex parte decree.

Where the defendant against whom an ex parte decree is passed has already moved the Small Cause Court for the purpose of setting aside the ex parte decree on the ground that summons was not tendered or served on him and has been given an opportunity of establishing his case and he by non-compliance with the condition imposed by the Small Cause Court failed to get an adjudication on that point in that Court, it is not open to him to bring a separate suit for setting aside the decree on the same allegations. AIR (Vol 14) 1927 Rang 130: 5 Rang 46 : 101 Ind Cas 434.

RANGOON SMALL CAUSE COURT RULES (1922)

——R. 5.

——R. 5—Pecuniary jurisdiction.

The jurisdiction of the second Judge is limited to suits which, for valuation purposes, do not exceed Rs. 500, and if the set-off in a case raises the valuation of the suit above Rs. 500, the second Judge cannot try the set-off; and if he attempts to do so, he would be exceeding his jurisdiction. A I R (Vol 12) 1925 Rang 65 : 2 Rang 462 : 84 Ind Cas 971.

——R. 101.

——R. 101—Rules, if ultra vires.

Rule 101, Rangoon Small Cause Court Rules is ultra vires to the extent that it conflicts with the provisions of Art. 159, Sch. I, Limitation Act. A I R (Vol 23) 1936 Rang 501 : 14 Rang 728 : 166 Ind Cas 148 (DB).

RAPE

See (1) Penal Code, Ss. 354, 375 and 376.
(2) Tort—Seduction.

RASH AND NEGLIGENT ACT

See (1) Penal Code, S. 304A.
(2) Tort—Negligence.

RATEABLE DISTRIBUTION

See Civil P. C., Ss. 47, 64, 73 and O. 21, R. 72.

RATIFICATION

See (1) Contract Act, Ss. 193, 197 and 200.
(2) Minor.

RAWALPINDI AND MURREE HOUSE RENT (CONTROL) ORDER (1941)

——S. 6.

——S. 6—"Charge any rent", meaning of—Order, not ultra vires—House partly let out on rent—Authority of Controller.

Rawalpindi and Murree Rent Control Order is not in excess of the powers conferred by Defence of India Act and is, consequently, not ultra vires.

The expression "charge any rent" must be construed as a whole and must not be split up or disjoined for the purposes of construction. Rent can obviously be charged only where it becomes payable, for payment of rent before it is due, is not a fulfilment of the obligation to pay rent but is, in fact, an advance to the landlord with an agreement that when the rent becomes due such advance shall be treated as fulfilment of the obligation to pay rent. The issue of the post-dated cheque does not establish that the amount was paid on the day it was issued; a cheque is merely a scrap of paper until and unless it rules in payment.

If only a part of a house is let out on rent and the other part has never been so let out, it is not within the competence of the Controller to hold an enquiry regarding the other part. AIR (Vol 32) 1945 Lah 158: 47 P L R 134 : 47 Cr L J 44 : 221 Ind Cas 48 (DB).

RAYAT

See (1) Landlord and Tenant.
(2) Local Tenancy Acts.
(3) Madras Estates Land Act.

RAYATWARI TENURE

See Land tenures.

REASONABLE AND PROBABLE CAUSE

See Tort—Malicious prosecution.

REBELLION

See Penal Code, Ss. 121 and 124A.

RECEIPT

See (1) Limitation Act, Ss. 19 and 20.
(2) Registration Act, Ss. 17 and 49.
(3) Stamp Act, S. 35.

RECEIVER

See also (1) Civil P. C., O. 40.
(2) Official Trustees Act.
(3) Provincial Insolvency Act, S. 59.

1. Appointment, of.
2. Acknowledgment of debt.
3. Compromise by.
4. Discharge and removal of.
5. Grounds and object of appointment.
6. Joint Receivers.
7. Power of.
8. Property in the hands of—Sale and attachment thereof.
9. Purchase by.
10. Misconduct of.
11. Remuneration and reinbursement of.
12. Rights and responsibilities of.
13. Sale by.
14. Suit against Receiver—Leave of Court.
15. Suit by.
16. Vesting of property.
17. Prosecution of—Sanction.

1. Appointment of.

——**Appointment—When takes effect.**

The appointment of a receiver does not take effect or date back by relation to a period prior to his appointment. The appointment of a receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. (1909) 13 C W N 654 : 36 C 713 (724): 9 C L J 563 : 1 Ind Cas 356 (DB).

——A Receiver appointed by Court is a public officer holding lands in attachment under the order of a Civil Court within the meaning of S. 85 of the Madras Rent Revenue Act. No Leave of the Court is necessary before instituting suit against him. (1907) 17 M L J 483 (483, 484) : 30 M 505 : 3 MLT 7.

—— **In execution over property not the subject-matter of suit — Appellate Court—Practice—Procedure.**

Where in execution of a decree a Receiver has been validly appointed, on the ground that the property was the subject-matter of the suit, and it afterwards turns out on appeal that the decree only operates against the defendants personally, the appellate Court has jurisdiction to maintain the Receiver as a method of realizing the decree amount from the judgment-debtor personally. (1907) 17 M L J 201 (211) : 30 Mad 255 : 2 M L T 167.

——Where in a suit pending before a First Subordinate Judge for recovery of property, an application had been made for the appointment of a Receiver, and granted.

Held, on appeal, that it was inadvisable to go into merits of the case, which was pending before the Court, where the appointment of a Receiver was under consideration. Such course was undesirable and tended to prejudice the case. (1905) 32 Cal 741 (744, 745).

——An application for the appointment of a Receiver on the retirement of another Receiver should be made in Court and not Chamber. (1901) 28 C 250 (250).

2. Acknowledgment of debt.

——For the purposes of giving a fresh starting point for computing the period of limitation, payment of interest or part payment of principal by a Receiver or guardian may stand on different footing from an acknowledgement of liability made by him. (1904) 14 M L J 84 (102) : 27 Mad 243 (255) (FB).

——**Possession of receiver appointed by Court—Officer of Court.**

Receiver's possession is possession of the Court and cannot be interfered with except with the leave of the Court.

He can neither sue nor be sued without the leave of the Court. (1903) 7 Cal W N 390 : 30 Cal 593 (597, 598); See also (1903) 30 Cal 696 (698) (DB).

3. Compromise by.

——**Compromise by.**

Where an estate is being, in effect, administered by another Judge in a separate action, it is for the Court in that action to say whether a particular suit should be brought or not on behalf of the estate, and whether a particular suit should be defended on behalf of that estate, and specially what compromise should be sanctioned for the Receivers to enter into. AIR (Vol 11) 1924 Bom 89: 25 Bom LR 1180: 48 Bom 200: 81 Ind Cas 844.

——**Contract with—No permission of Court—Dealings with—Officer of Court.**

Agreements between a Receiver and a party to the suit entered into without the intervention of the court are illegal and void. The Receiver is an officer of court and the parties cannot by any act of theirs add to or derogate from the functions of the court without the authority of the court itself. (1903) 30 C 696 (698) (DB); See also (1903) 7 CWN 390 : 30 C 593 (597, 598).

4. Discharge and removal of.

——Where a Receiver is appointed by the lower Court and the appellate Court in modification of the lower Court's order appointed another as the Receiver, the appellate Court has jurisdiction to try an application for the removal of the Receiver. AIR (Vol 12) 1925 Lah 309: 7 LLJ 6: 86 Ind Cas 246.

——**Appellate order modifying scheme.**

A suit was brought on the Original Side for a scheme to be framed in relation to a temple, it was decreed and a scheme was framed. During pendency of an appeal from it application was made to a Judge sitting on the Original Side for the appointment of a Receiver and an ordar was made appointing a Receiver. The Appellate Court affirmed the decree of the Court below with slight modifications in the scheme. After the order in appeal a Judge's summons was taken out on the Original Side for the discharge of the Receiver on the sole ground that the effect of the order of the Court of appeal was to put an end to the receivership.

Held, that the effect of the order of the Court of appeal was not ipso facto to discharge the Receiver and that the summons was therefore taken out on entirely wrong grounds and must be dismissed. AIR (Vol 11) 1924 Mad 557: 46 M L J 343: 19 MLW 388: 34 MLT 90: 1924 MWN 235: 78 Ind Cas 133 (DB).

——Suit by—Discharge of Receiver before decree—Decree passed subsequently is not bad.

Where the Receiver has filed a suit but before a decree is passed there is a devolution of his interest the suit should not be arrested as not maintainable and the decree passed in favour of the plaintiff is not a bad decree. If the party on whom the interest devolved does not apply to carry on the proceedings then in such a case the decree would enure for the benefit of the party and such a case must be distinguished from one in which an event subsequent to suit shows that the plaintiff had no title to bring the suit on the date of its institution. AIR (Vol 8) 1921 Cal 422: 26 CWN 361: 70 Ind Cas 104 (DB).

——Discharge — Pending appeal—Appeal decided and remanded—Receiver not finally discharged—How far 'functus officio' as soon as appeal is decided.

Where a Receiver is appointed pending an appeal, his office does not come to an end as soon as the appeal is decided, but continues till he is finally discharged. (1901) 28 C 790 (793) (DB).

——Administrative Suit—Receiver – Discharge of—Receiver before completion of administration decree.

No order can be made for the discharge of a Receiver appointed in an administration suit and directing him to make over possession of the estate to the plaintiff, before the completion of the administrative decree. (1901) 5 CWN 417 (419).

5. Grounds and object of appointment.

——Grounds for appointment of — Suit for partition of a definite share in suit properties and mesne profits — Defendant chronically indebted and addicted to violent drinking.

Where in a suit for partition of their 1/3rd share of the suit properties and for mesne profits under the terms of an agreement the plaintiffs allege and prove that the defendant is a person chronically indebted and is addicted to violent drinking and has been embarking upon a career of extravagance and waste, it is a fit case for the exercise of a judicial discretion in favour of the appointment of a receiver for the properties in the suit. AIR (Vol 35) 1948 Mad 396 : 1948 MWN 40 : 61 L W 74 : (1948) 1 M L J 54 (DB).

——It is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the Receiver. A Receiver is merely the officer of the Court through whom the Court takes possession of property, the subject of a litigation; by giving leave to sue its officers the Court does not relinquish possession of the properties to the Court where the claim of the third party may be asserted. Further leave to sue out execution if the plaintiff succeeded in the action against the Receiver is necessary. It is well established that parties whose rights are interfered with by having a Receiver put in their way may on making a proper application to the Court appointing the Receiver obtain all that they may justly require. AIR (Vol 11) 1924 Pat 491 : 3 Pat 357 : 1924 P H C C 54 : 5 PLT 243 : 78 Ind Cas 620 (DB).

——The object of appointment of a receiver is to protect the estate from unnecessary and extensive litigation, to preserve equal benefit of those equally interested in its distribution, and to keep the property at all times within the control of the Court by which the receiver is appointed. (1910) 12 Cal L J 368 (371) : 7 Ind Cas 75.

——Suit by, in his own name.

The object and purpose of the appointment of a Receiver may be generally stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto. He is not a mere custodian. The Receiver, as the officer of the court, is the real party in interest in the litigation. A court may authorise a Receiver, to sue in his own name, and a Receiver who is authorized to sue, though not expressly in his own name, may do so by virtue of the appointment with full powers under S. 503, C. P. C. (1907) 5 C L J 270 (279, 280) : 34 Cal 305 (DB).

——It is the practice of the original side of the Bombay High Court, on an interlocutory notion, to require before any order for injunction or receiver is passed that the plaintiff makes a sufficient affirmative case, a strong prima facie case, to show that he is entitled to the relief which he seeks. (1905) 7 Bom L R 925 (927).

——Mahant — Rival claimants — Prima facie case — Waste.

The parties were rival claimants to the headship of a mutt. Plaintiff claimed under an appointment of his predecessor and defendant under an appointment by a punchayat. Defendant obtained possession with the help of police and had not long been in possession with the acquiescence of plaintiff. Defendant was proved to have wasted the property and to have secreted a portion of it. Neither party had any other property.

Held, that the case was a fit one for the appointment of a Receiver. Semble: Waste of property by the defendant under suspicious circumstances pending suit in regard to them may be sufficient to justify an order for Receiver. (1899) 5 C W N 362 (365) : 27 Cal 279 (DB).

——Prima facie title.

In an application for the appointment of a Receiver it is sufficient if a prima facie title to the property, over which the Receiver is sought to be appointed, is made out. (1894) 5 C W N 365 (367) ; See also (1899) 5 C W N 362 (365) : 27 Cal 279 (DB).

6. Joint Receivers.

——Principles governing — Joint tenancy.

The principle applicable to the competency of one joint tenant giving notice on behalf of all, does not govern the case of joint receivers. Where two or more persons are appointed joint receivers of an estate, in all matters which requires the exercise of judgment and are not purely ministerial concerning the management of the estate they should act after united deliberation. AIR (Vol 4) 1917 Cal 621 : 23 C L J 453 : 34 Ind Cas 221 (SB).

7. Power of.

——Status of.

The receiver ordinarily is not the representative or agent of either party in the administration of the trust but the appointment is for the benefit of all parties and he holds the property for the benefit of those ultimately found to be the right owners. (1910) 12 C L J 252 : 37 C 754 (758, 759) : 6 Ind Cas 416 (DB).

——Receiver and executor or trustee — Distinction between.

A Receiver acts through or under directions of the Court and imposes obligations binding on the estate in favour of the creditor with whom he has dealt and such obligations the court ought and does give effect to; but an executor or trustee cannot create under ordinary circumstances similar obligations so as to bind the estate. (1903) 7 C W N 799 : 30 C 937 (943).

8. Property in the hands of—Sale and attachment thereof.

——Attachment of property in hands of.

Where a receiver is appointed by Appellate Court in proceedings pending in the trial Court on an

appeal to the Appellate Court against an order about appointment of Receiver passed in such proceedings, the proper Judge to sanction the attachment of the property in the hands of the Receiver is the Judge of the trial Court. AIR (Vol 16) 1929 Lah 147: 111 Ind Cas 739.

——Attached property in hands of Sheriff of Calcutta, to credit of money suit—Holder of mortgage decree can have the property sold.

Held, that the application should be granted. AIR (Vol 12) 1925 Cal 1006: 29 CWN 731: 95 Ind Cas 259.

——Execution—Sale of property in possession of—Validity.

Where the Receiver appointed by the court was directed to take possession of moveable properties and was further authorised to get in and collect all debts and claims due to the estate.

Held—That he must be taken to have been appointed Receiver in respect of the whole estate and had authority to apply for an order absolute on a decree nisi for foreclosure. A sale of the foreclosure decree while the estate was in the possession of the Receiver in execution of a decree for money, without leave of the court previously obtained, was illegal and liable to be avoided; and punishment by the procedure of contempt was not the only remedy against such unauthorised sales. (1910) 11 CLJ 489 (494): 14 CWN 560: 5 Ind Cas 390.

——Foreclosure decree,

Property in the hands of a Receiver is exempt from judicial process except to the extent permitted by the appointing court.

Even though an attachment be levied on property before the appointment of a Receiver, it is within the sound discretion of the appointing court to refuse to permit a sale of the property thereunder. Hence property in the hands of a Receiver, though subject to a paramount judgment cannot be sold under execution without leave of court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution court. A Receiver of lands does not take actual possession but only receives the rents; and he does so, not by virtue of the estate vested in him but merely as an officer of the court authorised to collect the rents upon the title of persons who are parties to the action.

Hence the direction to the Receiver to take possession of the moveable property and of the rents and profits of the immovable properties includes his appointment in respect of the foreclosure decree obtained by one of the parties. (1909) 11 CLJ 489 (495): 14 CWN 560: 5 Ind Cas 390 (DB).

——Partition suit—Mortgage by receiver under order of court—Attachment by creditors of co-parcener prior to mortgage—Priority.

In a partition suit, a receiver was appointed and an order was made citing him to borrow money on mortgage of the joint estate. Subsequent to the order but before the date of the mortgage, the money decree-holders of two of the co-parceners attached their shares in the joint estate and claimed priority over the mortgages executed by the Receiver.

Held—that the attaching creditors were not entitled to priority. The same will be the case even if the order directing the receiver to mortgage were subsequent to the mortgage. The attaching creditors are subject to all the liabilities and obligations of the joint members of the family, arising in the course of the partition suits. (1905) 33 C 1175 (1176, 1177).

——Possession of receiver appointed by Court—Officer of Court.

Receiver's possession is possession of the court and cannot be interfered with except with the leave of the court.

He can neither sue nor be sued without the leave of the court. (1903) 7 CWN 390: 30 C 593 (597, 598); See also (1903) 30 C 696 (698).

9. Purchase by.

——Execution sale after decree on mortgage—Decree-holders with leave to bid and set-off purchasing—One of decree-holders appointed receiver in suit—Validity of sale.

A purchase in a sale in execution of a mortgage decree by a receiver in the suit without the leave of the Court is liable to be set aside on that ground or for that reason alone, without any enquiry as to whether any person interested in the property has been in fact prejudiced. A grant of permission to the decree-holders (one of whom was a receiver) to bid at a Court auction and to set-off the decree amount under O. 21,R. 72, C. P. Code, is not equivalent to the grant of permission to the receiver to bid at the Court sale and buy the property in his possession. The two things are quite distinct and must be separately applied for and sanctioned by the Court.

Having regard to the fact that the receiver is in possession of the property and has opportunities of knowing all the details about the income and value of the property—information which is not ordinarily available to the outside public—Courts will not authorise a receiver to bid at a sale in the absence of special circumstances. The fact that only one of the decree-holders (two brothers) was a receiver would not protect both of them at the Court sale. AIR (Vol 36) 1949 Mad 641: (1949) 1 MLJ 542: 62 LW 360: 1949 MWN 338 (2).

——Insolvency—Insolvent's property—Sale—Sanction to receiver to purchase.

The purchase by a Receiver in insolvency of property belonging to the insolvent's estate is irregular, and the court ought not to sanction such a purchase. (1900) 5 CWN 91 (104) (DB).

10. Misconduct of.

——Plaintiff appointed — Appropriation of partnership funds

Plaintiff in a suit for dissolution of partnership was appointed Receiver without security and remuneration he withdrew from the partnership funds in his hands; as such Receiver, first, a sum of Rs. 22,000 and odd and later, one of Rs. 3,500. Subsequently he was ordered on several occasions to pay over these monies, but he failed to do so. The Court passed orders to condone the plaintiff's unauthorised retentions by treating them, without even any charge for interest, as being in account with the defendants both regular and final.

Held, that the action of the plaintiff in this matter, fully acknowledged and neither explained, nor excused, amounted to a breach of duty as serious in character as any that can be committed by an officer of the Court in his position.

Held, further that his action ought not to have been overlooked to any degree by any Court jealous of its responsibility for the actions of its own officers. AIR (Vol 12) 1925 PC 257: 1926 MWN 101: 23 MLW 628 : 7 PLT 275 : 23 ALJ 1045 : 92 Ind Cas 274.

——Irregular order of.

Where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should set aside the order passed by the Receiver. AIR (Vol 10) 1923 Mad 350 : 17 MLW 622 : 44 MLJ 284 : 73 Ind Cas 374 (DB).

——No suit after accounts passed.

When the Receiver applies to pass his accounts, ordinarily, then is the time for the parties to the suit to object to the accounts, and to make allegations of misconduct, against the Receiver, and if the accounts are passed, in spite of those objections, then the

matter is decisive against those parties as far as the allegations which are made against the Receiver at that time. AIR (Vol 8) 1921 Bom 427 : 45 Bom 99 : 59 Ind Cas 421 (DB).

——Lease — Application to set aside summary jurisdiction—Pro inter esse Suo — Receiver's Account — Action—Practice.

No summary order can be passed to set aside a lease already executed and granted by a Receiver. The proper remedy of the aggrieved parties is to institute a regular suit to set aside the lease against the Receiver and also the lessee, if it is alleged that the lease was obtained by collusion.

No order can be made against a lessee from a Receiver for arrears of rent or interest in an application in a suit. A regular suit ought to be instituted to recover them. The claims against a Receiver for giving up arrears of rent or interest due on a lease granted by him are matters which cannot be dealt with in an interlocutory application in the suit.

Quære:—Whether the Court can go into such matters on the passing of the Receiver's accounts or the parties must file a suit in respect of them against the Receiver. (1908) 12 CWN 1023 (1025, 1026) : 36 Cal 52 : 1 Ind Cas 470.

——Accounts — Mofussil collections — Liability — Practice.

Where a Receiver is charged with liability for collections made from mofussil properties by the employees of the estate which the receiver alleged did not reach his hands, if there is a prima facie case made out against the Receiver, the Court should either pass the accounts reserving the right of the party to establish any further liability on the part of the Receiver or postpone the passing of the accounts until the liability of the Receiver is established by suit. (1900) 5 CWN 223 (230, 231).

——Accounts, exception to—Matters to be inquired into.

The only question which properly arises on an application by a receiver to pass his accounts is as to the items of that particular account and involves the inquiry whether all his collections, made on behalf of the property of which he is receiver are duly entered in the accounts, and next whether all his disbursements are payments made in respect of that estate. Liability of Receivers in respect of matters not appearing on the face of the accounts for imprudent management, for wilful default or neglect or for malpractices of their servants or for more than what they have received of collections from mofussil properties cannot be determined on an application by the Receiver to pass accounts, but must be established in a separate suit for the purpose. (1900) 5 CWN 223 (228, 229).

11. Remuneration and reimbursement of.

——Remuneration — Party appointed as receiver — Right to remuneration.

Subject to a few exceptions, where a party is appointed receiver he is not allowed any remuneration except by consent of parties. Where a party is appointed a receiver for carrying on quarrying operations on a 'seignorage' basis in a hillock, which formed the subject matter of the litigation, as no special scientific skill or any technical knowledge is necessary, the receiver is not entitled to any remuneration especially when it is not shown that by utilising his time for the quarrying business he has suffered by the loss of his employment or other occupation during that period. He is, however, entitled to reimburse himself out of the estate, the expenses incurred in the conduct of suits and proceedings as receiver. AIR (Vol 35) 1948 Mad 335 : (1948) 1 MLJ 264 : 61 LW 281 : 1948 MWN 258.

——Rights of—Costs — Right to be reimbursed out of estate—Suits properly and not properly constituted as to parties — Suits instituted in Courts without jurisdiction.

If a receiver is properly appointed by a competent Court in a properly constituted suit, he is entitled to be reimbursed for his costs, charges and expenses out of the estate over which he is so appointed and has a lien over such estate, and the parties to the action are not personally liable to the receiver even if his appointment was made with their consent. As long as such a receiver acts properly upon orders of Court, however erroneous they may have been on the facts of that particular case, he is entitled to his indemnity even if the estate has not derived any appreciable benefit or even if it has suffered loss.

If in a properly constituted suit filed in a Court of competent jurisdiction the plaintiff makes a false claim and obtains an order for the appointment of a receiver but is unsuccessful in establishing his right and the suit is ultimately dismissed, he may personally be made to pay the loss suffered by the defendant by reason of such improper appointment of the receiver. If the plaintiff in such a case is a man of straw, the Court may protect the receiver by giving him a lien on the estate and allowing the receivership expenses to the defendant as part of his costs against the unsuccessful plaintiff. If, however, there is any proof of laches or misconduct on the part of the receiver vis-a-vis the defendant the Court may protect the latter first by giving back his property to him and direct the receiver to realise his dues from the plaintiff if he can.

If in a suit the Court on an interlocutory application appoints a receiver in spite of a denial of the jurisdiction of the Court by the defendant but at the hearing dismisses the suit for want of jurisdiction, on general principle the Court will, in its discretion, allow the receiver to reimburse himself out of the assets or as the plaintiff has obtained the appointment improperly or illegally the Court may visit him with the consequence of his own wrong-doing and make him pay the receivership expenses as part of the costs or as compensation for loss inflicted on the defendant. As between two innocent persons, the receiver and the defendant, the Court will ordinarily in a case of this kind lean in favour of the receiver unless the equities are preponderatingly in favour of the defendant by reason of any laches or misconduct of the receiver vis-a-vis the defendant.

The above are cases where the suits are properly constituted as to parties. In such cases the necessary parties being before the Court there can be no difficulty in adjusting the equities between the parties and the receiver. In the case of a suit in which persons interested in the property are not before the Court; there is ordinarily no principle on which such persons could be made to suffer unless they had been guilty of gross laches or had otherwise mislead the Court and the receiver. On general principles the Court would be reluctant, in the absence of special equity against him, to inflict any loss on a person who is a stranger to the suit but would content itself by giving the receiver a right of reimbursement and lien limited to the share of the parties to the suit and also an order for payment of his balance due, if any against the parties personally. ILR (1946) 1 Cal 378 : 51 C W N 433.

——Commission—No vested right to—Conversion of old Government bonds into new—Powers of Court.

Even where the Receivers are, under the order of appointment entitled to remuneration on collections, they have no vested interest entitling them to collect the amount and their right can be controlled or modified by directions of the Court as the justice of the case may require. Thus it is open to the Court, at the time of maturity of some old Government of India bond belonging to the estate and deposited in the

Imperial Bank, to authorise the Bank directly to convert them into new bonds without giving the Receivers an opportunity of collecting the bonds and reinvesting them and thereby gain a commission for their own benefit at the expense of the estate. AIR (Vol 18) 1931 Mad 36 : 59 MLJ 833.

12. Rights and responsibilities of.

——Liability of.

A Receiver put in charge of property for the purpose of managing it, is ordinarily personally responsible to any persons with whom he may contract liabilities for the purposes of managing the property, looking to be reimbursed from the estate itself. This principle does not apply, where the sums have been advanced pursuant to an express order from the Court and where payment has been made a charge upon the assets only. As the acts of the Receiver are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them.

The purchaser of an equity of redemption instituted a suit against the mortgagee for the specific performance of a contract for assignment of the mortgagee's interest. The suit was decreed by the Trial Court. The plaintiff deposited the consideration amount in Court. But the mortgagee preferred an appeal to the High Court. Pending the appeal he was appointed Receiver to sue upon the mortgage bond as it was going to be time-barred. As Receiver he borrowed money by sub-mortgaging the mortgage bond for the purpose of bringing the suit on the mortgage bond. He brought the suit, but on the dismissal of his appeal in the specific performance case, he withdrew the suit. The sub-mortgagee thereafter instituted a suit for recovery of his loan and as his claim for mortgage decree was time-barred he prayed for a personal decree against the Receiver.

Held, that the money was borrowed entirely in the mortgagee's personal interest. Assuming that he could not be sued as a Receiver because the transaction was made under the express directions of the Court, still the principles of justice and equity required that he should repay that which he borrowed as a Receiver and used for his own benefit and covenanted to repay. AIR (Vol 12) 1925 Pat 602: 7 P L T 129 : 1925 P H C C 201 : 89 Ind Cas 32 (DB).

——Indemnity—Debt incurred on behalf of estate — Receiver's right to indemnity — Parties.

In the event of a Receiver being sued for acts done by him as such he would doubtless be entitled to rely on his right to indemnity as against the estate; and in order to try this question of indemnity, it would be necessary to secure the presence of the beneficiaries or others as parties to the suit who are interested in questioning the authority of the Receiver. (1903) 7 C W N 799 : 30 C 937 (944).

——Responsibility, extent of.

A Receiver is responsible for all properties which come into his custody or management and he is responsible not only for actual sums received by him, but for those which might have been received by him but for his neglect and default. (1900) 5 C W N 223 (228).

13. Sale by.

——Sale by auctioneer.

Where the heirs to the estate in the hands of Receiver applied to the Court to have it sold through recognized auctioneer with the object of realizing the best price and they did not want the Receiver to sell, and the property was so sold,

Held, that the Receiver was not entitled to any commission. AIR (Vol 15) 1928 Rang 301 : 114 Ind Cas 673 (DB).

——Directions to—Proper Court.

It is not competent for a Subordinate Court to restrain a Receiver appointed by the High Court on the Original Side from performing his duties as a Receiver. The proper course for any person who desires to prevent a sale of the property by the Receiver is to apply on the Original Side in the suit, on notice to the Receiver, asking the Court to direct the Receiver not to sell the property. AIR (Vol 12) 1925 Cal 1174 : 87 Ind Cas 808 (DB).

——Dismissal of suit—Jurisdiction of Court to grant power to sell after dismissal.

A Court has no power to grant to the Receiver after the suit is dismissed, any fresh power, e. g., power to sell properties. (1907) 34 C 336 (339) (DB).

——By order of Court—Right of parties or their successors to challenge—Debutter property—Sale of.

A sale by a Receiver made under the order of court cannot, in the absence of fraud, be attacked collaterally by persons who were parties to the proceedings or their representatives or successors in office (here a shebait). There was a suit for partition between two brothers one of them, the plaintiff, claimed share in some properties as joint family property and the other said that it was debutter property and was not partible. A Receiver was appointed and he sold a portion of the properties under order of court for paying the expenses of litigation. The parties died and their representatives as successors in the office of shebait, brought the suit to set aside the sale. Held, that the sale was binding. (1907) 6 C L J 404 : 11 C W R 489 (494) (DB).

——Vesting of property in — Duties of receiver — Private sale — Pre-emptor's right.

An order appointing a Receiver vests in the receiver all the insolvent's property with the exception specified in the first proviso to S. 266 of the Code of Civil Procedure (old) and it is the duty of the Receiver to convert under the directions of the court that property into money. When the Receiver sells the property he cannot do so in derogation of the right of third parties. Hence when a receiver sells property by a private sale, the person who in the case of an ordinary sale, would be entitled to pre-empt, does not loose his right of pre--empt. 1905 A W. N 149 : 2 A L J 390 : 27A 670 (677, 678) (DB).

——Powers — Order to Receiver "to get in and realize" the estate—Power of sale included—Order, construction.

Under an order of court the Receiver had "power to get in and realize" the estate of a deceased person.

Held, that the word "realize" in the order must be construed so as to include the power of sale. (1904) 6 Bom L R 1140 (1143, 1144).

14. Suit against Receiver—Leave of Court.

——Execution sale — Validity — Receiver not made party—Possession of property not taken by him pursuant to his appointment.

Where a receiver appointed in respect of a certain property did not notify the fact of his appointment to the persons interested, did not even take possession of that property, and did not make any attempt to satisfy the amount due under a decree for rent passed before his appointment, a sale held in execution of that decree without the leave of the Court which appointed him is a valid sale. Even if it be held that the receiver should have been made a party to the proceedings, failure to do so would merely be an irregularity, and irregularity which might be set aside by appropriate proceedings. (1946) 50 C W N 163.

——Leave to sue.

The absence of an objection by Receiver that no leave was obtained will not entitle the Court to pass a decree against a Receiver as the proceedings initiated are invalid.

It is competent for the Court to grant leave to continue a suit against a Receiver of the Court instituted

without such leave, provided a proper case is made out. A I R (Vol 13) 1926 Cal 1040 : 95 Ind Cas 961 (DB).

——Decree against Receiver—Leave of Court.

Where a money suit is filed against the heirs of a deceased party, whose estate is in the hands of a Receiver, the Receiver has nothing to do with the satisfaction of the claim, and all that the Court could do would be to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the plaintiff obtained an ex parte order from the Court appointing the Receiver, granting him leave to add the Receiver as a party, does not in any way affect the question whether the Court which hears the suit can grant relief against the Receiver. That question would have to be decided on the merits and clearly no decree could be passed against the Receiver. If the decree against the other defendants was not satisfied and the plaintiff wished to execute against the estate, he would have to go to the Court which appointed the Receiver for permission to attach the estate of the deceased in the hands of the Receiver.

If a party makes a claim for money due by a person, who is dead, against his representatives, then he can only get a decree against the representatives, to the extent of the assets in their hands, and if the estate is not in their hands, but in the hands of a Receiver, the plaintiff will have to go to the Court that appointed the Receiver, in order to attach the property in his hands. But by no possible conception could the Receiver be a necessary party in a suit to decide whether the plaintiff was entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime. AIR (Vol 12) 1925 Bom 523 : 27 Bom L R 1147: 90 Ind Cas 600 (DB).

——Examination pro interesse suo.

When a Receiver is in possession of property under the process or authority of the Court, his possession is not to be disturbed, even by an ejectment under an adverse title without the leave of the Court, for the Receiver's possession is deemed to be the possession of the Court and the Court will not permit itself to be made a suitor in a Court of law. The proper and usual mode to be adopted under such circumstances is for the party claiming an adverse interest to apply to the Court to be permitted to come in and be examined pro interesse suo.

But where the question to be tried is a pure matter of title, the Court from a sense of convenience and justice will generally authorise a suit to be brought, taking care, however, to protect the possession of the Receiver by giving proper directions.

An examination pro interesse suo is never made unless the applicant shows diligence. AIR (Vol 12) 1925 Cal 681 : 41 C L J 197 : 86 Ind Cas 677.

——When a Receiver has been appointed, a third party whose property is being interfered with under a claim by a Receiver or the parties to the suit may apply to the Court for redress. The only other way in which the applicant can have any redress would be to file a separate suit, getting the leave of the Court and implead the Receiver and then ask by means of an application that the parties to the suit and the Receiver, should be restrained from interfering with his right. AIR (Vol 10) 1923 Mad 304: 17 MLW 64 : 70 Ind Cas 673.

——The omission to obtain the permission of the Court to the institution of a suit against a Receiver appointed by the Court can be made good during the pendency of the proceedings. Where in a suit against a Receiver the Receiver dies during the pendency of the proceedings, further proceedings can only be continued against his successor and against no one else. (1921) 61 Ind Cas 888 (All) (DB).

——The sanction of the Court appointing the Receiver to implead the Receiver as a defendant is necessary for the maintainability of the suit. But the failure to obtain the sanction can be effectively cured by the plaintiff's obtaining the sanction during the course of the litigation. The necessity to obtain the sanction is imposed by the Common Law, merely to enforce due respect towards Courts of Justice and the omission does not affect the jurisdiction of the Courts.

A Receiver might waive his right to put forward such plea and he might by his conduct be estopped from raising such a plea in certain circumstance. Where the Receiver has subsequently been substituted by the person himself for whose estate the Receiver was appointed, the objection to want of sanction is no longer available as against the plaintiff, the Receiver having ceased to be on the record. AIR (Vol 8) 1921 Mad 624 : 15 M L W 289: 42 M L J 339: 70 Ind Cas 759 (DB).

——Proceeding against—Leave when to be taken.

Leave to proceed against a receiver need not precede institution of proceedings. (1911) 14 C L J 50 : 15 CWN 872 : 10 Ind Cas 527 (DB).

——Leave of court, if condition precedent to suit — Stay of proceedings.

Where a suit has been instituted against a receiver without previously obtaining the leave of the court which appointed him, it is open to the court to stay proceedings for a reasonable time so as to enable the plaintiff to apply for leave to proceed with the suit. The consent of the court which appointed the receiver is not a condition precedent to the right to bring an action against the receiver. 32 C 270 : 9 C W N 247, Diss. from.

Where property in the hands of a receiver is intended to be affected by the result of the litigation the receiver is a proper and necessary party to such a suit. (1910) 15 CWN 54 (56) : 8 Ind Cas 1 (DB).

——Leave to sue, condition precedent — Whether leave can be granted pending suit—Practice.

The consent of the court to an action to be brought against a Receiver appointed by the court is a condition precedent to the right of the party to sue, and that cannot be rectified by an application to the court to continue an action wrongly brought without the permission of the court, and the court will not entertain an application to grant leave to institute a fresh action against the receiver in respect of the same cause of action unless the action so wrongly brought has either been dismissed or withdrawn. (1904) 9 C W N 247 : 32 C 270 (271, 272) ;

But see (1910) 15 CWN 54 (56) : 8 Ind Cas 1.

——"Owner" — Suit against Receiver — Leave of Court—Bengal Act III of 1899, Ss. 3, 320, 457.

A Receiver is not an "owner" within the meaning of the term in the Calcutta Municipal Act. He is an officer of the court and manager of property on its behalf, and consequently cannot be made a party to any suit or proceeding without the leave of the court appointing him. (1903) 7 CWN 706: 30 C 721 (723, 724) (DB).

——Possession of receiver appointed by Court—Officer of Court.

Receiver's possession is possession of the court and cannot be interfered with except with the leave of the court.

He can neither sue not be sued without the leave of the court. (1903) 7 Cal W N 390: 30 Cal 593 (598) ;

See also (1903) 30 Cal 696 (698).

——Leave.

Leave of the court must be obtained before a suit is brought against the receiver. (1902) 6 C W N 829 (829): 29 Cal 509.

——Leave of Court when necessary.

The party feeling aggrieved by the conduct of a Receiver may seek redress against the Receiver in the

very proceeding in which the Receiver was appointed or file a separate suit with the leave of court without which the suit is liable to be dismissed. (1902) 26 M 492 (493) (DB).

——The Court is not bound nor is competent to it to add the Receiver as a party to a suit of its own motion under S. 32, C. P. Code (1882), is without the leave of the Court which appointed him. (1901) 5 CWN 27 (28) ; (1910) 14 CWN 654 (656) (DB).

1 . Suit by.

——A Receiver is entitled to bring a suit for recovery of rent which accrued due prior to his appointment. 69 Ind Cas 853 : 1 Pat 255 : AIR (Vol 9) 1922 Pat 480 (DB).

——**Suit in ejectment—By Receiver under authority of Court—Decree binding on the real party ascertioned.**

When a court appoints a Receiver in a suit and empowers him to sue in ejectment a person who is not a party to the suit, the necessary implication is that the Receiver as an official representative or trustee is to bring the suit for the benefit of the party who may ultimately appear to be entitled to the property and when the party entitled to the property has been ascertained the Receiver will be considered Receiver. Where the official representative of an estate sues to recover possession of an estate while the true owner of it is being ascertained by proceedings duly instituted in a court of law a decree passed in favour of the official representative would be for the true owner when ascertained, though he was not a party to the suit and bind the other party to the decree. The same principle applies, if before the suit ends in a decree, the receiver's office has come to an end ; and the party ascertained has a right to a step into the receiver's place and to continue the proceeding. (1904) 6 Bom L R 995 (999, 1000) : 30 Bom 250.

——Power to move for contempt.

There is nothing to prevent the Receiver of a property appointed by the Court, from himself applying for taking proceedings against a party for contempt. (1901) 28 Cal 790 (793).

16. Vesting of property.

——Possession of.

When the Court has appointed a Receiver and the Receiver is in possession his possession is the possession of the Court and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the Receiver is in the position of stake-holder and such custody is for the benefit of the true owner. 79 Ind Cas 520 : 39 C L J 40 : AIR (Vol 11) 1924 Cal 600 (DB).

——Powers of.

A Receiver may be appointed even where the property has not been attached. Where the appointment of the Receiver is made in the form provided in the Code of Civil Procedure which expressly gives him full powers under the provisions of O. 40, Civil Procedure Code.

Held, it must be taken that he had all the powers under O. 40, R. 1 (d), and where no powers were reserved he had all the powers of the owner with reference to the property, of which he is appointed Receiver. Receiver's title to possession accrues on the date of his appointment. Appointment of the Receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. 78 Ind Cas 811 : 7 N L J 16 : AIR (Vol 11) 1924 Nag 136.

——**Vesting of—Accretion, title to, prevails against all persons not claiming under prior title.**

As a general rule a receiver takes no title in property acquired by the person formerly in possession. But a receiver is entitled to any accretion to the property vested in him upon general principles and the policy of the law by which a proprietor acquires a title to accessions to his property. Where a receiver has been appointed under S. 146, Cr. P. C., in respect of any property in dispute the Receiver is entitled unless some special circumstances is established not only to the subject-matter of the proceedings under S. 145, Cr. P. C., but also to the accreted land, and gives good title to a tenant under him. Such a title will prevail against a trespasser but not against a person, who established a title to the accreted land acquired prior to the vesting of the lands in the Receiver. (1910) 6 Ind Cas 177 (180) : 14 C W N 681 (DB).

17. Prosecution of—Sanction.

—— **Leave—Necessity—Offence in relation to property in his possession.**

Nowhere in the Code of Criminal Procedure is there any reference to leave of Court being required before prosecuting a receiver. A receiver is not referred to in S. 195 of that Code which requires fulfilment of its provisions in respect of prosecution of certain individuals. When a receiver commits an offence in relation to property in his possession, then he can be prosecuted without leave being obtained from the Court by which he is appointed. ILR (1948) Mad 639 : 1948 M W N 57 : AIR (Vol 35) 1948 Mad 318 : 61 L W 13 : (1948) 1 M L J 2 (DB).

——**Criminal offence—Sanction of Court, whether necessary for prosecution.**

It is not a general rule of law that in all criminal proceedings, the leave of the Court is not necessary to prosecute, a receiver.

Sanction is required to proceed against a Receiver for defamation when he acts for the protection of the estate in his hands, e.g., where the alleged act of defamation arises out of the matter for repairs to the estate and is based on a letter written with reference thereto. (1912) 13 Cr L J 489 : 15 Jnd Cas 489 (DB) (Cal).

RECIPROCAL CONTRACT.
See Contract Act, Ss. 51 to 57.

RECIPROCAL PROMISES.
See Contract Act, S. 2.

RECITALS.
See (1) Deed.
(2) Evidence Act, Ss. 32, 34-38, 61, 74 to 99.

RECOGNISED AGENTS.
See (1) Civil P. C., O. 3.
(2) Contract Act, Ss. 182 to 238.
(3) Principal and Agent.

RE-CONVERSION.
See Hindu Law.

RECORD.
See (1) Civil P. C., O. 13, Rr. 7 and 10.
(2) Evidence Act, Ss. 35, 65, 32 and 144.

RECORD, LOSS OF.
See Criminal P. C., S. 423.

RECORD OF CONFESSION.
See Criminal P. C., Ss. 164 and 364, Evidence Act, Ss. 24 and 27.

RECORD OF DEPOSITIONS.
See (1) Civil P. C., O. 18, Rr. 8, 13 and 14.
(2) Criminal P. C.. Ss. 356, 357 and 362.

RECORD OF EXAMINATION OF ACCUSED.
See Criminal P. C., Ss. 342 and 364.

RECORD OF RIGHTS.
See also (1) Bengal Tenancy Act, Ss. 101 & 103-B.
(2) C. P. Land Revenue Act, S. 82.
(3) Custom (General).
(4) Evidence Act, Ss. 35 and 101 to 104.
(5) Landlord and Tenant.

(6) Local Tenancy Acts.
(7) Mutation.

1. Alterations in.
2. Burden of proof.
See also N. 11.
3. Civil suit.
4. Conclusive proof.
See also N. 8.
5. Conflicting entries.
6. Construction.
7. Effect of entry.
8. Evidentiary value.
See also N. 4.
9. Fraudulent entry.
10. Mutation proceedings.
See also Mutation.
11. Presumption of correctness.
12. Void entry.
13. Wrong entry.
See also N. 3.

1. Alterations in.

——Wrong entry corrected subsequent to suit—Right to decree for profits is not taken away.

Where the plaintiff in a suit for profits was a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the Khewat even though the decree is based on a finding that the original entry was wrong. AIR (Vol 10) 1923 All 562: 74 Ind Cas 914.

——Revenue Records — Entry of plaintiff's name as proprietor of certain share for Faslis 1323 and 1324—Alteration of entry for Fasli 1325—Suit for profits after the last entry — Profits must be calculated for all Faslis on basis of last entry.

When there has been an alteration in the revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the Court trying a suit for profits must be to consider the order by which the alteration was made and to give effect to the intention of the said order. If, for instance, a planitiff was the recorded proprietor of an eight annas share in a mahal during the first year or the period in respect of which profits were claimed and it was shown that after the close of that year he had been recorded as proprietor of a four annas share from a finding only that he had transferred his interest in the remaining four annas share after the close of the first year in suit, then the duty of the Court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however it is clear upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiffs' share was intended to be a correction of a previously erroneous entry and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Court is bound to give effect to the entry as it stood on the date of the institution of the suit. A I R (Vol 9) 1922 All 102 : 66 Ind Cas 125 : 44 All 413 : 20 A L J 243 (DB).

2. Burden of proof.

See also N. 11.

——Where the entry in the Settlement khatian is against the plaintiff, the plaintiff has to rebut the presumption of its correctness. AIR (Vol 16) 1929 Cal 385 : 120 Ind Cas 147 : 49 C L J 285 : 33 C W N 623 (DB).

——There is a presumption of correctness attaching to the entries in the record-of-rights to rebut which, the onus lies heavily on the party challenging the correctness of the entries. A I R (Vol 15) 1928 Lah 308 : 110 Ind Cas 857 : 10 L L J 63 : 29 P L R 381 (DB).

——It is for the person who challenges an entry in the record-of-rights to show that it is incorrect.

When the record-of-rights has once been finally published, it cannot be attacked on the ground that certain procedure adopted by the revenue authorities in arriving at the final conclusion does not support the entry as finally published. The party challenging the record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the Revenue Officer. A I R (Vol 14) 1927 Cal 268 : 100 Ind Cas 7 : 31 C W N 192 (DB).

——When the entry in the Settlement records implies a permanent lease, the person contesting the permanent character or the lease must prove that it was merely an annual lease. A I R (Vol 14) 1927 Nag 147 : 100 Ind Cas 438 : 23 N L R 16.

——Where the record-of-rights is in favour of one party, it is for the other party to establish that it is wrong. AIR (Vol 14) 1927 Pat 225 : 101 Ind Cas 119: 8 P L T 578 (DB).

——Where a party on whom the onus of proof of a certain matter lies puts in evidence the record-of-rights which favours that party, the onus shifts to the other party to disprove the presumption raised by the record-of-rights. AIR (Vol 12) 1925 Pat 530 : 88 Ind Cas 495: 6 P L T 805 : 1925 P H C C 185 (DB).

——Where it is contended that an entry in the record-of-rights is wrong, it lies on the party so contending to prove that it is wrong and not on the opposite party to prove that it is right. AIR (Vol 10) 1923 PC 217 : 82 Ind Cas 879 : 28 C W N 145: 1923 M W N 702 : 33 M L T 408.

——To set aside the presumption arising from the record-of-rights it is not sufficient to show that the entry is contrary to the general custom or law. The presumption arising from the entry in record-of-rights, therefore, that the trees belong to the tenant, is not rebutted by the mere fact that ordinarily the landlord is owner of the timber, and the burden of proof is shifted to the landlord. AIR (Vol 9) 1922 Pat 497 : 69 Ind Cas 868 : 1 Pat 363 : 3 P L T 818 (DB).

3. Civil suit.

——Declaration only.

Apart from the Bengal Tenancy Act the person aggrieved by an entry in record-of-rights, and who has failed to avail himself of the means given him to correct the wrong entry under that Act, cannot be denied his right to bring an ordinary civil suit. But the power to bring an ordinary civil suit instead of availing oneself of the remedy given him in Chap. 10 of the Act would result in a declaration only. It will not force the revenue authorities to alter their finally published record-of-rights. AIR (Vol 14) 1927 Cal 458: 31 CWN 499: 102 Ind Cas 113 (DB).

——No presumption under S. 50, B.T. Act.

Where a suit was brought by certain raiyats for correcting an entry as to their status in the record-of-rights, without any proceedings being taken before the revenue Court or the special Judge or under Chap. 10, Bengal Tenancy Act.

Held, that the suit can only be treated as an ordinary civil suit and that no presumption under S. 50 can arise. AIR (Vol 14) 1927 Cal 458: 31 CWN 499: 102 Ind Cas 113 (DB).

——The malik makbuza right is the creation of the settlement. If the settlement officer gave that right to a certain person in respect of certain fields a civil Court cannot go behind the settlement award and find that there was a mistake in the award and the right should have been conferred to certain other fields. The settlement entry recording a person as a malik makbuza proprietor in respect of certain lands

is final and conclusive and one cannot go behind it or challenge it. AIR (Vol 14) 1927 Nag 406: 99 Ind Cas 1041.

——A co-sharer is estopped from claiming otherwise than as the record of-rights shows. AIR (Vol 8) 1921 Pat 341: 2 PLT 163.

——Entry—Suit to impeach.

Suit can be maintained for declaration that plaintiffs, who are recorded as tenure-holders without fixity of rents, are raiyats with fixed rents and that the entry is wrong. (1910) 5 Ind Cas 266 (Cal).

——Suit for declaration that entry is wrong entry, barred by limitation—Suit for consequential relief if barred.

The fact that a claim for a declaration that an entry in the Record of Rights is wrong is barred by limitation would not prevent the Court from determining that the entry is wrong if it is essential for the main or consequential relief claimed. A claim is not necessarily barred by an entry in the Record of Rights which if produced in evidence and unrebutted would be fatal to the relief claimed. AIR (Vol 5) 1918 Pat 220: 46 Ind Cas 229.

4. Conclusive proof.

See also N. 8.

——Khasra—Title, if can be based on.

A khasra (plan) of land drawn and kept by the Municipality is not a conclusive evidence as to its contents and no title can be based upon it. AIR (Vol 38) 1951 MB 114.

——Entries in—Value of—Santal Parganas.

In the Santal Parganas the entries in the Record of Rights finally published do not merely carry a presumption of correctness, but they are conclusive. AIR (Vol 34) 1947 Pat 471: 26 Pat 253 (DB).

——Peile's Report.

The statements in Sir James Peile's Report cannot be placed on a higher footing than evidence of tradition with respect to the nature of tenancies in talukdars' estates. In view of the fact that the Gujrat Talukdars' Act was passed in 1888 about twenty years after Peile's Report, the Report cannot be taken as conclusive in respect of matters expressly or impliedly, provided for by the Act. AIR (Vol 18) 1931 Bom 167: 32 Bom LR 1679 (DB).

——The description in the Settlement Register that certain land is Mandai poramboke is only some and not conclusive evidence of the character of the land. AIR (Vol 18) 1931 Mad 213: 1930 MWN 515.

——Entries in—Conclusiveness of—Chota Nagpur Tenancy Act (VI of 1908)—Mundari Khunt Kattidari tenancy—Evidence to prove—Admissibility.

Where the holding is not recorded as a Mundrai Khunt-Katti tenancy in the Record of Rights no evidence is admissible to prove such a tenancy in bar of execution of a decree for sale of that holding. AIR (Vol 18) 1931 Pat 136: 9 Pat 952 (DB).

——Where there has been a finally published record-of rights and no proceedings are taken to alter a wrong entry either before the revenue Court or before the special Judge or in any other way provided for in Chap. 10 of the Bengal Tenancy Act, the record-of-rights must be treated to be finally settled. AIR (Vol 14) 1927 Cal 458: 31 CWN 499: 102 Ind Cas 113 (DB).

——Thak maps.

Thak maps are not conclusive and may be shown to be wrong. AIR (Vol 14) 1927 Cal 457: 100 Ind Cal 507 (DB).

5. Conflicting entries.

——Where the revised record-of-rights is in conflict with the original record the presumption is that at some time between the two dates of final publication the persons recorded in the original record lost their possession and that the persons whose names appear in the revised record obtained possession but that there is no presumption regarding the exact time at which this change in the state of affairs took place. AIR (Vol 17) 1930 Pat 568 (DB).

——Mere production of contrary entries in an earlier record-of-rights which is practically the only evidence of the proprietor of land will not in law rebut the presumption arising out of the subsequent entry in record-of-rights. 118 Ind Cas 316 : 10 P L T 569 : AIR (Vol 16) 1929 Pat 460 (FB).

6. Construction.

——Entries—Meaning of "Taluqdari villages."

As regards the question whether the expression "taluqdari villages" comprises villages subsequently awarded by the settlement decree the best evidence is to be found in the settlement record of rights. 7 O W N 1010 : AIR (Vol 17) 1930 Oudh 481 (DB).

——Jungle plot.

A jungle plot would ordinarily mean and include not only the standing trees, but also land on which the trees stand. The trees upon the land are part of the land; the right to cut them down and dispose of these trees is incidental to the proprietorship of land. AIR (Vol 17) 1930 Pat 533 (DB).

——Plots comprised in khata No. 145 originally formed one holding with another khata No. 12. They were separated by partition and in survey entry, against plot No. 12 there was the entry that it was held at fixed rent. Against plot 145 there was the entry "kaimi" and the further entry that the rent was included with that of khata No. 12.

Held, that khata No. 145 was "kaimi" in spite of the other entry that the rent was included with that of khata No. 12 and so rent with regard to it was liable to enhancement. 11 P L T 240 : AIR (Vol 17) 1930 Pat 379 (DB).

——Bhaoli.

The term "Bhaoli" means "produce rent" and in South Behar District it has been made strictly applicable to the system under which the crop is valued or appraised before cutting and the landlord's share is paid according to this appraisement and not actual results of cutting. 120 Ind Cas 46 : 11 P L T 228 : AIR (Vol 17) 1930 Pat 157 (DB).

——On the strength of mokurrari deeds certain lands were recorded as waste lands in the record-of-rights but no mention was made of underground rights.

Held, the underground rights still remained with the owners of the mokurrari deeds. 118 Ind Cas 603 : AIR (Vol 16) 1929 Pat 190 (DB).

——Right to erect dam.

Where the right of the residents of a village to erect dam across a river is entered in the record-of-rights but the entry does not specify the period for which the dam was to stand the entry is not thereby rendered as of no effect but simply means that the dam is to stand for a reasonable period i.e., to say till sufficient water has entered their reservoirs to enable them to irrigate the area specified. 118 Ind Cas 333 : 30 Cr L J 896 : AIR (Vol 16) 1929 Pat 180 (DB).

——Pagoda poramboke—No absolute exemption from revenue.

Certain land was entered in the settlement register as poramboke and was said in the remarks column to be pagoda poramboke. It was claimed that the entry was sufficient proof to show an implied agreement by the Government to exempt the land from assessment for all time.

Held, that poramboke is land liable to revenue, but the right to levy assessment on it is given up by Government for certain reasons, but it does not follow that if those reasons cease to exist, the Government cannot levy assessment if it so chooses. The word "pagoda" is merely description of the poramboke and it is not used to afford evidence of either a recognition of lost grant or a present engage-

ment on the part of Government. The entry therefore does not prove an implied agreement on the part of Government so as to exempt the land from assessment for all time. 115 Ind Cas 49 : 52 Mad 25 : 1928 M W N 581 : 29 M L W 185 : A I R (Vol 15) 1928 Mad 1176 : 56 M L J 24 (DB).

——Khata number always consists of one holding.

It has been the practice and custom of Settlement Officers to show a separate tenancy for a holding under a single khata number. A khata number will never consist of more than one holding. 101 Ind Cas 511 : 8 P L T 564 : AIR (Vol 14) 1927 Pat 207 (DB).

——Trees on tenant's rent-free homestead land—Entry saying ; "Half share of tenant and half share of malik"—Landlord cannot claim falkar rent.

Falkar rent was claimed in respect of rent-free homestead land of the defendants. Reliance was placed on an entry in the Record-of-Rights. The entry showed that there were a certain number of trees in the land and then the entry recorded as follows "Half share of the tenant and half share of the malik."

Held, that the entry merely recorded the fact that the landlord was entitled to half the share in the trees mentioned and that the tenant was entitled to the remaining half share in those trees. It did not purport to regulate the rights of the parties as to the fruits and it would be an extraordinary thing if the landlord were entitled to claim rent from the defendant's rent-free land. The landlord was not entitled to claim falkar from the defendants. 86 Ind Cas 1016 : AIR (Vol 12) 1925 Pat 753.

——Entry as tenure holders does not indicate permanency of tenure of fixity of rent. 78 Ind Cas 605 : 3 Pat 120 : 1924 P H C C 1 : AIR (Vol 11) 1924 Pat 443 (DB).

——In a suit for rent where the Khatian contained an entry as to rent as follows, "Every year the land which actually grows crop is measured. The tenant pays to the malik Rs. 3-5-6 Dhan and4 annas Moong, Laggi 9 feet 9 inches."

Held, the entry meant that the rent was payable at the rate of Rs. 3-5-6 per Bigha of land grown with Dhan and 4 annas per bigha of the land grown with moong the actual quantity of land grown with Dhan and Moong being ascertained by measurement every year. AIR (Vol 9) 1922 Pat 481.

——Lagan abtak nahin Dia—Meaning.

The description "Lagan abtak nahin dia" in the settlement record may possibly denote that the lands may be "Belagan" i.e. rent free or "Kabillagan" i.e. capable of being assessed. AIR (Vol 3) 1916 Pat 312 : 35 Ind Cas 588.

——Entry as "Bahissa Braber"—Meaning.

Entry in Record of Rights to the effect that a certain person and his two nephews are tenants "Bahissa Braber" means only that the first name is that of uncle and the next two are nephews and that there are two shares in the jote and not three. It does not mean that they are tenants-in-common or that they are equal sharers. (1910) 5 Ind Cas 291 (DB) (Cal).

7. Effect of entry.

——Khasra—Entries in — Non-mention of land set apart as grave-yard—Effect of — Muslim community living in village since ancient times.

The absence of an entry of a particular nature may or may not accord with actual facts, but, if a certain position is found to be established from the surrounding circumstances of the case, a mere non-mention of it in the village records would not carry much weight. As the burying of the dead is an absolute necessity among the Muslim community, where such community had been living in the village since ancient times, one would rather presume that it must have had some place within the village area set apart as a grave-yard than to conclude from the mere absence of an entry in the records that there was no land used as such in the village at all. A I R (Vol 36) 1949 All 493 : 1950 A L J 21 : 1949 A W R 496.

——No tacit recognition of rights — Adverse possession.

An entry in the record of rights that the land was subject to the rights of the plaintiff does not amount to a tacit recognition of the plaintiff's rights on the part of the defendant. If the defendant was in adverse possession for over the statutory period his title is not prejudiced by any such entry. 16 C W N 929, overruled. AIR (Vol 18) 1931 Cal 25 : 57 Cal 796 (DB).

——Occupancy right.

Where it is recorded in the Record-of-Rights that a certain person being an under-raiyat has a right of occupancy it must be presumed that that right of occupancy has been acquired by him under and by virtue of a custom. AIR (Vol 17) 1930 Cal 315 : 33 C W N 1193 : 123 Ind Cas 266 (DB).

——Poramboke — No title conferred thereby.

The mere registry of land in a village as a particular kind of poramboke creates no vested right in the villagers to hold it as such against Government. Such registry implies no kind of dedication or trust or any recognition of a vested right or user. For, the classification of porambokes, including channel, in village registers, is merely by way of description and confers no title. AIR (Vol 17) 1930 Mad 621.

——No recognition of rights.

An adverse entry in the Record-of-Rights, even if allowed to remain unchallenged, does not necessarily extinguish the right of the party against whom such entry has been made and a fortiori an order to alter the entry to the prejudice of the party without the actual alteration of the entry cannot by itself extinguish the right unless the other party can prove adverse possession for the statutory period or some similar reason in support of his plea of such extinction. AIR (Vol 15) 1928 Lah 516 : 9 Lah 428 : 119 Ind Cas 258 (DB).

——An entry in the Record-of-Rights in favour of a person other than the person in actual possession before such entry does not in itself constitute dispossession of the occupant although it may be evidence of actual possession at that time. AIR (Vol 15) 1928 Pat 653 : 110 Ind Cas 623 (DB).

——An entry in the record-of-rights operates in the same way between landlord and tenant as between landlords of the same or neighbouring estates and between tenant and tenant. AIR (Vol 13) 1926 Cal 862 : 30 C W N 689 : 96 Ind Cas 959 (DB).

——An entry in the record-of-rights merely raises a presumption of correctness, and is not a starting point for the computation of the period of limitation. AIR (Vol 9) 1922 Cal 251 : 35 C L J 19 : 25 C W N 1022 : 63 Ind Cas 954 (DB).

——The effect of the publication of the record-of-rights is not to sweep away all previous decisions between the parties. Such a consequence would not followed even if the entry in the record-of-rights has the effect of a decision in a suit between the parties. Hence where a decision operates as res judicata its effect is not destroyed by the subsequent publication of the record-of-rights. AIR (Vol 8) 1921 Cal 761 : 35 C L J 200 : 60 Ind Cas 389 (DB).

8. Evidentiary value.

See also N. 4

——Entry as to custom—Value—Absence of entry in subsequent records—Effect of.

An entry in a wajib-ul-arz is good evidence of custom and the absence of any entry of such custom

in the subsequent records of rights does not raise any presumption that the custom has ceased to exist, nor is it any evidence to that effect. AIR (Vol 34) 1947 Pesh 51.

——The record-of-right is a very valuable piece of evidence which raises the presumption of correcteness of entries therein. If it happens to be in favour of one party rather than another the Magistrate can treat it as reliable evidence in possession proceedings. AIR (Vol 18) 1931 Cal 5 : 34 C W N 957 (DB).

——The entries in the record-of-rights are not the foundations of the title but are mere items of evidence to be adduced by a vendee to prove the sale. AIR (Vol 17) 1930 P C 91 : 1930 A L J 292 : 32 Bom L R 380 : 31 P L R 145: 31 M L W 321: 11 Lah 199 : 57 IA 86 : 51 C L J 518 : 122 Ind Cas 316.

——Entry in the record-of-rights raises a prima facie presumption of possession in favour of party in whose name such entry is made. AIR (Vol 17) 1930 All 341 (DB).

——Inam proceedings.

The inam proceedings constitute a "great act of state" and great weight ought ordinarily to be attached to the enquiries and reports of the Inam Commissioner. 1930 M W N 945 (DB).

——In the absence of any evidence to the contrary an entry in Record-of-Rights must be taken as sufficient evidence as regards particular succession and title. AIR (Vol 17) 1930 Oudh 310 : 7 O W N 504.

——Entry of a custom in the Record-of- Rights is prima facie evidence of the existence of the custom and omission of the mention of such custom in subsequent Record-of-Rights is no evidence of the disuse of it. (1929) 118 Ind Cas 150 (All).

——An entry in a Botkhat is presumptive evidence of title and possession in favour of the person whose name appears in it. AIR (Vol 16) 1929 Bom 333 : 31 Bom L R 628 : 119 Ind Cas 786 (DB).

——The presumption arising from the entry in the record-of-rights is a very important piece of evidence and is conclusive until it is rebutted by evidence. AIR (Vol 14) 1927 Cal 933 : 31 C W N 448 : 102 Ind Cas 398 (DB).

——Where the plaintiffs who were tenure-holders under the defendants, sued to recover possession of what they alleged formed part of their tenure under the defendants and of which they alleged they had been dispossessed by the defendants,—the presumption raised in favour of defendant by the record-of-rights was held to be very slight and sufficiently rebutted by the rent decrees obtained by plaintiff against another person as their tenant.

Held, that the presumption raised by the record-of-rights is very slight and it was sufficiently rebutted by the rent decrees obtained by plaintiffs against A. (1925) 91 Ind Cas 608 (Cal).

——Although entries in the record of rights which were prepared in the Basti and Gorakhpur settlements in the year 1885 have a peculiar weight, the Full Bench decision does not lay down that such an entry is conclusive proof. Where there was no record of custom in the wajib-ul-arzes of 1833 and 1860 and it was proved to the satisfaction of the Court that in both those years the village was in the possession of a single proprietor.

Held, that there was evidence on the record which overturned the presumption founded upon the entry in the record-of-rights for the year 1885. A I R (Vol 11) 1924 All 449 : 46 All 35 : 78 Ind Cas 519 (DB).

——Important evidence but rebuttable.

With the presumption of correctness which attaches to record-of-rights by law it is undoubtedly a most important piece of evidence. The entries in it may be rebutted by subsequent decrees of the Civil Court and the delivery of possession that followed them. A I R (Vol 11) 1924 Pat 765 : 5 P L T 535 : 1924 P H C C 244.

——An entry in Khewat is prima facie evidence of title which may be rebutted by showing that there is no likelihood of there being any title. AIR (Vol 9) 1922 Oudh 140 : 69 Ind Cas 821.

9. Fraudulent entry.

——Mortgagee in possession.

A mortgagee in possession cannot, by getting himself recorded in the revenue paper as owner, defeat the right of the mortgagor to redeem. (1929) 120 Ind Cas 789 (Lah).

——Where it is found that certain properties forming the subject-matter in dispute in a suit were entered in the record-of-rights in the name of certain persons, fraudulently and as a result of conspiracy to deprive the person entitled to it, the Court can ignore the entry in record-of-rights. AIR (Vol 16) 1929 Pat 559: 119 Ind Cas 881 (DB).

10. Mutation proceedings.

See also Mutation.

——Mutation — Sale deed by widow of one of co-sharers, of certain plots in possession of mortgagees from other co-sharers—No mention of mortgages in deed—Deed, held not effective.

When the widow of one of the co-sharers executes a sale deed in respect of certain plots in the possession of the mortgagees, from other co-sharers, which made no mention of the mortgages, the sale-deed is ineffective. The name of the transferee cannot be recorded in the place of that of the widow. (1945) 11 BR 161 (Rev.).

——Not judicial.

Proceedings for mutation of names are not judicial proceedings in which the title to and the proprietary rights in immovable property are determined, but are more in the nature of fiscal inquiries instituted in the interest of the State, and the entry in the record-of-rights by itself would not vest the property in the person in whose favour it is made. AIR (Vol 15) 1928 Bom 269 : 30 Bom LR 720 : 113 Ind Cas 523 (DB).

——Inference of assertion of hostile title.

Although an order made in mutation proceedings may not per se create any title, but if accompanied or followed by overt acts of possession such an order might give rise to an adverse inference of an assertion of a hostile title. AIR (Vol 15) 1928 Nag 252 : 109 Ind Cas 522.

——Not judicial.

An adverse entry in the revenue papers does not debar a plaintiff from raising the question as to the ownership and title to specific plots of land within a mahal by a civil suit, as the mutation proceedings in the revenue Court are not judicial proceedings in which the title to and the proprietary rights in immovable property are determined. AIR (Vol 14) 1927 All 784 : 8 LRA Rev 45 : 100 Ind Cas 687 (DB).

——Purchaser relying on entries.

Where the revenue entries show a person as the sole proprietor of certain land and there are no other circumstances leading the purchasers of such land from the proprietor to go behind the revenue records and make any further enquiry the vendees are fully protected by the principle underlying S. 41. AIR (Vol 14) 1927 Lah 666 : 103 Ind Cas 45 (DB).

——Not judicial.

Proceedings for the mutation of names are not judicial proceedings, in which the title to and the proprietary rights in immovable property are determined. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denomina-

tions of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. AIR (Vol 14) 1927 Nag 406 : 99 Ind Cas 1041.

——Purchaser relying on entries.

Mutation of names by itself creates no proprietary title. Mutation is merely a statement of the facts which existed as to the possession of the property. Consequently it follows that neither the mutation entry nor the entry in the record-of-rights can supply the place of a title-deed, and a purchaser who acts upon such an entry as evidence of title and seeks the benefit of S. 41, T. P. Act does so at his risk; and it enhances the burden of proof which law lays on him to prove that he acted in good faith. AIR (Vol 14) 1927 Nag 41 : 97 Ind Cas 988.

——Not judicial—Only fiscal enquiries.

Mutation proceedings are not judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are much more in the nature of fiscal inquiries instituted in the interests of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

Orders in mutation proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion, for example, of all claims of the other members of the family as co-owners or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronounce upon the validity of such a claim. AIR (Vol 13) 1926 P C 100 : 51 MLJ 836 : 1 Luck 389 : 29 OC 316: 53 IA 220 : 48 All 529 : 25 ALJ 25: 28 Bom LR 1409: 44 CLJ 330 : 25 MLW 1 : 3 OWN 623 : 1926 MWN 716: 13 MLT 81: 98 Ind Cas 1013.

——No evidence of title.

It is a common practice for the Revenue Authorities to effect mutation in disputed cases in favour of the party in possession without attempting to decide except, perhaps, in a summarry way, the disputed question of title. Therefore, as regards mutation, the Civil Courts have to come to an independent finding in such cases and cannot base their decision merely on an opinion formed by the Revenue Authorities. AIR (Vol 8) 1921 Lah 344 : 60 Ind Cas 456.

11. Presumption of correctness.

(a) General.
(b) Rebuttal—Onus.
See also N. 2.
(c) Rebuttal—Essentials.
(d) Rebuttal—Duty of Court.

(a) General.

——Entries in—Presumption of correctness—If rebuttable.

Entries in a survey record or Khewat raise a presumption of correctness but it may be rebutted. There is, therefore, no special sanctity attached to those entries. AIR (Vol 36) 1949 H. P. 11.

——Entry in—Value of—Erroneous foundation.

The presumption of correctness of an entry in the settlement khatian is rebuttable, and the presumption cannot be maintained if it appears that the foundation for the entry is erroneous or non-existent in law. (1947) 82 C L J 183.

——Entry in—Value of—If creates or extinguishes rights in land,

It is well-settled that an entry in the record of rights describing a tenant a "istumurari darpattadar" cannot by itself create or extinguish any right; it merely raises a presumption of accuracy which can be rebutted. The entry cannot be taken as depriving the rights of the occupier especially when the occupant is an agricultural tenant. (1947) 13 Cut LT 66: 29 PLT 81 (DB).

——Presumption of correctness.

The fact that in the Record of rights an entry is made deciding the claim in a certain way, is not to be regarded as a tacit recognition of its correctness on the part of the person whose claim has been overruled. 15 IC 64, Diss. from. AIR (Vol 18) 1931 Cal 25: 57 Cal 798 (DB).

——Old record no evidence of possession.

The presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared; and, even if such presumption can be made in a criminal trial, it is clear that where there has been an interval of ten or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. AIR (Vol 17) 1930 Cal 134: 34 CWN 170: 1930 Cr C 134 (DB).

——Although an entry in the Settlement Records is to be presumed to be correct, it is liable to be rebutted. AIR (Vol 15) 1928 Nag 329: 114 Ind Cas 454.

——All entries in the Record-of-Rights including the entries made in accordance with the provisions of S. 55 of the U. P. Land Revenue Act must be presumed to be true until the contrary is proved. AIR (Vol 14) 1927 All 212: 8 LRA Rev 67: 99 Ind Cas 531.

——An entry in record-of-rights must be presumed to be correct unless the contrary is proved, but when the matter is investigated by the Civil Court, and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it. AIR (Vol 14) 1927 Cal 210: 31 CWN 135: 100 Ind Cas 453 (DB).

——A presumption of correctness attaches to the entries in the record of rights. A I R (Vol 14) 1927 Pat 353 : 8 PLT 669 : 106 Ind Cas 298 (DB).

——Entries in the record-of-rights that lands are Zerait qaimi or Zerait dakhilkar or Zerait Gair dakhilkar shall be presumed to be correct until contrary is proved, by the tenants. Zerait Gair dakhilkar means non-occupancy tenants. AIR (Vol 12) 1925 Pat 241: 6 PLT 240: 1924 PHCC 337: 4 Pat 89: 84 Ind Cas 305 (DB).

——The presumption in favour of survey record-of-rights cannot be displaced by Batwara or irrigation maps. AIR (Vol 10) 1923 Pat 37 (DB).

——Entry in—Presumption as to correctness—Evidence—Duty of Court.

An entry in the Record of Rights is presumed to be correct so long as it is not rebutted by sufficient evidence. AIR (Vol 7) 1920 Pat 129: 1 Pat LT 221: (1920) Pat HCC 177: 56 Ind Cas 417.

——Entry in—Value of.

An entry in the Record of Rights in Berar though not supported by a statutory presumption as in the C. P., does raise a presumption of correctness. (1918) 45 Ind Cas 217 (Nag).

——The proceedings of the Revenue Officer in the matter of a record made under Section 103 amounted to a "record of rights" within the meaning of Chapter X of the Bengal Tenancy Act.

Section 103B provides that a certificate signed by the Revenue officer, stating that a record of right has been finally published under this chapter, shall be conclusive evidence of such publication, and every entry in a record of rights so "published should be

presumed to be correct until the contrary is proved. (1905) 32 C 518 (526): 9 CWN 504: 1 CLJ 239.

(b) Rebuttal—Onus.

See also N. 2.

——Entry in—Presumption as to correctness.

An entry in the survey record of rights must be presumed to be correct. If that entry shows that the defendants are in possession of a tenure which is non-resumable, the onus is on the plaintiff to show that that entry is incorrect. AIR (Vol 33) 1946 Pat 313: 12 BR 446: 1946 PWN 262: 27 PLT 259: 223 Ind Cas 615 (DB).

——Difference between entries under the Estate Partition Act and the B.T. Act.

The difference between the two records, the one prepared under the Estates Partition Act, and the other under the Bengal Tenancy Act, is this that, while the latter records the status of the landlord and tenant, the former records the status of a proprietor and the other persons, who need not necessarily be landlords or tenants. In the Bengal Tenancy Act Records, the rent stated by the landlord and that stated by the tenant and as attested by the Survey Settlement Officer is recorded. In the record-of-rights prepared under Chapter VI of the Estates Partition Act, in addition to the above, the assets of all other lands are recorded. The record-of-rights prepared under Chapter VI of the Estates Partition Act raises a presumption in favour of its accuracy in the same way as the record-of-rights prepared under the Bengal Tenancy Act, and every presumption as to its having been carried out according to the rules and of its having been duly published will arise in its favour. The record-of-rights raises a strong but rebuttable presumption that the rent payable by the tenants to the recorded proprietor with respect to the land in question must be that entered in the batwara papers.

Where the plaintiff's landlords had got in their favour the presumption of the entries in the batwara papers as to the rate of rent payable by the defendants to them and also the presumption of the Survey record-of-rights of their liability to pay rent.

Held, that it is open to the defendants to rebut that presumption or they must pay a fair and equitable rent for the use and occupation of the lands under the plaintiffs who are the recorded proprietors and are liable to pay revenue to the Government. Where the Survey record-of-rights has determined a certain rate of rent with respect to a part of the land in dispute and in the vicinity, the defendants, no doubt, can succeed if they are in a position to show that they are not liable to pay, under any express provision of law, any rent in excess of the proportionate revenue upon these lands, but in case of failure to do so, they must accept the entries in record-of-right. AIR (Vol 10) 1923 Pat 391: 71 Ind Cas 395.

——Under the general law the landlord is entitled to claim rent from every one shown to hold land within the ambit of his zamindari. That is the general law and if any one relies upon any exception to the general law it is for him to prove that he comes within the exception. To that extent there is a conflict between the record-of-rights and the general law. But the case of an occupancy tenant is entirely different. Their is no denial of the right of the landlord to recover rent from the tenant and there is no conflict whatever between the record-of-rights and the case that he, the tenant has an occupancy holding within the ambit of his zamindari. The decision of the Judicial Committee in AIR 1922 P. C. 272: 2 Pat. 38 does not support the extreme proposition that although the record-of-rights is in favour of the tenant, it is still necessary for the tenant to establish by clear evidence that the entry in the record-of-rights is correct. AIR (Vol 10) 1923 Pat 340: 1923 PHCC 122: 1 Pat LR 99: 71 Ind Cas 1022 (DB).

——Entry in—Presumption as to correctness—Suit for declaration of right—Onus of proof.

In a suit by plaintiffs for declaration of their right to lands as khudkasht, the record of rights showed an entry that the lands were Khudkasht.

Held, that the onus was on defendant to show that the entry was wrong. AIR (Vol 6) 1919 Cal 317: 23 CWN 304: 51 Ind Cas 115.

(c) Rebuttal—Essentials.

——The statutory presumption of correctness of the entries made in the Record-of-Rights prevails even when both parties to a litigation allege that the entries are incorrect. AIR (Vol 17) 1930 Pat 485 : 123 Ind Cas 615 (DB).

——Presumption of its correctness can be rebutted by producing evidence even subsequent to it. AIR (Vol 15) 1928 Pat 209: 9 P L T 317: 106 Ind Cas 272. (DB).

——The presumption arising from any entry in the record-of-rights that the lands are not rent free lands, but are liable to pay rent is rebutted when there is no proof that rent was ever paid. AIR (Vol 14) 1927 Cal 189 : 98 Ind Cas 85 (DB).

——If in fact the plaintiffs were rafa-tankidars at the time of the Provincial Settlement, there is no procedure by which they become tankidars at the time of the Revision of Settlement. The Provincial Settlement Records must be considered to be of very high value in determining the status of tenants and is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records where it is conceded that there is no evidence in the case on the point. AIR (Vol 9) 1922 Pat 548: 1 Pat 167 : 5 P L T 140 : 75 Ind Cas 427 (DB).

——In determining whether the presumption has been rebutted, evidence of facts both documentary and oral of the date prior to that of the publication of the record is admissible and should be weighed. AIR (Vol 8) 1921 Pat 277 : 2 P L T 133 : 61 Ind Cas 78 (DB).

——A circumstance relied upon as negativing the presumption of correctness of record-of-rights must not only be inconsistent with the Record but it must be incapable of explanation on any other hypothesis than that of the record-of-rights is wrong. (1920) 60 Ind Cas 482 (Pat).

——Entries in — Presumption as to correctness of —Rebuttal.

Where both the parties to a suit repudiate an entry in the Record of Rights, the presumption as to its correctness is rebutted. AIR (Vol 6) 1919 Cal 311: 51 Ind Cas 50.

——Entry—Presumption as to correctness.

There is a presumption of correctness attached to an entry in a Record of Rights, to rebut which, strong evidence to the contrary will be necessary. AIR (Vol 4) 1917 Pat 258 : 39 Ind Cas 561.

(d) Rebuttal — Duty of Court.

——It is for the Court of fact to say whether the evidence as furnished by the batwara proceedings is so valuable as to rebut the presumption of the correctness of the record-of-rights. AIR (Vol 8) 1921 Pat 275 : 1921 P H C C 343 : 63 Ind Cas 226 (DB).

——Entry in — Presumption as to correctness of.

An entry in a Record of Rights raises only a presumption, but where evidence is let in to rebut the presumption the judgment must show that the rebutting evidence has been carefully considered and that the Court has come to a conclusion whether or not the evidence has rebutted the presumption. If nothing to that effect appears in the judgment, the

suit should be remanded. AIR (Vol 5) 1918 Pat 268 : 4 Pat L W 448 : 45 Ind Cas 916.

12. Void Entry.

——There was an entry in the record-of-rights to the effect that under-raiyats defendants had acquired occupancy right. The kabuliyat did not contain any clause entitling the plaintiff to eject the defendants but contained a term that it was a san basen kabuliyat, i. e., it was a tenancy from year to year :

Held, that if the kabuliyat was treated as creating a permanent lease, it must be regarded as void since it would offend against S. 85 of the Bengal Tenancy Act. On the other hand, if it was treated as a year to year lease it did not protect the defendants, from ejectment upon notice under S. 49. In either view of its terms, therefore, the kabuliyat could not create a right of occupancy in the under-raiyats; and hence the record-of-rights based on it was not correct. AIR (Vol 16) 1929 Cal 450 : 49 C L J 352.

——**Entry based on special oath.**

Where an entry in the record-of-rights regarding the interest of the defendant tenant in certain trees was based on a special oath taken by the defendants by which the plaintiff's gomastha agreed to be bound at the time of the preparation of the Record.

Held, there were sufficient materials before the Court in support of plaintiff's case that there was no foundation at all for the entry in the record-of-rights especially when the gomastha had no authority from his master to consent to his master's title being bartered away in this manner. AIR (Vol 12) 1925 Pat 498 : 3 Pat L R 87 : 87 Ind Cas 741.

——**Mistake of Revenue Officer.**

The mistake of a Revenue Assistant in his report regarding mutation of certain lands cannot affect the nature of tenure under which they are held. AIR (Vol 8) 1921 Lah 294 : 3 L L J 516 (DB).

13. Wrong entry.

See also N 3.

——Predecessors-in-title of defendants instituted a suit for the recovery of the land comprising an area of 25 bighas 13 biswas 13 biswansis and asked that certain lands be decreed to them by way of maintenance so that they might cultivate them and that they would pay rent therefor like tenants and would manage to support themselves by those means. The plaintiff's predecessors-in-interest agreed to this with the result that a decree was passed.

Held, that the decree cannot be construed to have conferred under-proprietary tenure on the defendant's predecessors, and if that was the true interpretation of the decree, the entries made in the papers of the first and the subsequent settlements as regards the nature of the tenure being under-proprietary were of no consequence. AIR (Vol 12) 1925 Oudh 751 : 88 Ind Cas 53.

RECORDS
See (1) Civil P. C., O. 13, Rr. 7 and 10, O. 18, Rr. 8, 13 and 14.
(2) Criminal P. C., Ss. 342, 364 and 423.
(3) Evidence Act, Ss. 35, 65, 32 and 144.

RECORD, TRANSLATION OF
See Criminal P. C., S. 218.

RECTIFICATION
See (1) Deed.
(2) Specific Relief Act, Ss. 31 to 33.

RECURRING RIGHT
See Limitation Act, S. 23 and Art. 131.

REDEMPTION
See (1) Civil P. C., O. 34.
(2) Limitation Act, Art. 132.
(3) Mortgage.
(4) Transfer of Property Act, Ss. 60 and 91.

REDEMPTION OF MORTGAGES ACT
See Punjab Redemption of Mortgages Act (2 of 1913).

RE-ENTRY
See (1) Landlord and Tenant.
(2) T. P. Act, S. 111.

REFERENCE
See (1) Civil P. C., S. 113, O. 46.
(2) Criminal P. C., Ss. 374, 376, 432, 435 to 439.
(3) Income-tax Act, S. 66.
(4) Stamp Act, Ss. 57 and 60.

REFORMATORY SCHOOLS ACT (8 of 1897)

——Intention of Act.

The sending of first youthful offenders, whose antecedents are not shown to be bad, to ordinary jails has the effect of making them hardened criminals after they are discharged from such jails. Their association with all classes of offenders has a very unhealthy influence on them. It is the duty of the Magistrate to take into consideration all such matters, when deciding the question of sentence. There are other suitable forms of punishment provided by the law. The provisions of Reformatory Schools Act are intended for cases of youthful offenders. AIR (Vol 13) 1926 Lah 611 : 27 Cr L J 934 : 96 Ind Cas 390.

——S. 4.

——S. 4—'Youthful offender'—Boy of 16.

The order for detention in a Reformatory School can only be made in the case of a youthful offender, and under S. 4 of the Reformatory Schools Act. A boy ceases to be techically a youthful offender at the age of 15; therefore it is illegal to order detention of a boy of 16. AIR (Vol 11) 1924 Rang 16 : 2 Bur L J 96 : 24 Cr L J 918 : 75 Ind Cas 294.

——S. 8.

——S. 8—Scope.

Section 8 does not enact that a Magistrate cannot try a juvenile offender. It says that certain Magistrates who are not specially empowered may not exercise the power of sending a juvenile offender to a Reformatory School. Similarly S. 29-B, Criminal P. C., was not intended to take away the jurisdiction already conferred on Magistrates under S. 28 and Col. 8, Sch. 2, Criminal P. C. It was intended to extend to certain Magistrates the power to try juvenile offenders for certain offences which would otherwise have been triable exclusively by the Court of Session. AIR (Vol 23) 1936 All 675 : 1936 A L J 957 : 37 Cr L J 1073 : 1936 A W R 735 : I L R (1937) All 101 : 165 Ind Cas 148.

——S. 8—Revision—Powers of High Court.

Section 439, sub-s. (1) gives the High Court the necessary power to pass an order under sub-s. (2) of S. 8, Reformatory Schools Act, of detaining a boy accused in Reformatory, not only on appeal but also in revision. A I R (Vol 15) 1928 Bom 348 : 30 Bom L R 952 : 29 Cr L J 1016 : 11 A I Cr R 308 : 112 Ind Cas 344 (DB).

——Ss. 8, 10—Detention for five years.

Order of detaining a boy of thirteen years in a Reformatory School for five years or until he attains the age of eighteen years is bad. The period of detention should be a definite period. (1913) 15 Bom L R 306 : 14 Cr L J 256 : 19 Ind Cas 512 (DB).

——S. 8—Scope—Fine or detention for default.

A boy under 12 years was convicted for stabbing a companion with a knife and was sentenced to pay a fine of Rs. 100 or in default of payment to go to the Reformatory School for three years. The order was illegal. Under S. 8 before such an order is passed the offender must have been sentenced to imprisonment or transportation and not to mere fine. (1911) 4 Bur L T 69 : 12 Cr L J 244 : 10 Ind Cas 773.

——Ss. 8, 9, 10—Detention order invalid—Procedure in High Court.

An order under the Act cannot be made in respect of a youthful offender unless and until a definite sentence of imprisonment is passed. In absence of such sentence of imprisonment an order for detention in the Reformatory School is invalid and must be set aside.

A High Court should not in such a case pass a definite sentence of imprisonment to legalize the proceedings where the Magistrate would not pass a sentence of imprisonment. 34 P R 1910 Cr: 12 Cr L J 56: 8 Ind Cas 1166.

——Ss. 8, 9, 11, 13, 16—Youthful offenders—Periods of detention allowable under the Act.

A District Magistrate sentenced a youthful offender to six months imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a reformatory school for five years, unless he should attain the age of eighteen years at an earlier date:

Held, that the order was wrong, as the exact period of detention was not fixed. He should have fixed the exact age of the boy. In some cases, this may not be necessary, e.g., if the youthful offender is not over fifteen, a period of three years may be rightly fixed. The effect of the notification of the Government regulating the periods of detention of youthful offenders in reformatory schools in the Madras Presidency is to fix a minimum of five years where such a period is possible, namely, in all cases where the offender is not over thirteen at the time of conviction. (1900) 24 M 13 (16) (DB).

——S. 8 (1)—Applicability.

Before any steps can be taken under S. 8 (1), conviction and sentence should have been recorded, allowing the accused an opportunity of appealing. An appeal does not lie where there is no order of conviction. A I R (Vol 21) 1934 Pesh 29 (2): 36 P L R 79: 149 Ind Cas 1128.

——S. 9.

——S. 9 — Youthful offender—Sentence—Commutation.

The Magistrate should in the first instance sentence the accused to a term of imprisonment or transportation, which he may then commute into one of detention in a reformatory school for such period as the law prescribes. An order for the detention of a youthful offender in a reformatory school when no sentence of imprisonment or of transportation has been passed is bad in law. (1901) 5 C W N 210 (211) (DB).

——S. 9 (2)—Second class Magistrate—To whom he may refer a case which he cannot try.

A second class Magistrate not empowered to act under S. 8 of the Act must refer the case to the Dt. Magistrate after convicting the accused and not to the joint Magistrate to whom he may be immediately subordinate. AIR (Vol 2) 1915 Mad 841: 16 Cr L J 32: 26 Ind Cas 336.

——S. 11.

——S. 11—Procedure.

S. 11 requires that an enquiry as to age should be held before sending a youthful offender to a Reformatory School. There must be a clear finding as to age.

The period of detention in the Reformatory School must also be fixed.

The Court must find that the youthful offender to be sent to the Reformatory School is a fit and proper person to be an inmate of such a School. 86 Ind Cas 708: 26 Cr L J 852: 3 Rang 218: AIR (Vol 12) 1925 Rang 302.

——S. 16.

——S. 16—Scope.

Section 16 does not prevent interference by the Sessions Judge with a sentence of imprisonment though an order of detention has been substituted for the imprisonment. AIR (Vol 18) 1931 Nag 179 (179): 27 N L R 242: 32 Cr L J 1268: 134 Ind Cas 864.

——S. 16—Order of detention in lieu of imprisonment—High Court if can interfere with.

The High Court will not interfere with an order directing detention in a Reformatory School rather than imprisonment but it is not precluded from altering the sentence of imprisonment into a sentence of whipping, and in the latter case the order of detention falls to the ground. (1912) 5 S L R 173: 13 Cr L J 44: 13 Ind Cas 284.

——S. 16—Appellate or revisional Jurisdiction.

S. 16 does not exclude the exercise of appellate or revisional jurisdiction in all cases where a subordinate court has ordered an offender to be detained in a reformatory school. The exclusion is limited to the question of determination of the age of a youthful offender. (1904) 6 Bom L R 550 (551).

——S. 16 — Revision — Criminal Procedure Code, S. 439—Original sentence—Commutation.

S. 16 does not take away the jurisdiction of the High Court as a court of revision to alter or set aside the sentence in substitution of which an order for detention in a reformatory school is made. (Whipping of five stripes by way of discipline substituted for detention in reformatory for four years where a youthful offender was guilty of theft of a piece of charcoal from a waggon for the first time.) (1901) 5 C W N 211: 28 C 423 (424) (DB).

See also (1901) 5 C W N 210 (211) (DB).

——S. 31.

——S. 31—Boy of 14 years guilty of murder—Accused not depraved—Held, should be sent to Reformatory School.

The accused found guilty of murder was a boy brought up in a comfortable home, a boy apparently of intellectual attainments above the average but of a haughty and imperious disposition which had not been properly controlled, a boy who had been accustomed to treat the coolies with whom he inevitably came in frequent contact as if they were beings of another order and bound to execute all his wishes without demur or question. Unaccustomed to having his desires thwarted and unfortunately having a lethal weapon in his hands at the time, he lost control of himself and used it with a fatal effect killing a cooly boy:

Held, that the discipline of a Reformatory School may well prove salutary to such a youth, whereas it would have been ineffective in the case of a depraved youth. AIR (Vol 24) 1937 Nag 274: 39 Cr L J 92: 172 Ind Cas 204 (DB).

——S. 31—Applicability.

For the application of S. 31, the accused should receive a sentence of four years' rigorous imprisonment because it is only then that he could be sent to the Reformatory School. AIR (Vol 21) 1934 All 976: 36 Cr L J 368: 4 A W R 669: 57 A 395: 153 Ind Cas 582.

——S. 31—Sentence.

A boy of 14½ years, convicted under S. 411, I. P. C. cannot be let off after mere admonition though 6 months' rigorous imprisonment is not proper on a youthful first offender.

A security for good behaviour for 1 year was thought to be sufficient in the case. 82 Ind Cas 480: 1 P L R Cr 177: 25 Cr L J 1312: 6 P L T 294: AIR (Vol 10) 1923 Pat 297.

——S. 31—Sentence.

Of two accused found guilty of the offence of theft, one, a boy of 16, was ordered to be detained for two years under rigorous imprisonment in the Juvenile Prison at Dharwar. But the other, an adult with three previous convictions, was sentenced to rigorous imprisonment for one year.

Held, the sentence passed on the juvenile offender should not exceed the sentence passed on the other accused. 65 Ind Cas 445 : 46 Bom 429 : 23 Cr L J 93 : 23 Bom L R 1199 : AIR (Vol 9) 1922 Bom 169 (DB).

——S. 31—Applicability—Girl of 10.

It is undesirable that a girl of ten or eleven years of age should be sent to prison even for an offence of murder. In such a case S. 31 of the Reformatory Schools Act should be applied. 65 Ind Cas 609 : 24 O C 305 : 23 Cr L J 145 : AIR (Vol 8) 1921 Oudh 190.

——S. 31—S. 31 applies both to boys as well as girls. 65 Ind Cas 609 : 24 O C 305 : 23 Cr L J 145 : AIR (Vol 8) 1921 Oudh 190.

——S. 31—Youthful offender—Punishment.

S. 31 read with the definition of youthful offenders, makes it open to any Court in the case of an offender under S. 15 to deliver him to his parents, with or without sureties for his future good behaviour. 39 All 141 : 14 A L J 1158 : 17 Cr L J 524 : 36 Ind Cas 492 : AIR (Vol 4) 1917 All 420.

——Detention period—Definite.

Period of detention in Reformatory School should be exactly fixed in the Magistrate's order. (1913) 15 Bom L R 306 : 14 Cr L J 256 : 19 Ind Cas 512 (DB).

REFUSAL TO ANSWER QUESTION

See (1) Evidence Act, S. 114.
(2) Penal Code, S. 179.

REFUSAL TO SIGN STATEMENT

See Penal Code, S. 180.

REFUSAL TO TAKE OATH

See Penal Code, S. 178.

REGISTER, ENTRY IN

See Evidence Act, Ss. 32 to 35.

REGISTRATION

See Registration Act.

REGISTRATION ACT (3 of 1877)

See under corresponding provisions of Registration Act (16 of 1908).

REGISTRATION ACT (16 of 1908)

——Preamble.

——Preamble — Provisions of, if can be avoided — Mortgage split up — Legality.

It is open to a party to avoid the provisions of a penal statute like Registration Act, Income-tax Act and so on, provided he does not infringe the law. Such an act may be unsocial but it is not illegal.

Where, therefore, the parties entered into three transactions by splitting up the amount and the security of the mortgage it was held that they have not infringed any law although they have been successful in avoiding the stringent provisions of the Registration Act and S. 46 of the C. P. Tenancy Act of 1898. AIR (Vol 32) 1945 Pat 465: 11 Cut LT 42.

——Preamble — Proof of oral award is not excluded by Act. AIR (Vol 26) 1939 Nag 233 : 1939 NLJ 375 : 12 R N 81 : I L R (1939) Nag 607 : 183 Ind Cas 845 (FB).

——Preamble — Scope of Act — Documents and not transactions are affected.

The Registration Act strikes only at documents and not at transactions and if there is no document in existence, the question of an agreement which is found to be a purely oral agreement as coming within the mischief of the law of registration does not at all arise. AIR (Vol 25) 1938 Cal 136 : 42 CWN 97 : ILR (1938) 1 Cal 563 : 176 Ind Cas 832 (DB).

——Preamble — Stamp Act (II of 1899) — Registration Act and Stamp Act, whether in pari materia — Interpretation of words in one with reference to their declaration in another—(Case under 1877 Act).

The Stamp Act and the Registration Act, are not in pari materia. The Stamp Act is a purely fiscal Act providing for the payment of Government revenue whereas the Registration Act has for its objective the conservation of evidence, assurance of title, publicity of documents and prevention of fraud, and it is not permissible to interpret one word used in one enactment by a reference to its description in a different Act altogether. AIR (Vol 23) 1936 All 239 : 1936 ALJ 350 : 1935 AWR 1432 : 58 All 505 : 161 Ind Cas 903 (DB).

——Preamble — Construction of Act.

Though the Registration Act has to be construed strictly, there is a point at which it is unnecessary to multiply technicalities. AIR (Vol 18) 1931 Cal 478 : 58 Cal 133 : 133 Ind Cas 110 (DB).

——Preamble — Construction of Act.

The Act must be strictly construed. AIR (Vol 17) 1930 Rang 277 (DB).

——Preamble—Though the Stamp Act and the Registration Act are not strictly in pari materia, the two Acts may be read together. AIR (Vol 15) 1928 Bom 553 : 53 Bom 1 : 30 Bom LR 1396 : 112 Ind Cas 758 (DB).

——Preamble—Applicability of Act—Trade marks.

The Act relates to registration of documents alone and has nothing to do with the registration of trademarks. AIR (Vol 14) 1927 All 81 : 49 All 92 : 24 ALJ 975 : 99 Ind Cas 353 (DB).

——Preamble—Registration in contravention of law.

Registration in contravention of any provision of law, whatever be the cause that led to the contravention, is ineffectual and must be ignored. AIR (Vol 14) 1927 Nag 30 : 22 NLR 128 : 97 Ind Cas 1015 (DB).

——Preamble — Interpretation — Exact compliance should be insisted on—(Case under Act of 1877).

The provisions of the Registration Act are very carefully designed to prevent forgeries and the procurement of conveyances or mortgages by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with the provisions of the Act, it is necessary so to do. AIR (Vol 8) 1921 PC 93 : 39 MLJ 41 : 42 All 487 : 47 I A 177 : 18 ALJ 717 : 22 Bom LR 1362 : 28 MLT 98 : 1920 MWN 413: 2 UPLR 179: 25 CWN 73: 13 MLW 4 : 58 Ind Cas 386.

——Preamble — Board of Revenue — Powers.

The Board of Revenue cannot refer to High Court a question under the Registration Act. AIR (Vol 3) 1916 All 171 : 38 All 351 : 14 ALJ 422 : 34 Ind Cas 280 (DB).

——Preamble — Registration, object of.

The object of registration is to check forgery and to provide good evidence of the genuineness of written instruments, and not to give information to third parties. (1913) MWN 525: 24 MLJ 664: 14 MLT 237: 20 Ind Cas 385 (DB).

——Preamble — Object.

The object of registering a document is to give notice to the world that such a document has been executed. (1909) 31 All 523 : 6 ALJ 627 : 6 MLT 5 : 3 Ind Cas 506 (DB).

——S. 2.

1. **Clause (3)—"District."**
2. **Clause (6)—"Immovable property."**
3. **Clause (7)—"Lease."**
4. **Clause (9)—"Movable property."**
   See also, N. 2.
5. **Clause (10)—"Representative."**

1. Clause (3)—"District."

——S. 2 (3)—Districts and sub-districts under Act.

Section 2 (3), Registration Act defines a district and sub-district as one formed under the Registration Act. Therefore, it is clear that the Registering Authorities have their own districts and sub-districts

which need not necessarily conform to those of the Revenue Authorities. AIR (Vol 27) 1940 Nag 13 : 1939 NLJ 520 : ILR (1940) Nag 74 : 187 Ind Cas 295 (DB).

2. Clause (6)—"Immovable property."

——S. 2 (6) — Hereditary allowance — Meaning of, explained—Brit jajmani payable to Panda of Muttra is not hereditary allowance.

The hereditary allowances referred in the section are allowances which are payable out of the income of land and buildings and also allowances incidental to a hereditary office. The payment made to a Panda of Muttra by his jajman is not a hereditary allowance mentioned in the Registration Act. A I R (Vol 33) 1946 All 476: 1946 A W R H C 607 : 224 Ind Cas 391 (DB).

——Ss. 2 (6), 17, 49 — Immovable property — Document creating right of way of consideration above Rs. 100 requires registration.

A document which creates a right of way creates a right to or interest in immovable property within the meaning of S. 2, Cl. (6) and S. 17 (1) (b), Registration Act. A I R (Vol 30) 1943 Mad 522 : 56 L W 279 : (1943) 2 M L J 15: 1943 MWN 466 : 209 Ind Cas 202.

——Ss. 2 (6), 17 (1) (b)—Immovable property.

Although, by reason of S. 37, Bombay Land Revenue Code, the soil in the road may vest in Government that vesting does not confer on Government the right to levy tolls. The claim to levy toll by Government is based on a statutory right and in Bombay, it is conferred by the Tolls on Roads and Bridges Act (Bombay III of 1875). The right of the Government to levy tolls under the Tolls on Roads and Bridges Act is neither a benefit arising out of, nor an incident of the ownership of Government in the soil of the road under S. 37, Bombay Land Revenue Code. It is, therefore, not immovable property; and consequently the writing which purports on the face of it to be an assignment or extinguishment of the rights of the lessees of the tolls would not be compulsorily registrable under S. 17, Cl. (1) (b). Registration Act. AIR (Vol 27) 1940 Bom 369 : 42 Bom L R 750 : ILR (1941) Bom 71 : 191 Ind Cas 806 (DB).

——Ss. 2 (6), 17, 2 (9)—Immovable property—Grants of right to collect and remove leaves.

A right to collect and remove leaves from trees for a certain period is a license coupled with a grant amounting to profits a prendre and not lease; such leases are grants of immovable property within the definition contained in the General Clauses Act, S. 3 (25) and S. 2 (6) of the Registration Act, as relating to "benefits to arise out of land" and as not being excluded by S. 3 of the T. P. Act or S. 2 (9) of the Registration Act. These grants accordingly fall within S. 17 (1) (b) of the Registration Act, and require registration. AIR (Vol 25) 1938 Nag 377 : ILR (1939) Nag 432 : 181 Ind Cas 126 (DB).

——S. 2 (6) — Future rents and profits, whether immovable property.

Upon consideration, the nature of interest in the income of the state which was given to M by the deed of settlement and also of his interest in the ultimate proceeds of the sale of properties in the schedules thereto, it was held that the interest in future rent and profits was immovable property within the meaning of T. P. Act and Registration Act. A I R (Vol 23) 1936 P C 230 : 2 B R 709 : 1936 A L J 832 : 40 C W N 1253 : 38 Bom L R 1011 : 71 M L J 440 : 17 P L T 653 : 14 R 400 : 44 L W 595 : 1936 M W N 1267 : 1936 A W R 809 : 65 C L J 275 : 63 I A 340 : 163 Ind Cas 418.

——S. 2 (6)—Flour Mill.

A flour mill, as such, can change hands and be removed from one place to another while a house which is attached to the earth cannot be removed from its site as such and fixed in another place. Consequently, a flour mill is not immovable property within the meaning of S. 2 (6). A I R (Vol 23) 1936 Lah 242 : 38 P L R 375 : 161 Ind Cas 631.

——S. 2 (6)—Mortgage debt.

A mortgage debt is within the definition of immovable property in S. 2 (6) of the Registration Act. A I R (Vol 17) 1930 Cal 536 : 57 Cal 328 : 34 C W N 605 (DB).

——S. 2 (6)—Trees—Sold to be cut and removed.

Where the object of the sale of trees is to convert them into movables by getting them cut and removed and the parties to the transaction do not contemplate that the the trees should continue to stand and be enjoyed as such, the documents relating to the transaction do not create any interest in immovable property and are admissible in evidence even though unregistered. A I R (Vol 16) 1929 Oudh 93 : 112 Ind Cas 156 (DB).

——S. 2 (6) — Mango trees are immovable property within the meaning of S. 2, cl. (6). AIR (Vol 15) 1928 Pat 652 : 112 Ind Cas 335 : 7 Pat 646 : 10 P L T 19 (DB).

——S. 2 (6)—Nim tree.

Timber under Registration Act must be deemed to imply only such trees as are fit to be used in building and repairing houses. A nim tree the wood whereof is fit to be used for such purposes, must be regarded as primarily a timber tree, and movable property for the purpose of registration. AIR (Vol 13) 1926 All 350 : 93 Ind Cas 358 (DB).

——S. 2 (6)—House.

A house which is built on a site with foundations laid in it is immovable property. A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, is immovable property for the purposes of the Transfer of Property Act. In the case of a sale or any other contract it has to be seen in what state the property sold or dealt with under a contract was at the time of sale or contract. What the parties intended should be done with the property after the sale or contract should not be taken into consideration in deciding whether the sale or contract is of movable property or of immoveable property. A I R (Vol 13) 1926 Mad 343 : 91 Ind Cas 754.

——S. 2 (6) — In order to defermine whether mango trees are or are not immovable property the intention of the purchaser must be taken into consideration. If the intention is sooner or later to sever the trees from the soil and to use their wood for industrial purposes then they must be regarded as coming within the exception to the definition but not otherwise. A I R (Vol 13) 1926 Oudh 136 : 91 Ind Cas 512 : 2 O W N 947.

——S. 2 (6)—The question whether a tree is a standing timber is a question of intention. If the intention is that the plaintiff should enjoy the fruit of the tree and not cut it down as timber, then it is immovable property and could only be conveyed by a registered instrument. A I R (Vol 13) 1926 Pat 125 : 90 Ind Cas 769.

——S. 2 (6)—Right of way—Easements Act.

A right of way created by writing requires registration if the value of the right be more than Rs. 100 as it comes under the term "immovable property" in S. 2 (6) of the Act. A I R (Vol 4) 1917 Cal 681 : 20 C W N 1158 : 34 Ind Cas 450 (DB).

——S. 2 (6)—"Immovable property"—Standing timber and standing trees—Distinction between.

"Standing timber" means trees, the wood of which is useful for building or repairing houses or for other Industrial purposes, and implies an intention, sooner or later, to sever the trees from the soil. The term "standing trees," however does not suggest any such

severance. A mortgagee took a usufructuary mortgage of the tenant's right in grove, consisting mostly of fruit bearing trees, and the parties to the mortgage never contemplated the severance of the trees and use of their wood for industrial purposes. The trees of the grove could not be considered to be "standing timber" and that therefore the mortgage of the grove-holder's rights was a transfer of an "immovable property" within the Regn Act, S. 2 (6). 9 I C 478, Diss. AIR (Vol 3) 1916 Oudh 211: 3 O L J 367 : 35 Ind Cas 713 (DB).

——S. 2 (6) and (9) — Standing trees — Movable and immovable property—Registration.

Where there is a transaction regarding trees in connection with which an instrument of transfer has been executed, the character of the transaction has to be looked to determine whether the trees referred to are movable or immovable property. 6 M H C R 71 : 28 I C 180, Ref.

Where a nim tree is mortgaged without any intention of its being severed from the land and used as timber, the tree is immovable property. AIR (Vol 2) 1915 Oudh 195 : 2 O L J 285 : 30 Ind Cas 281.

——Ss. 2 (6), 17 — Future rent — Mortgage of— Registration—Possession of mortgage who had taken an unregistered document.

Future rents payable in respect of lands are benefits to arise out of land within, S. 3, of the Regn. Act. A mortgage of future rents, worth more than Rs. 100 can be effected only by a registered instrument. Therefore, a mortgagee of such rent, under an unregistered document, is liable to be evicted as a trespasser and the document is inadmissible in evidence. (1911) 34 Mad 64 : 20 M L J 966 : (1910) M W N 263: 8 M L T 91 : 6 Ind Cas 504 (DB).

——S. 2 (6)—Immovable property—Standing trees.

Standing timber has been excluded from S. 2 (6) of the Act and therefore standing trees are not immovable property for the purpose of registration. (1911) 9 Ind Cas 478 (All).

——S. 2 (6)—Right to take lac.

A right to take out "lac" from trees is a right to enjoy an interest in immovable properties within the meaning of S. 2 (6). (1909) 5 N L R 21 : 1 Ind Cas 903.

——S. 2 (6)—Standing timber—Registration Act, S. 3—General Clauses Act, S. 4—C. P. C.

Although standing timber is moveable property within the meaning of S. 3 — Cl. 25 of Old Reg. Act, and S. 4 of the General Clauses Act 1867, standing timber is immoveable property within the meaning of the Civil Procedure Code.

Growing trees may be regarded as part of the soil and consequently immoveable property.

But where under a contract the grantee has no right to the soil, takes no interest in the land, and obtains a right to the trees with a view to fell them immediately or within a reasonable time, without any stipulation for the beneficial interest of the soil, but with a license to enter and take the trees away, the transfer may be regarded as one of moveables. (1908) 7 C L J 152 (166) (DB).

——Ss. 2 (6), 17 (d), (O. A. S. 3)—'Immovable property'—Right to collect market dues, lease of.

The right to collect market dues upon a given piece of land is a benefit to arise out of land within the purview of S. 3. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. (1905) A W N 48 : 2 A L J 208 : 27 All 462 (463) (DB).

3. Clause (7)—"Lease."

——S. 2 (7) — Lease.

An oral agreement between the parties followed by a letter whereby one party agreed to create and the other agreed to accept a lease is an agreement to lease. (1936) 63 Cal 31.

——S. 2 (7) — Registration.

A document which provides that on the happening of a contingent event within a specified period and upon a certain indeterminate act, a lease would be executed is not an 'agreement to lease' within the meaning of the Registration Act and is not compulsorily registrable.

An 'agreement to lease' which a 'lease' is by the Registration Act declared to include, must be a document which effects an actual demise and operates as a lease. AIR (Vol 18) 1931 All 252 : 130 Ind Cas 6 (DB).

——S. 2(7)—Lease—Undertaking to occupy, whether lease.

In a document, the executants acknowledged that they occupied sites in the abadi without the permission of the lambardar and they undertook to pay rent for these sites at the rate of Rs. 10 per year for five years and to give up possession at the end of five years. They also undertook that, if they desired to remain in the village after five years, in breach of the agreement, they would pay rent at Rs. 25 per year, but said nothing as to the period for which they would occupy at that rate. The trial Court held this document to be a lease and inadmissible because unregistered and also invalid for the same reason :

Held, (i) that the document was a lease.

(ii) that even if it was admissible in evidence, it did not show that the executants were entitled to hold for ever after 5 years. AIR (Vol 18) 1931 Nag 128 : 134 Ind Cas 263.

——S. 2 (7)—Agreement to lease.

A written agreement to grant a lease after calculation of the area of the land and giving the lessee permission to take possession, not for his immediate use but for clearing the jungle in order that the land might be measured is not a present demise of the land and does not require to be registered. AIR (Vol 16) 1929 Cal 186 : 49 CLJ 12 : 116 Ind Cas 630 (DB).

——S. 2 (7)—Lease, what is — Letter to tenant.

In a suit for specific performance on the basis of an oral agreement to lease, the plaintiff filed a letter written to him by the landlord. The letter recited "This is to inform you that as long as you occupy the room ..... we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day."

Held, that the letter did not operate as a lease or an agreement to lease. It was unilateral letter which at the most gave right to obtain another document, the formal lease. It was therefore exempt from registration under S. 17 (2) (v), and so could be admitted in evidence though unregistered. AIR (Vol 16) 1929 Rang 164 : 7 Rang 70 : 117 Ind Cas 255 (DB).

——S. 2 (7) — A document by which rent is agreed to be paid is a lease as defined in S. 2, Cl. (7), Registration Act. AIR (Vol 15) 1928 Nag 27 : 23 NLR 152 : 10 NLJ 169 : 105 Ind Cas 43.

——S. 2 (7)—Kabuliyat.

Where the receipt by lessee contained a recital that a formal lease deed would be executed next day, a stamp not being available at the time, and where the terms of the receipt expressly implied a definite and fixed lease for a specific period.

Held, the receipt must be considered as an acknowledgment that the lease has been given and would come under 'kabuliyat' or 'undertaking to cultivate or occupy' within the meaning of definition in S. 2(7) of the Registration Act. AIR (Vol 13) 1926 Nag 238 : 92 Ind Cas 553.

——S. 2 (7)—Letter by tenant accepted by landlord.

The plaintiff wrote to the defendant on 19th November 1921, "I do hereby agree to take by our personal settlement your house and premises No. 7, Bowbazar Street on a lease for 21 years" and then

the terms followed. The defendant replied,—"I do confirm your letter, dated the 19th November 1921. All terms will be settled on the agreement."

Held, that the terms contained in the two letters of the 19th November 1921 amounted to a present demise of the said premises and created an immediate interest therein. AIR (Vol 12) 1925 Cal 1087 : 52 Cal 695 : 91 Ind Cas 320.

——S. 2 (7)—Undertaking by tenant.

An undertaking to cultivate or occupy land is not a lease within S. 105, T. P. Act, but it is a lease within S. 2 (7) of the Registration Act. If such a document is for a term not exceeding one year, it need not be registered. AIR (Vol 12) 1925 Rang 273 : 4 Bur LJ 99 : 3 Rang 379 : 90 Ind Cas 693.

——S. 2 (7) — It is not necessary for the validity of a conditional agreement to execute a lease, to register the same. Such an agreement is not an agreement within the meaning of S. 2 (7) which contemplates a present demise. AIR (Vol 12) 1925 Sind 54 : 19 SLR 306 : 78 Ind Cas 71 (DB).

——S. 2 (7)—Lease—(Case under 1877 Act).

For purposes of registration a counterpart, kabuliat an undertaking to cultivate or occupy and an agreement to lease are put in the same category as a lease; in other words, an undertaking to cultivate or occupy from year to year ordinarily requires registration under the provisions of S. 17. What is known as a lease under the law is not the same thing as an undertaking to cultivate and the substantive law relating to leases cannot be applied to undertakings to cultivate by substituting the words "undertaking to cultivate" for "lease" wherever the word "lease" occurs in legislative enactments other than the Registration Act. AIR (Vol 11) 1924 All 514 : 46 All 303 : 22 ALJ 185 : 5 LRA Civ 80 : 78 Ind Cas 934 (DB).

——S. 2 (7)—Amalnama.

Amalnama is neither a lease nor an agreement to lease within the meaning of S. 2 and consequently is admissible in evidence without registration, where the document in essence authorised the grantee to take possession and was intended to be followed by a formal kabuliyat. AIR (Vol 11) 1924 Cal 558 : 39 C L J 90 : 28 CWN 1033 : 80 Ind Cas 357 (DB).

——S. 2 (7) — Every promise to grant a lease must in its nature create or declare or assign some interest in the property to be leased, but unless the promise is to grant an immediate lease which is to come into existence at once, even before any other document has been executed, it is an agreement to lease outside the class of such agreements of which alone S. 2 (7) of Registration Act speaks. AIR (Vol 10) 1923 Nag 171: 6 NLJ 151 : 19 NLR 186 : 71 Ind Cas 468.

——S. 2 (7)—Before an agreement can be held to be "an agreement to lease" within S. 2 it must be one which operates as of lease, creates an immediate and present interest and effects an actual demise.

But where the document in question does not effect a present demise, and is regarded as an agreement creating in the plaintiff a right to obtain a putni lease on the performance of certain conditions on or before a certain date, the document does not require registration. AIR (Vol 8) 1921 Cal 127: 25 CWN 550: 64 Ind Cas 747 (DB).

——Ss. 2 (7) and 17—Agreement to lease not importing a present demise—Registration.

An agreement to lease, which does not import a a present demise or the creation of an immediate interests, is not compulsorily registrable. AIR (Vol 7) 1920 Bom 226 : 21 Bom LR 1130 : 54 Ind Cas 134.

——S. 2 (7)—Lease — Agreement to lease — Meaning of.

An agreement to grant a lease on a future contingency is not within the definition of a lease and does not require registration. AIR (Vol 6) 1919 P C 79 : 46 I A 240 : 24 C W N 177 : 37 M L J 525: 17 A L T 1117 : (1920) M W N 66 : 27 M L T 42: 11 L W 301 : 53 Ind Cas 534.

——S. 2 (7)—Lease — Agreement to lease.

Agreement setting the terms of a "lease" are leases within S. 2, whether the creation of another document is intended or not. AIR (Vol 4) 1917 Mad 274 : 3 L W 370 : 30 M L J 519 : (1916) 1 M W N 373 : 19 M L T 377 : 33 Ind Cas 439 (DB).

——Ss. 2 (7) and 17 (1) (d) — Document creating immediate interest in grantee—Registration.

A document specifying the boundaries of a certain plot of land and fixing the rent and stating that a lease is granted to the grantee who undertakes to execute a Kabuliyat within a certain time, is in substance a lease. It creates an immediate interest in the grantee in the land leased out and is therefore compulsorily registrable. AIR (Vol 2) 1915 Cal 563 : 27 Ind Cas 91 (DB).

——Ss. 2 (7), 17 (d), 49—Agreement to lease — No present demise—Registration not necessary—Specific performance.

Unless an agreement to lease certain premises operates as a present demise it does not, of itself, create any interest in or charge on the property agreed to be demised and can therefore, be given in evidence for the purpose of enforcing specific performance of it, without its having been registered under the provisions of the Indian Registration Act. 10 Bom 101, Not foll.

An unregistered agreement to lease provided for the grant of lease for a period of 5 years commencing from the day following the day on which the agreement was entered into and also provided that the proposed lessee would get a proper kabuliyat granted to him to be registered at his own cost.

Held—That on the day the agreement was come to there was no present demise, and therefore the agreement could be adduced in evidence for the enforcement of specific performance thereof. (1910) 14 C W N 65 (67, 68) : 5 Ind Cas 38.

——Ss. 2 (7), 17, (O. A. S. 3) — Amalnama evidence, admissibility in.

An amalnama reciting that the defendant verbally applied for a grant of certain lands, that he is permitted to hold and clear the jungle that he should be allowed to hold without payment of any rent for nine years, that on the expiration of that period the land would be measured and assessed at the rate of Rs. 3 odd per biga, and that upon the execution of a kabuliyat by the tenant, a patta would be granted to him and no lease in the terms of the amalnamas having been granted. Held, that the amalnamas themselves were not leases, nor any absolute agreement to lease within the meaning of S. 3. (1906) 33 C 502 (505) (DB).

——S. 2 (7)—Agreement to renew kanom.

Quaere—Whether an agreement to renew a Kanom is not an agreement to lease and if so a lease within the meaning of S. 3 of the Registration Act (old) and requires to be registered under S. 17. (1903) 13 M L J 217 (220) (DB).

4. Cl. (9)—"Movable property."

See also N. 2.

——S. 2 (9) and (6)—Moveable property.

The definition of "immovable property" in S. 2 (6), Registration Act and in S. 3, T. P. Act is the same for the purpose of determining whether a movable attached to immovable property is itself immovable or not; the inquiry should be not whether the attachment is direct or indirect but what is the nature of the attachment and what its object and purpose. Hence, a machinery of a Mill fixed to a cement platform and attached to iron pillars fixed in the ground is immovable property. AIR (Vol 31) 1944 Mad 492 : (1944) 2 M L J 60 : 57 L W 438 : 1944 M W N 727 : I L R (1945) Mad 304 (DB).

——S. 2(9)—Movable property — Crop in S. 2 (9) includes leaves.

The word "crop" in S. 2 (9) might include leaves of a tree. AIR (Vol 25) 1938 Nag 377 (381) : 11 R N 433 : ILR (1939) Nag 432 : 181 I C 126.

——Ss. 2 (9), (6)—Movable property — Right to collect bidi leaves, whether movable property.

A right to collect bidi leaves is movable property as defined in Cl. (9) of S. 2 and does not fall within the definition of immovable property contained in Cl. (6). So where an agreement between the plaintiff and the defendant that the latter would collect the leaves and pay a certain sum to the plaintiff is reduced to writing, but the deed is lost, the plaintiff is entitled to give oral evidence to prove the terms of the contract though the contract was unregistered. AIR (Vol 24) 1937 Nag 116 : 169 Ind Cas 834.

——S. 2 (9)—Growing crops — Crops not actually in existence.

The fact that the crop was not actually in existence at the time a contract for its sale is made does not take it out of the category of "growing crop." A I R (Vol 12) 1925 All 411 : 47 All 138 : 23 A L J 430 : 6 L R A Civ. 382 : 88 Ind Cas 109 (DB).

——S. 2 (9)—Movables — Cash allowance.

An allowance paid by Government to a Deshpande family as a remuneration for public services is movable property. AIR (Vol 6) 1919 Bom 38 : 21 Bom L R 716 : 51 Ind Cas 954 (DB).

——Ss. 2 (9), 17 (1) (a) and 49 — Grove — Movable or immovable property—Timber and trees.

Standing timber and standing trees are not convertible terms. The question whether a grove transaction amounts to merely a transfer of standing timber or to a larger transfer of an interest in immovable property is one to be determined on the circumstances of the case. Where there was no intention in a deed of transfer of a grove that the trees should be severed and used as timber, the transfer is one of immovable property and requires registration. AIR (Vol 2) 1915 Oudh 75 : 18 O C 122 : 2 O L J 97 : 28 Ind Cas 180.

——S. 2 (9) — Moveables — Standing timber, when immoveable property. See (1908) 7 C L J 152 (166).

5. Cl. (10)—"Representative."

——Ss. 2 (10) and 32—Deed of adoption—Presentation for registration—Competency of natural father of the minor adopted boy—Circumstances.

Where the factum or validity of the adoption of a minor is denied or disputed by the person who would otherwise be his natural guardian in the adoptive family, the guardianship of the minor's natural father must, in the absence of any appointment by the Court, necessarily continue for the purpose of asserting and safeguarding his rights as a member of the adoptive family.

Accordingly, where a widow disputes the legality of an adoption alleged to have been made by her husband and which is evidenced by a deed of adoption the natural father of the minor adopted boy would be competent to present the deed of adoption, for registration as the minor's representative within the meaning of S. 32 of the Registration Act. (1921) 26 C W N 369 (PC), Dist. 1949 F C R 688 : AIR (Vol 37) 1950 F C 138 : 1950 R L W 137 : 1950) S C J 120.

——S. 2 (10)—Representative.

A person claiming as a real owner under a sale-deed and alleging that the ostensible owner was a benamidar is not a representative of the latter. AIR (Vol 18) 1931 Cal 664 : 58 Cal 681 : 133 Ind Cas 591 (DB).

——S. 2 (10) — 'Representative" — Natural father—(S. 3 of 1877 Act).

The definition of "representative" does not make it equal to guardian, but says that it includes guardian. In the absence of any legally appointed guardian, therefore, the natural father is the representative of a boy given in adoption. 114 Ind Cas 17 : 52 Mad 175 : 31 Bom L R 299 : 56 I A 21 : 1929 A L J 41 1929 M W N 47 : 29 M L W 118 : 49 C L J 148 : 33 CWN 261 : AIR (Vol 16) 1929 P C 24 : 56 M L J 218.

——S. 7.

——Ss. 7, 30, Cl. (a), 87—Registration by Sub-Registrar of deed concerning lands situate in separate Registration Sub-District.

A Sub-Registrar, who was empowered under S. 7 to discharge the duties of a District Registrar registered a bond which might have been registered by the Registrar at his discretion under S. 30, cl. (a) of the Act.

Held, that the bond was validly registered and that any doubt as to the validity of the registration was removed by S. 87 of the Act. 18 C. 556 Dist. (1905) 3 C L J 165 (167) (DB).

——S. 7 (2) — Powers of District Registrar—Sub-Registrar if authorised can exercise powers of District Registrar.

Where the office of the Sub-Registrar has been amalgamated with that of the Registrar, the Sub-Registrar may be authorised to exercise and perform, in addition to his own powers and duties, all or any of the powers and duties of the Registrar to whom he is subordinate. But the mere fact that the Sub-Registrar had in fact authority to register the document does not necessarily justify the inference that the document was validly registered by him as District Registrar. The Sub-Registrar must be given the opportunity to exercise the discretion which it would be incumbent upon him to exercise under S. 30 if he were called upon to register a document in respect of land not situated in his sub-district. 70 Ind Cas 583 : 38 C L J 355 : AIR (Vol 11) 1924 Cal 348 (DB).

——S. 11.

——S. 11 — Unless there is anything contrary on record, the presumption is that the official has been duly appointed by the Registrar. AIR (Vol 22) 1935 Lah 301 (DB).

——S. 17.

See also (i) Evidence Act, S. 92.
(ii) Registration Act, S. 49.
(iii) T. P. Act, S. 107.

1. Scope.
2. Retrospective operation of.
3. Effect of registration and non-registration.
4. "Documents" and "Instruments."
5. Instrument of gift.
6. Registration and operation of gift.
7. Muhammadan gifts.

SUB-S. (1) (b).

8. Scope.
9. "Declare."
10. "Assign."
11. "Limit."
12. "Extinguish."
13. "In present or in future."
14. "Any right, title or interest."
15. "Whether vested or contingent."
16. "Of the value of one hundred rupees and upwards."
17. To or in immoveable property.

SUB-S. (1) (c).

18. Scope.
19. Receipt of consideration for an agreement to sale.
20. Endorsements and receipts by mortgagees.
21. Receipt itself creating, declaring, etc. rights in property.

SUB-S. (1) (d).

22. Scope.
23. Term of lease.

24. Year to year.
25. "For any term exceeding one year."
26. Lease for a term with a provision for renewal or for continuation thereafter.
27. Lease entitling lessee to hold as long as he pays rent or as he may wish.
28. Lease for indefinite period.
29. Lease from month to month.
30. Perpetual lease.
31. Tenancy at will.
32. "Reserving a yearly rent."
33. Proviso to clause (d).
34. Lease by Government.
35. Variation of lease.
36. Agricultural leases.
37. Assignment of decrees and awards.
38. Recitals and memoranda and admissions of past transactions.

SUB-S. (2).

39. Scope.
40. Composition deed—Clause (i).
41. Debentures—Clause (iii).
42. Document merely creating right to obtain another document—Clause (v).
43. Document itself creating etc., interest in property not exempted under clause (v).
44. Clause (vi)—Scope of.
45. "Any decree or order of a Court."
46. Decrees and orders creating gifts, or leases.
47. Compromise and consent decrees.
48. Petitions of compromise.
49. "Subject-matter of the suit or proceeding."
50. Mutation proceedings.
51. Petition of compromise in criminal Court.
52. Compromise in execution proceedings.
53. Security bond in favour of Court.
54. Compromise in testamentary proceedings.
55. Awards.
56. Berar—Applicability of amended clause (vi).
57. Grant by Government—Clause (vii).
58. Endorsements and receipts—Clause (xi).
59. Sale certificate.
60. Explanation.

SUB-S. (3).

61. Authority to adopt.

PARTICULAR TRANSACTIONS.

62. Mortgage.
63. Sale.
64. Lease.
65. Gifts.
66. Exchange.
67. Charge.
68. Partition.
69. Partnership.
70. Family arrangements and compromises.
71. Release, relinquishment and surrender.
72. Pre-emption and option to repurchase.
73. Power of attorney.
74. Appointment of trustees.
75. Waqf deeds.
76. Splitting up transactions to avoid registration.

1. Scope.

——Ss. 17 (1) (b), 28, 49 — **Settlement deed affecting movable and immovable property worth more than Rs. 100 — Deed registered by sub-registrar within whose jurisdiction no part of immovable property covered by deed was situate—Held registration was invalid and, therefore, document could not affect immovable property—Deed held valid so far as movable property was concerned.**

A deed of settlement between A and B, the widow of A's deceased brother provided that B was to remain in possession of all the property whether movable and immovable already in her possession and that the property in A's possession was his self-acquired property and that she had no right whatsoever to that property. The immovable property covered by the deed was worth more than Rs. 100. The deed was registered by a sub-registrar at B within whose sub-district no part of the immovable property covered by the deed was situate.

Held, that the deed was compulsorily registrable under S. 17 (1)-(b).

Held further, that the sub-registrar at P had no jurisdiction to register the document under S. 28 and consequently under S. 49 the document could not affect any immovable property comprised therein.

Held further, that the deed in so far as it affected movable property was valid as the settlement deed was divisible. AIR (Vol 33) 1946 Nag 377 (DB).

——**Ss. 17, 49—Unregistered deed—Admissibility in respect of property not requiring registration.**

Where an unregistered deed covers various properties, some of which are situate in an area to which the Registration Act does not apply and the clause in respect of them is separable from the rest, it is open to party to limit his remedy to such property. AIR (Vol 31) 1944 Mad 518 : 1944-2 M L J 131 : ILR (1945) Mad 355 (DB).

——**S. 17—Construction.**

It is not only non-testamentary instruments which create any right, title or interest that must be registered but also non-testamentary instruments which purport to create any right, title or interest.

The strictest construction should be placed upon the prohibitory and penal sections of the Registration Act which impose serious disqualifications upon the non-observance of the rules of registration and unless a document is clearly brought within the purview of the Act, non-registration is no bar to its being acted upon or received in evidence, and in case of doubt, the benefit of the doubt should be given to the person who wants the Court to act upon or receive it in evidence. A I R (Vol 23) 1936 Sind 79 : 30 S L R 115 : 163 Ind Cas 455 (FB).

——**S. 17 — Construction — Registration and part-performance.**

The provisions of S. 107, T. P. Act, and S. 17, Registration Act, are imperative and cannot be overridden by the equitable doctrine of part-performance as the doctrine can be of no avail when there has been a violation of a provision of law. AIR 1923 Cal 63, Not Foll. AIR (Vol 16) 1929 All 831 : 1929 A L J 1134 (DB).

——**S. 17—Old and new Acts — Document compulsorily registrable by the old Act then in force and not by the new Act.**

The greater strictness of the requirements of Act 8 of 1871 and the earlier Registration Acts was mitigated by Act 3 of 1877, and the Act was framed, with a view to admit, to the benefit of such mitigations, documents executed before the date on which the Act came into force, and the practical result was that the provisions of Act 3 of 1877 applied to all documents tendered in evidence on or after 1st April 1877.

Certain persons who purchased property executed an unregistered document in favour of the original owner of the property in 1872, and agreed to reconvey the property to him, if the latter paid sum of Rs. 2,500 within a period of 51 years.

Held : that the document was compulsorily registrable under the Act of 1871 which was in force at the time of its execution, but such a document would not have been compulsorily registrable if it had been executed after the passing of the Act of 1877 as it did not in itself create any title, or interest, or limit the title, of the vendor. Such a document would be entitled to the benefit of the mitigations of the rigour of the law embodied in S. 17 of the new Acts of 1877 and 1908, and would be admissible though unregistered if tendered in evidence after

1877. AIR (Vol 16) 1929 Bom 290 : 119 Ind Cas 793 : 31 Bom L R 493 (DB).

——S. 17—Test.

In deciding whether a document requires registration or not, one has to take the document as a whole and construe it with reference to the terms and not as to what might have been the intention. A I R (Vol 14) 1927 Mad 636 : 53 M L J 203 : 103 Ind Cas 302 : 50 Mad 687 : 25 M L W 806 : 1927 M W N 269 (FB).

——S. 17 (1) (b) — Miscellaneous — Document evidencing one transaction divided into two parts—Both parts must be registered.

If the agreement to re-convey can be treated as a separate transaction then under S. 54 it vests no interest in the property and need not be registered. But if the document which has not been registered is really a part and parcel of the transaction, which is only partly evidenced by the registered document, then it is clear that the other document also requires to be registered. In other words, when a transaction is evidenced by a document which is, in effect divided into two parts, one of which is registered and the other is not, then the law looks to what is the real transaction between the parties, and demands that the whole document evidencing that transaction must be registered, whether it consists of one part or two. A I R (Vol 13) 1926 Bom 131 : 92 Ind Cas 527 : 27 B L R 1465 (DB).

——S. 17—Applicability—Document not superseding or substituting previous contracts.

Where the contents of the deed do not supersede the previous mortgage contracts nor substitute an entirely fresh contracts but mean that the redemption price of the two previous mortgages is increased by a further sum less that Rs. 100, the document is not one which comes within the scope of S. 17. AIR (Vol 13) 1926 Lah 530 : 92 Ind Cas 762.

——S. 17—Section 17 being a disabling section must be strictly construed so that unless a document is clearly brought within its purview non-registration is no bar to the decument being admitted in evidence. And if there is any doubt on the subject the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. AIR (Vol 13) 1926 Lah 530 : 92 Ind Cas 762.

——S. 17—Section 17 must be strictly construed and that if there is any doubt whether a document is clearly brought within its purview, the benefit of the doubt must be given to the person, who wants the Court to receive the document in evidence. (1926) 92 Ind Cas 791 (Lah).

——S. 17—Registration is not notice by itself.

Notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian register of deeds.

Whether registration is or is not notice in itself depends upon the facts and circumstances of each case, upon the degree of care and caution which an ordinarily prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act. 6 Bom 168; 9 Bom 427 ; 14 Bom 506 and 17 Bom 741, overruled. AIR (Vol 8) 1921 P C 112 : 39 M L J 243 : 57 Ind Cas 465 : 47 I A 239 : 18 A L J 1074 : 22 Bom L R 1319: 32 C L J 479 : 28 M L T 224 : 1920 M W N 591 : 2 U P L R 139 : 48 Cal 1 : 25 C W N 49 : 13 M L W 161 : 2 P L T 101.

——S. 17 — Section 17, like every other enactment must be read as "subject to any other law for the time being in force." A I R (Vol 13) 1926 Nag 335 : 93 Ind Cas 633.

——S. 17 — It is a well-established rule of construction that S. 17, being a disabling section, must be stricly construed, and that unless a document is clearly brought within the purview of that section, its non-registration is no bar to its being admitted in evidence. If there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the court to receive the document in evidence. A I R (Vol 9) 1922 Lah 43 : 2 Lah 300 : 4 L L J 1 : 110 P L R 1921 : 27 P L R 1922 : 65 Ind Cas 254 (DB).

——S. 17—S. 17 being a disabling section must receive a strict construction, and unless a document is clearly brought within its purview, its non-registration is no bar to its admissibility in evidence. AIR (Vol 8) 1921 Lah 117 : 62 Ind Cas 809 (DB).

——S. 17—Transfer of property, where registration is compulsory, can only be effected by a registered instrument or by a decree of a competent Court. (1911) 33 All 728 : 8 ALJ 918 : 12 Ind Cas 199 (DB).

——S. 17, Cl. (c), S. 28 — Registration of a hypothecation by a Sub-Registrar — No portion of the land hypothecated in his jurisdiction—Effect of—Validity of the deed.

A mortgage deed registered by a Sub Registrar, within whose jurisdiction no portion of the property mortgaged is situate, is not properly registered and is therefore void. (1902) 6 C W N 856 : 29 C 654 (663).

2. Retrospective operation of.

——Ss. 17, 49 — Document, when executed, not requiring registration under old Act but requiring registration under new Act — Admissibility of, after new Act coming into force.

Section 17 (1), when read along with S. 6, General Clauses Act, does not destroy the validity or the admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. Consequently, the documents which were not required to be registered under the terms of the Registration Act of 1866 are admissible in evidence subsequent to the Act of 1908 even though they are required to be registered under the Act of 1908. AIR (Vol 28) 1941 Mad 602 : 53 LW 634 : (1941) 1 M L J 759 : 1941 M W N 518 : 198 Ind 606.

——S. 17 — Under the amended Registration Act an unregistered agreement for sale even reciting payment of consideration is not inadmissible in evidence and this provision is made retrospective in its operation. AIR (Vol 16) 1929 Mad 243 : 52 Mad 300 : 1929 M W N 93 : 29 M L W 329 : 58 M L J 318 : 121 Ind Cas 753 (DB).

3. Effect of registration and non-registration.

——Ss. 17 and 49 — Agreement by Hindu reversioner after death of widow not to challege alienation by widow and relinquishing rights in property worth over Rs. 100 — Admissibility in evidence when unregistered — Document separable into parts—Use of part not requiring registration.

A document in writing by a Hindu reversioner after the death of the widow and the succession has opened, agreeing not to challenge an alienation by way of gift made by the deceased widow, and also relinquishing in favour of the donee whatever rights he had in the property, worth over Rs. 100, cannot be regarded as inadmissible in evidence in its entirety when it is not registered. The deed is clearly divisible into two parts : (1) an undertaking not to challenge the alienation and (2) a relinquishment or surrender of rights. Though in regard to the latter part, the document requires registration and therefore is rendered inadmissible for want of registration, yet so far as the first part agreeing not to challenge the alienation is concerned, it is not inadmissible, and can therefore be admitted in evidence for the purpose of showing assent to the alienation and used against the reversioner when the latter seeks to go against the undertaking. That part of the document does not require registration.

The law of registration is not concerned with the effect of a document, but all that has to be seen is what on the face of it, it purports to say. A I R (Vol 36) 1949 E P 207 (DB).

——S. 17—Registration not notice.

Even in countries where registration is compulsory registration is not necessarily notice. A I R (Vol 10) 1923 Sind 50 : 16 S L R 278 : 77 Ind Cas 897 (DB).

——Ss. 17, 49 and 50 — Object of registration—Registration, if notice to the public.

Notice cannot in all cases be inferred from the fact that a document is found on the register of deeds. Whether registration is a sufficient notice is a question of fact depending on the circumstances of each case. The test is whether omission to search the registry amounts to gross negligence on the part of the person to be affected with notice. A I R (Vol 8) 1921 P C 112 : 39 M L J 243 : (1920) M W N 591 : 25 C W N 49 : 22 Bom L R 1319 : 28 M L T 224 : 18 A L J 1074 : 32 C L J 479 : 47 I A 239 : 57 Ind Cas 465.

——S. 17—Registration—Notice, if sufficient.

Registration of a document is not invariably sufficient to fix a man with notice. If the property affected by the registration is referred to in the index register then a person affected by it may be said to have constructive notice of it. A I R (Vol 8) 1921 Bom 161: 22 Bom L R 1158 : 59 Ind Cas 506 (DB).

——S. 17—Notice to strangers.

Registration of a document does not amount to notice to third persons. (1913) 17 C W N 224 : 16 Ind Cas 618 (DB).

——S. 17 — Notice of non-possessory hypothecation of movables.

A registered deed of the hypothecation of movables without possession is neither a constructive nor actual notice of such hypothecation to strangers. (1911) 7 N L R 72 : 10 Ind Cas 869.

——S. 17—Notice.

Registration is notice to all subsequent purchasers or encumbrancer of the same property. The doctrine of constructive notice cannot be extended to others besides subsequent purchaser or incumbrancer. (1910) 12 Bom L R 940 : 8 Ind Cas 633.

——S. 17—Priority as between— Registered and unregistered instrument — Prior agreement to sell coupled with delivery of possession—Subsequent registered sale to another—Estoppel.

Registration in statute should not be made an engine to work injustice and therefore the holder of a registered conveyance who took it with notice of the existence of a prior but unregistered conveyance will not, despite the provisions of the Registration Act, be given priority against the holder of the unregistered deed. (1906) A W N 17 : 3 A L J 100 : 28 A 315 (325, 326) (DB).

——S. 17—Notice by registration — How far, so as to vitiate payment made without knowledge of submortgagee. See (1905) 6 Bom L R 836: 29 B 199 (202, 203).

4. "Documents" and "Instruments"

——S. 17—Document stating that a previous mortgage-deed is benami—"Create, declare, or extinguish," meanings of.

There is a distinction for the purposes of S. 17, between the documents which contain a mere recital of a fact and those which create or extinguish title.

Where a person in whose favour a hypothecation bond had been executed, subsequently executed a document addressed to the mortgagor and styled as a varthamanam which stated that the hypothecation bond was a benami document, that no amount was really due under it and that the varthamanam was executed in token of his cancelling the said deed when required by the mortgagor:

Held, that the varthamanam was not a document creating, declaring or extinguishing any right in immovable property within the meaning of S. 17 and was admissible in evidence, even though it was not a registered document. A1R (Vol 21) 1934 Mad 735 (2): 40 L W 727: 67 M L J 690: 1934 M W N 1392: 153 Ind Cas 694.

——S. 17—"Documents"—Meaning.

The word "Documents" in S. 17 covers more than one letter creating a lease. AIR (Vol 4) 1917 Mad 274: 3 L W 370: 30 M L J 519: (1916) 1 M W N 373: 19 M L T 377: 83 Ind Cas 439 (DB).

5. Instrument of gift.

——S. 17 (1) (a)—Surrender.

A document by which rights in immovable property are surrendered without any consideration is in effect a deed of gift which under the section requires registration compulsorily. AIR (Vol 12) 1925 Lah 183 : 78 Ind Cas 113.

——S. 17 (1) (a)—Gift already complete.

A mere memorandum of an already completed oral gift does not require registration. AIR (Vol 1) 1914 Lah 48: 92 PLR 1914: 74 PR 1914: 141 PWR 1914: 22 Ind Cas 712 (DB).

6. Registration and operation of gift.

——S. 17— Where a person sued to recover lands made over to the defendants by an unregistered deed of gift :

Held, that since the so-called gift was not made by registered deed, the plaintiff was still owner of the property. AIR (Vol 14) 1927 Rang. 335: 6 Bur L J 31: 101 Ind Cas 590.

——S. 17 — Where a deed of gift is really the basis of the defendant's title, and affects immovable property exceeding Rs. 100 in value, it should have been registered and is inadmissible to prove his title for want of registration. AIR (Vol 9) 1922 Lah 112: 4 Lah L J 7 (DB).

——S. 17 (1) (a)—Gift by bridegroom to bride.

Kanwin property, i.e., property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair; it is a gift and must be in writing and registered as required by S. 123 of the T. P. Act, otherwise if there is mutual divorce the property will revert to the husband as being only paying property. AIR (Vol 3) 1916 L B 11: 9 Bur L T 87: 33 Ind Cas 129.

——S. 17, cl. (a)—Registration by legal representative after donor's death—Gift valid.

The voluntary registration of a deed of gift by the donor's legal representative has the same effect as its voluntary registration by the donor himself in his lifetime. (1902) 12 M L J 409: 25 M 672 (674) (DB).

7. Mohammadan gifts.

——S. 17 (1) (a)—Hiba-bil-Iwaz—Transfer in favour of wife in lieu of dower—Question, whether deed is registrable—How to be determined—Value of property or amount of dower.

G sued on his mortgage and obtained a decree against M and in execution of the decree, was about to sell the half-house when M's wife S instituted a suit for declaration that the half house belonged to her and was not liable to be sold in execution of the mortgage decree on the ground that her husband had, before the mortgage, transferred half the house and some other property over Rs. 100 in value by an unregistered deed of hiba-bil-iwaz in her favour in lieu of dower which she claimed to be Rs. 90. The suit was decreed in the trial Court:

Held, (Per Monroe. J. agreeing with Addison J., Agha Haidar, J. contra.) that as the amount of the consideration was not mentioned in the deed, the enquiry must be what was the value of the property and not what was the amount of the dower and the

question whether the document required registration or not was to be determined by the value of the property transferred not by the value or amount of the consideration for the transfer and as the value of the property transferred far exceeded Rs. 100, the deed required registration and being unregistered, it was not admissible and hence the mortgage prevailed. AIR (Vol 23) 1936 Lah 307: 16 Lah 177: 37 PLR 424: 156 Ind Cas 70 (DB).

——S. 17 (1) (a)—Gift—Hiba Basharat-ul-Ewaz.

A deed of Hiba Basharat-ul Ewaz is nominally a gift, with a condition for consideration. But once the condition is fulfilled the contract becomes a sale. Therefore such a deed requires registration. AIR (Vol 17) 1930 Pat 530: 122 Ind Cas 158 (DB).

——S. 17—Mahomedan Law.

The essentials of a gift under the Mahomedan Law are a declaration of hiba by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required.

The position under the Mahomedan Law is this that a gift, in order to be valid, must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. This being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift but a mere piece of evidence and does not require registration within the meaning of S. 17 Ragistration Act. AIR (Vol 14) 1927 Cal 197: 44 CLJ 490: 100 Ind Cas 296.

SUB-S. (1) (B).

8. Scope of.

——S. 17 (1) (b)—Partition—Chittahs — Whether require registration—Determination of question.

The question whether a particular document is one falling within the scope of S. 17 (1) (b) is one to be decided on a perusal of that document. Hence the question about the admissibility of certain partition chittahs which have not been registered has to be decided with reference to the contents and the nature of the document and surrounding circumstances in each particular case. Where the partition chittahs are very differently worded and do not amount to anything more than mere memoranda containing the list of the shares which each of the parties got at the time of the partition, and do not constitute a deed of partition, they do not come within the purview of S. 17 (1) (b) and do not, therefore, require registration.

Even if they are considered as constituting a partition deed requiring registration, they can be used, not as documents which themselves effected partition but as evidence of a collateral transaction not required to be effected by registered instrument. AIR (Vol 33) 1946 All 200 : 1945 A L J 452 : 1945 A W R (HC) 359 (DB).

——Ss. 17 (i) (b), 49—Express agreement to sell contained in sale deed—Deed not accepted by vendee or incomplete in terms or legally inoperative — Registration.

In the absence of a specific agreement to sell a property, it is not possible to regard an unregistered sale deed as sufficient to support a suit for specific performance of a contract to sell. But it does not follow that an express contract to sell must necessarily be regarded to have merged in a sale deed, when that deed is not accepted by the vendee or happens to be incomplete in regard to its terms or is otherwise legally inoperative.

The plaintiff instituted a suit for specific performance of an agreement to sell contained in a deed executed by the defendant in his favour which ran as follows : "for payment of circar cists and for family necessity, I have borrowed of you Rs. 300. A-1. (For this money by May 25, I agree to sell the schedule mentioned properties to you and execute the sale deed on a proper stamp and get it registered.) A-2. (If I fail to do so, you should treat this deed, get into possession of the properties and enjoy them with rights of gift and sale etc.) :

Held, (1) that no doubt an agreement to sell could not be spelt out of a sale deed and could not form the basis of a suit for specific performance.

But the Court was not spelling out an agreement to sell from the deed in suit as cl. A-1 contained an express agreement to sell;

(2) that the fact that the deed was not registered could not prevent its portion (A-1) from being admitted in evidence in the suit for specific performance in view of the clear provisions of S. 49, proviso;

(3) that there was nothing which would show that the plaintiff had agreed to accept the deed as a sale-deed. In the absence of any definite words of conveyance by the vendor of his title to the properties, cl. A-2 could not come within the purview of S. 17 (i) (b);

(4) that even assuming that cl. A-2 fell within S. 17 (i) (b), cl. A-1 containing an agreement to sell could not, in view of S. 49, proviso, be ignored on that account. The deed must, for that purpose, be regarded as a composite document and cl. A-1 was easily detachable from the rest;

(5) that the plaintiff, therefore, was entitled to a decree for specific performance. AIR (Vol 29) 1942 Mad 716 : 1942 MWN 571 : 55 LW 563: 1943-1 MLJ 469 : 206 Ind Cas 564.

——Ss. 17 (1) (b), 49 — Award intending to continue status quo and not creating new condition of affairs.

U purchased in execution sale, the proprietary right in the village R subject to incumbrances. Subsequently, his friend advanced to him a sum of Rs. 50,000 for the purpose of partially clearing off the incumbrances and upon the terms that he should have an option to acquire a half share in the village in lieu of the repayment of his loan. This option he exercised in or about the year 1914. No conveyance was executed; the matter continued to rest on contract, but thenceforward he enjoyed a half share of the profits of the village till his death. He left him surviving three sons. Ultimately the parties referred to two arbitrators differences which had arisen, "regarding the accounts and transfer of R property." In the course of the arbitration, it was suggested and agreed between the parties that a sum should be fixed upon the payment of which the sons should have no claim to share in the village. This course was adopted by the arbitrators who made their award. The last part of the para. 2 of the award was in these terms : "the ownership of the second party sons in one half of R property shall not cease till after the above sum of rupees sixty-one thousand and four hundred as well as the amounts mentioned in the statement together with interest specified in respect of both be fully paid up." The question arose whether by the last sentence of para. 2 of the award the arbitrators purported to confer upon "the second party" a right, title or interest to or in one-half of the village, which commenced with the award and came to an end when the sum of Rs. 61,400 with interest had been paid, or whether they intended merely to provide that the status quo (i.e., the contractual interest which arose from the exercise of the option) should remain unaltered until the Rs. 61,400 and interest had been paid :

Held, that the sentence was not framed as one which purported to create or confer an interest. It was framed on the assumption that an interest was already in existence, and provided that that existence

should not cease until a specified event had happened. It was true that the interest was called "ownership," while the existing interest of the second party was merely contractual, but the arbitrators were not lawyers, but laymen, to whom the rights in respect of the village which were being exchanged or released for cash, might well appear to be not inaccurately described as an ownership which was not to cease until the cash was paid. However that may be, the mere use of the word "ownership" could not outweigh the consideration that the whole wording of the sentence pointed to the continuance of a status quo, and not to the creation of a new condition of affairs. The award did not, therefore, purport or operate to create, declare or assign any right, title, or interest in the village within the meaning of S. 17 (1) (b) and, therefore, did not require registration under the Act. AIR (Vol 27) 1940 PC 222 : 21 PLT 935 : 1940 OWN 1103 : 1940 ALJ 813 : 1940 MWN 1122 : 52 LW 800 : 7 BR 198 : 45 CWN 204 : ILR (1940) Kar PC 460 Sup : 43 Bom LR 381 : 73 CLJ 145 : 1940 AWR 147 : 191 Ind Cas 7.

——S. 17 (1) (b) (Rangoon)—Document, whether requires registration, how decided.

It is the document itself which must be looked at in deciding whether it requires registration and the immediate intention of the document and not its ultimate result is the important point. A very strict interpretation is to be placed on the words in S. 17 (1) (b).

Held, on construction of the document that it did not, on the face of it, purport to mortgage any interest in immovable property. Under it, the executant did not purport to give up any of the rights in the property. The present tense did not bring the document within the scope of S. 17 (1) (b). The document, therefore, could be admitted in evidence. AIR (Vol 26) 1939 Rang 410 : 188 Ind Cas 228.

——S. 17—"Declare" in S. 17 (1), if implied declaration of will or mere statement of fact—Partition deed causing change of legal relation—Letter containing admission of partition.

In S. 17 (i), Registration Act, the word 'declare' implies a declaration of will, not a mere statement of fact, and a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. The distinction is between a mere recital of a fact and something which in itself creates a title. AIR (Vol 25) 1938 Mad 55 : 1937 M W N 1183 : 176 Ind Cas 646.

——S. 17—Agreement permitting owner of adjacent vacant site to build house in any way he liked does not require registration. AIR (Vol 23) 1936 Lah 905 : 38 P L R 1146 : 167 Ind Cas 454 (DB).

——S. 17—N and others brought a suit for possession of 1300 odd kanals of land against the defendants and obtained a decree in the terms of the relief claimed. Formal possession was delivered to them in execution of their decree but actual possession remained with the defendants. A dispute having arisen among the parties to that litigation, the matter was referred to the village notables who decided that about 91 ghumons of land should remain with the defendants and the rest be made over to plaintiffs. This decision was incorporated in two documents executed by the parties in favour of one another and the mutation was entered accordingly. More than a year afterwards N and others instituted a suit claiming possession of 626 kanals of land on the ground that it had been wrongly mutated in defendants' favour. It was contended by them that the document relied upon was inadmissible in evidence, or want of registration :

Held, that the document was admissible as it merely recited that the executants accepted award of panchayats and did not by itself create any such rights, title or interest as is contemplated by S. 17, Registration Act. AIR (Vol 22) 1935 Lah 955 : 37 P L R 459 : 160 Ind Cas 895 (DB).

——S. 17 (1) (b) — Rulings on other documents—Whether sufficient guide.

The question whether a particular document is one falling within the scope of S. 17 (1) (b) is one to be decided on a perusal of that document and rulings upon other documents not shown to be of an exactly similar character are no guide to a proper decision. Where the lists together were intended by the parties to be the only evidence of an arrangement arrived at, then the lists declare the rights of the parties and they are, therefore, not admissible, being unregistered, to prove the terms of the partition. AIR (Vol 22) 1935 Lah 448 : 17 Lah 122 : 38 P L R 582 : 159 Ind Cas 274 (DB).

——S. 17—A document by which certain rights are relinquished in respect of property over Rs. 100 in value requires registration and though inadmissible for proving the relinquishment when unregistered, it may be referred to for the collateral purpose of proving the nature of possession. AIR (Vol 20) 1933 Lah 422 : 145 Ind Cas 691.

——S. 17 (1) (b)—Leases are excluded from the operation of Cl. (b), S. 17. Therefore cl. (b), sub-s. (1), S. 17, does not apply to a kabuliyat though securing a rent of over Rs. 100. 114 Ind Cas 900 : 9 L R A Rev 186 : AIR (Vol 15) 1928 All 536.

——S. 17 (1) (b) — Document discharging debt is not governed by S. 17 (b). 107 Ind Cas 808 : 27 M L W 47: AIR (Vol 15) 1928 Mad 382 (DB).

——S. 17 (1) (b) — Deed reciting terms of concluded sale is a sale deed and requires registration.

Where a document simply recites the fact that the sale has already been made and that Rs. 550 cash have already been received and that an entry has been made in a bahi ragarding the remaining Rs. 550.

Held, that such a document constitutes a sale-deed and is not admissible in evidence if not registered. The mere omission to give the boundaries or any other particulars as to the property in question in the deed does not make the document other than a deed of sale. 67 Ind Cas 144 : 3 L L J 173 : AIR (Vol 8) 1921 Lah 113 (DB).

——S. 17 (1) (b)—Sale or mortgage.

The construction of a sale deed and an agreement to reconvey the property, must be put according to the actual contents of the documents. Where the Court finds from the extrinsic evidence and circumstances, the relation of the written language to the facts, it may conclude that the sale deed and the agreement to reconvey constitute a mortgage. 22 Bom L R 979 : 58 Ind Cas 406 : AIR (Vol 7) 1920 Bom 117 (DB).

——Ss. 17 (1) (b) and 49—Scope of.

The words "create," "limit," "assign" or "extinguish" in S. 17 (b) of the Act, imply a definite change of legal relation to property by an expression of will embodied in the document. The word "declare" implies a declaration of will and not a mere statement of fact. 19 O C 75 : 3 O L J 339 : 35 Ind Cas 770 : AIR (Vol 3) 1916 Oudh 339 (DB).

9. "Declare".

(a) Meaning of.
(b) Division of property, status etc.

(a) Meaning of.

——S. 17—Word "declares" in S. 17 (1) (b)—Meaning.

(Per Meredith J.)—The word "declares" used in S. 17 (1) (b) must mean something more than a mere recital—The word is used only in reference to declarations which form the basis of the title of the parties. AIR (Vol 30) 1943 Pat 433 : 11 B R 149 : 217 Ind Cas 49 (DB).

——S. 17—The word "declare" in S. 17, implies a declaration of will and not a mere statement of fact.

Where an instrument in writing made at the time of dissolution of partnership declares the rights in the properties from the date of dissolution of the partnership, that the persons who had constituted the partnership, had equal rights in the properties which had been purchased out of the profits, the instrument requires registration. [AIR (Vol 25) 1938 Mad 133 Reversed.] AIR (Vol 26) 1939 Mad 884 : I L R (1939) Mad 971 : 1939 M W N 866 : 50 L W 331 : (1939) 2 M L J 649 : 188 Ind Cas 831 (DB).

——S. 17 — Deed by person, declaring that certain purchase made by him was benami for his brother who was the real purchaser and owner.

The word "declare," in S. 17 is to be taken in the same sense as the words 'create, assign, etc.' used in the same section, that is, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of fact. Where a document written by a person that a certain property purchased by him was benami for his brother and declaring that his brother was the real purchaser and owner of the same, and that his brother has been in possession and enjoyment thereof, what it really does is to acknowledge that the executant never did have any title that the purchase was benami and has been followed by the actual possession of the real purchaser and the exercise by him of the rights of a full owner. It clearly comes within the description of a document which amounts merely to an admission of a pre-existing state of affairs and does not operate to create title, and, it is, therefore admissible in evidence though unregistered, to show who the real purchaser was. AIR (Vol 25) 1938 Oudh 119 : 1938 R D 499 : 1938 O W N 454 : 1938 A W R 49 : 174 Ind Cas 378.

——S. 17 — Document containing acknowledgment of previous transaction.

The word "declare" as used in S. 17 must be construed in the same sense as the preceding words "create," "assign," etc., and the declaration does not mean merely a statement of fact, but it must by itself bring about some definite change of relation to the property, by an expression of will embodied in it. Consequently, the letters which merely contain an acknowledgment of a past transaction will not require registration. AIR (Vol 22) 1935 Lah 821 : 160 Ind Cas 773 (DB).

——S. 17—The word 'declare' in S. 17, Registration Act is ejusdem generis with the other words 'create' 'assign' or 'limit', with which it is in contiguity. AIR (Vol 20) 1933 Rang 307 : 11 Rang 481 : 149 Ind Cas 457 (2) (DB).

——S. 17—Document acknowledging a right.

The word, 'declare' in S. 17 implies a declaration of will, not a mere statement of fact. A document which merely acknowledges as a fact that a right is vested in a particular person does not require registration.

In the case of an acknowledgment contained in a communication addressed to a third party, registration is not praticable nor required. AIR (Vol 19) 1932 P C 55 : 9 O W N 43 : 35 L W 217 : 1932 A L J 186 : 55 C L J 136 : 62 M L J 296 : 34 Bom L R 363 : 13 P L T 279 : 11 Pat 272 : 59 I A 130 : 36 C W N 250 : 1932 M W N 660 : 136 Ind Cas 798.

——S. 17 — Document acknowledging existence of previous mortgage.

The word 'declare' in S. 17 (1) (b) indicates something more than a mere statement of existing facts and implies a declaration of will to cause a change of legal relationship in respect of the property concerned. Therefore a document which merely acknowledges that a previous mortgage exists unredeemed cannot be said to declare a charge on the land mortgaged and as such is not compulsorily registrable. AIR (Vol 19) 1932 Lah 154 : 32 P L R 881 : 136 Ind Cas 14 (DB).

——S. 17 — The words 'declare an interest' imply a definite change of legal relation to the property by an expression of will. So a deed of adoption which is only a recital of an act of adoption which has already taken place is not the expression or declaration of will by which the right is constituted and so is not compulsorily registrable. AIR (Vol 18) 1931 Bom 105: 32 Bom L R 1385: 128 Ind Cas 901 (DB).

——S. 17 — The word 'declare' in Clause (b) of S. 17 (1) of the Registration Act implies a definite change of legal relation to the property by an expression of will embodied in the document and not a mere statement of a past fact. A I R (Vol 13) 1926 Nag 301 : 93 Ind Cas 193.

——S. 17 — The word 'declare' in S. 17 implies a declaration of will and not a mere statement of fact and therefore a document which merely stated that the houses in the possession and enjoyment of the appellant shall be enjoyed by her with powers of gift and sale is a mere statement of fact and admissible in evidence either as a contract to acknowledge an existing title or perhaps as evidence in the nature of an admission. A I R (Vol 10) 1923 Mad 621 : 17 M L W 588 : 32 M L T 312: 45 MLJ 100: 72 Ind Cas 456 (DB).

——S. 17 (1) (b)—Per Seshagiri Iyer J.— The declaration mentioned in S. 17 must have the legal consequences contemplated by the parties and should not be mere statement of what has taken place between the parties. A mere letter by mortgagor to mortgagee which is merely an evidence of transaction does not itself create or declare any right to immovable property within S. 17 (b). A I R (Vol 4) 1917 Mad 799 : 31 M L J 347 : (1916) 2 M W N 221 : 4 L W 472 : 35 Ind Cas 864 (DB).

(b) Division of property, status, etc.

——S. 17 — Some property belonging to minor B was sold by his guardian under a registered sale-deed and the transaction was ratified by B on attaining majority, but the deed of ratification was not registered. Subsequently, B sold the same property to another person who impugned the deed of ratification on the ground that it was ineffective for want of registration :

Held, that the title passed to the first transferee at the date the sale-deed was executed by the guardian. The subsequent document ratifying that transaction effected no change in the legal rights to the property, and all it did was to make clear that B did not intend to exercise his privilege of setting aside the transaction. Such a declaration did not require registration under S. 17 (1) (b) of Registration Act. A I R (Vol 30) 1943 Nag 263 : 1943 N L J 359 : I L R (1943) Nag 574 :209 Ind Cas 103.

——Ss 17 (1) (b) and 49 — A declaration of intention to separate from a Hindu joint family does not have to be reduced to the form of a document. It can be effected without any formality. But if it is reduced to writing, then it falls within the purview of S. 17 (1) (b), Registration Act and that is struck by S. 49. AIR (Vol 28) 1941 Nag 209 : 1941 N L J 266: I L R (1941) Nag 73 : 196 Ind Cas 278 (DB).

——S. 17—Document purporting to declare that executants had no title in house.

A document which purports to record a payment to certain persons of money described as having been spent by them in rebuilding a house and also purports to declare that the executants held no title in the house and had relinquished their connection with it, requires registration and if unregistered, cannot be admitted in evidence. A I R (Vol 21) 1934 Lah 604 : 35 P L R 570 : 149 Ind Cas 154 (DB).

——S. 17 — Where the document merely declares a certain person to be an heir of the executant it does not fall within the purview of S. 17 (1) (b). AIR (Vol 10) 1923 Lah 497 : 77 Ind Cas 473 (DB).

——S. 17 (1) (b)—Partition—Compromise— Compulsory registration—Deed effecting division.

A compromise giving effect to an arrangement arrived at between the parties about some estate is compulsorily registrable. A document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered. But when the document itself is a record of property subjected to a division which took place on the date on which it was written and which declares that in certain immovable properties certain parties had a share and that their former right in certain immovable properties are extinguished, it falls under S. 17 (1), (b) of the Registration Act and is compulsorily registrable. AIR (Vol 7) 1920 Nag 118 : 54 Ind Cas 804.

——Ss. 17 (b) and 49 — Partition Book containing a list of properties affecting immovable property — A formal declaration of status—Unregistered— Admissibility.

A document containing a list of properties both movable and immovable available for division and containing a note as "In presence of the witnesses named hereunder we divided" is a formal declaration of division of status attested by witnesses and it is inadmissible in evidence as it affects immovable properties and as it is unregistered. A I R (Vol 3) 1916 Mad 709 : 2 LW 118 : 30 M L J 404 : 31 Ind Cas 615 (DB).

——S. 17 (1) (b)—Partition—Lists of partition signed by co-sharers—Registration.

Lists of properties allotted to each co-sharer in a partition of joint family properties were prepared and each was given a list of his share of the properties signed by the other co-sharers. The lists formed the actual deed of partition and therefore registration was necessary. 188 P L R 1913 : 127 P W R 1913 : 19 Ind Cas 646 (DB).

——S. 17 (1) (b)—Family arrangement—Distributing properties.

Distribution of properties among relatives should only be made by registered instrument. (1913) 13 MLT 102 : 18 Ind Cas 636 (DB).

——S. 17 (1) (b)—Relinquishment — Covenant to pay annuity — Agreement to relinquish ownership in default of annuity—Enforceability of.

Under an unregistered deed a covenantor, after acknowledging his ownership of the immovable property under a prior conveyance, agreed to pay a certain annuity to another. In the event of default he agreed to relinquish his ownership in the property:

Held, the agreement can be enforced for the payment of the annuity and for specific performance of the agreement to relinquish, but the document being unregistered no suit can be maintained for possession. (1912) 16 Ind Cas 881 (Mad) (DB).

——S. 17 (1) (b) — Partition— Recitals—Memoranda of previous disposition—Document drawn up to evidence partition made at the time.

Deeds which are mere recitals or memoranda of dispositions of property which have been previously agreed upon or made and which do not themselves operate to effect any such dispossession need not be registered. But where a document is executed at the time of partition of properties worth more than Rs. 100 and it is not intended to serve merely as a memorandum of what had been previously arranged, the document is compulsorily registrable. 229 P L R 1912 : 231 PWR 1912 : 15 Ind Cas 28 (DB).

10. "Assign"

——S. 17 (1) (b)—Assignment—Assignment of mortgaged property in consideration of mortgagee giving up his rights under mortgage requires registration.

The document by which the mortgagor assigns all his right and interest in the immovable property subject to the mortgage in consideration of the mortgagee foregoing his right to recover the mortgage debt and the interest thereon exceeding Rs. 100 must necessarily be registered under S. 17, Registration Act; and if it is not registered it is not permissible for the mortgagee to rely upon that document for the purpose of founding his claim for possession against the mortgagor. AIR (Vol 15) 1928 Cal 107 : 46 C L J 573 : 107 Ind Cas 474 (DB).

——S. 17 — Right of contribution against co-mortgagor to be registered.

A co-mortgagor who discharged the whole amount of the mortgage debt acquires the rights of the mortgagee, and the assignment of this right of the mortgagor of recovering money from other co-mortgagors must be by a registered instrument if the value of the right is over 100 rupees. AIR (Vol 11) 1924 Nag 238 : 76 Ind Cas 57.

——S. 17 (b)—Lease—Admissibility if unregistered.

Where a right to collect "lac" is assigned for a number of years, the document must be registered compulsorily if the value of the interest transferred is more than Rs. 100 and cannot be admitted in a suit for damages based upon it if unregistered. (1909) 5 N L R 21 : 1 Ind Cas 903.

11. "Limit"

——S. 17—Agreement regulating right to hold market — Registration.

Per Srivastava, J. — A right to hold a market on one's land is a right in immovable property and, therefore, an agreement between two owners allocating particular days for holding a market on their respective lands and imposing a condition that the parties are not to be allowed to hold a market on other days, is one the registration of which is compulsory under S. 17, cl. (b). AIR (Vol 18) 1931 Oudh 110 : 5 Luck 504 : 8 O W N 38 : 131 Ind Cas 65 (DB).

——S. 17 (1) (b)—Agreements — Redemption not allowed for 54 years under mortgage deed — Subsequent unregistered agreement between mortgagor and mortgagee allowing mortgagor to redeem at any time on payment of Rs. 200.

Under the terms of the mortgage deed redemption was not permissible for 54 years. But mortgagor sued mortgagee before the expiry of that period relying on the agreement between himself and the mortgagee, which allowed him to redeem regardless of the term of 54 years if he paid to the mortgagee Rs. 200 by a certain date. The agreement was not registered.

Held, that the subsequent covenant was one by which the mortgagor's right to retain possession for 54 years was limited if not extinguished in so far as it became redeemable at any time after payment of the amount agreed on and as such the agreement was compulsorily registrable and not admissible in evidence for the purpose for which mortgagor desired to use it. AIR (Vol 17) 1930 All 506: 1930 A L J 1163 (DB).

12. "Extinguish"

——S. 17 (b) and (2) (xi) — Distinction between receipt and relinquishment.

When a receipt does not purport to extinguish a mortgage deed but only operates to do so, it may not be registered under S. 17 (2) (xi) and may be admissible in evidence but a receipt by the mortgagee relinquishing a portion of the mortgage-money does not fall under S. 17 (2) (xi) and is inadmissible in evidence when not registered. AIR (Vol 28) 1941 Mad 197 : 1940 M W N 895 : 52 L W 401.

——S. 17 (1) (b) — Lease — Lessee agreeing to give up lease in consideration of lessor paying a lump sum — Agreement extinguishes the lease and must be registered.

On September 30, 1919, two documents were passed between the parties. The document passed by the defendant was as follows: "I have taken on rent from you your land. The time fixed in respect thereof is three years, which has not yet expired, for that reason an understanding is arrived at between you and me and the land which is in my possession will be considered as being in your possession from this day. Now I shall have no right to the remaining period in respect of the rent note. And at present there are lying my pieces of timber wood and I am to remove the same within four months from this day, and deliver land into your possession and I am not to raise any objection with regard to the same. But the rent note which has been newly passed, is to be considered null and void and there is no dispute or objection as regards the fixed period, because you have satisfied my mind by payment of Rs. 15,000 to me in respect of my incomplete period."

The document passed by the plaintiff was as follows: "I have let out on rent to you land. The time fixed in respect thereof is three years, which has not yet expired. You have of your own accord entered into an agreement with me and have given up your right in respect of the period of the rent note from this day and you should remove your pieces of timber wood within four months from this day, and deliver the land into my possession."

Held, that the documents read together extinguished the right created by the original lease and that the position of parties as lessor and lessee no longer continued and that the defendant could only be considered as a licensee entitled to keep his timber on the premises for removal within four months and, therefore, come under S. 17 (1) (b) and required to be registered. AIR (Vol 13) 1926 Bom 573 : 28 Bom L R 1152 : 98 Ind Cas 426 (DB).

——S. 17 (1) (b)—Partition — Partition deed effecting division in status.

A partition deed creating division in status only extinguishes rights within Sub-section (1). A I R (Vol 7) 1920 Mad 172: 57 Ind Cas 18 (DB).

——S. 17 (1) (b) — Relinquishment.

Agreement declaring absence of title to tank. An agreement by which one party declares that he has no title of land more than Rs. 100 in value requires registration although it might be doubtful whether any title to the land existed in the declarant. AIR (Vol 6) 1919 Lah 222 : 39 P R 1919 : 80 P L R 1919 : 51 Ind Cas 391 (DB).

——S. 17 (1) (b)—Relinquishment—Document relinquishing rights in property.

Registration of a document relinquishing rights in immovable property of over Rs. 100 and indicating a clear intention that title should pass to the releasee is a conveyance and not a mere agreement to convey and is compulsorily registrable. AIR (Vol 5) 1918 Lah 317 : 10 P W R 1918 : 157 P L R 1917: 44 Ind Cas 228 (DB).

——S. 17 (1) cl. (b) and (2) cl. (11)—Relinquishment of portion of mortgaged debt — Registration.

An agreement by a mortgagee relinquishing a portion of the mortgaged debt requires registration under S. 17 (1) cl. (b) of the Act. AIR (Vol 5) 1918 Mad 331 : 24 M L J 79 : 7 L W 229 : (1918) M W N 262 : 44 Ind Cas 132 (DB).

——S. 17 (1) (b) — Scope of—Documents extinguishing rights—Registration.

A document which purports to extinguish the executant's rights as mortgagee of more than Rs. 100 in value is compulsorily registrable. AIR (Vol 2) 1915 Lah 417 : 55 P W R 1915 : 142 P L R 1915 : 27 Ind Cas 769 (DB).

——S. 17 (1) (b)—Relinquishment—Surrender of reversionary rights—Adverse possession.

An agreement whereby a reversioner surrenders his reversionary rights in immovable property of the value of Rs. 100 or upwards is compulsorily registrable since it amounts to an extinguishment of the right in the immovable properties. 30 B 304, Not foll. AIR (Vol 2) 1915 Lah 353 (2) : 12 P L R 1915 : 18 P W R 1915 : 27 Ind Cas 699.

——S. 17 (1) (b) — Relinquishment of reversioner's interest—Value above Rs. 100—Registration if compulsory.

The relinquishment of a reversioner's interest, the present value of which is ascertained Rs. 100 or above, requires compulsory registration. 135 P W R 1911 : 214 P L R 1911 : 11 Ind Cas 211.

——S. 17 (1) (b) — Relinquishment of claim to immovable property over Rs. 100.

A document containing consent to a disposition of property and a formal renunciation of a claim, whether legally correct or not is release and must be registered when pertaining to immovable property of the value of Rs. 100 or over. (1911) 7 N L R 36 : 10 Ind Cas 733.

——S. 17 (1) (b)—Release — Registration when complete.

A release which is duly executed and presented for registration but the registrar who registered it wrongly registered it in a book not kept for the registration of documents compulsorily registrable under S. 17 of the Act, must be considered to have been duly registered. A release requires registration. (1910) 34 Bom 202 : 11 Bom L R 1321 : 4 Ind Cas 588 (DB).

13. "In present or in future."

——S. 17 (1) (b) — Applicability — Document excluded from registration by S. 21.

S. 17 (1) (b), Registration Act only relates to documents which specify and define the exact property on which they are to operate and to rights which exist in the person executing the document at the date of execution. The section must be read in conjunction with Ss. 21 (1) and 49. A document which is excluded from registration by S. 21 cannot therefore be covered by S. 17 (1) (b). A document which merely relates to unspecified property which may be purchased in the future is excluded from registration by S. 21 and so does not fall under S. 17 (1) (b) and is not hit by S. 49 (a) and (c). AIR (Vol 37) 1950 Nag 192 : I L R (1951) Nag 196 : 1950 N L J 607.

——Ss. 17, 49 — In pursuance of a conversation between A and B, B wrote a letter to A agreeing to take either the ground floor or first floor of his house for a period of five years. The letter also stated that it was to be considered as an agreement. It was subsequently decided between themselves to let a flat on the first floor to B, A lease was prepared and presented by A for registration but was not registered on failure of B to admit execution before the Registrar. B lived in the house for some months and then alleging that he was a monthly tenant, vacated the house after the usual notice. A filed a suit to recover damages for breach of agreement :

Held, that the letter sent by B to A did not create a present demise of either of the flats and was admissible in evidence, though unregistered.

Held, also, that the lease, although unregistered, was admissible, not only as evidence of part performance of the terms of the agreement contained therein, but also in order to show that the plaintiff can, under S. 53A, enforce his right to claim damages for breach of the agreement as provided by one of its terms, and that A was entitled to recover damages for breach of agreement. AIR (Vol 20) 1933 Bom 381 : 35 Bom L R 722 : 145 Ind Cas 557.

——S. 17 — In the case of a document which is compulsorily registrable the mere fact that part of it would not come into operation till some years later, does not operate to make it other than a present demise, and is, therefore, compulsorily registrable. AIR (Vol 13) 1926 Bom 384 : 28 Bom L R 743 : 96 Ind Cas 827 (DB).

——S. 17 — Agreement embodying a complete contract.

The right, title or interest, whether vested or contingent, must be a present and not a future right, title or interest in order that it may come under S. 17 (1) (b) and it must itself purport or operate to create the right, etc. contemplated by the section. A document which recites that a certain contract had already been entered into and that in the event of certain happenings certain future right would accrue in favour of certain person, does not fall within the purview of S. 17 (1) (b) of the Registration Act. Section 17 read with S. 49 must be very strictly construed and the benefit of any doubt should be given in favour of the document not being compulsorily registrable. AIR (Vol 6) 1919 Lah 60 : 1 L L J 79:69 Ind Cas 608 (DB).

14. "Any right, title or interest."

——Ss. 17 (1) (b) and 49—A document which creates a right of way creates a right to or interest in immovable property within the meaning of S. 2 (6) and S. 17 (1) (b). It requires registration and if not registered, is inadmissible in evidence. AIR (Vol 30) 1943 Mad 522 : 56 L W 279 : (1943) 2 M L J 15 : 1943 M W N 466 : 209 Ind Cas 202.

——S. 17 — Right to or in property and right incidental to ownership — Distinction.

Generally when a right in or to property is assigned, created, declared, limited or extinguished, then there must be a definite change of legal relation to the property. If on the other hand, merely incidental rights are limited or extinguished, there may not be any change of legal relation to property for the purposes of S. 17 (1) (b); this distinction must be drawn. AIR (Vol 30) 1943 Pat 433 : 217 Ind Cas 49 (DB).

——S. 17 — Amendment in 1929—Effect of.

The amendment of S. 17 in 1929 does not require documents executed before that Act came into operation and which did not require registration when it was executed, to be registered. AIR (Vol 27) 1940 Pat 497 : 6 B R 459 : 187 Ind Cas 353 (DB).

—— S. 17—Document giving up reversionary rights.

The transfer of reversionary rights is not itself tantamount to transfer of property and hence, registration of a document giving up reversionary rights is not necessary. AIR (Vol 26) 1939 Lah 414 : 187 Ind Cas 865.

——S. 17 — Agreement not creating interest in land requires no registration

The question whether a document is compulsorily registrable, to be admissible in evidence, should be decided by perusal of the contents of the document. The undertaking that a person will sell the lands to any other person to whom the defendants might ask him to sell and deliver possession does not create interest in land and does not therefore bring it under S. 17. AIR (Vol 16) 1929 Mad 807.

—— S. 17 — Agreement to divide properties at the end of a litigation, need not be registered.

Where during the pendency of a suit, the parties effected a document the effect of which was that the litigation should pursue its full course and whatever the result might be the contestants would at the end of the litigation divide the property.

Held, that was an agreement to divide the property at the expiration of the litigation, and could not create any interest in the property under the provisions of S. 54 of the Transfer of Property Act and that the mere fact that there was an arrangement with regard to the profits pending the litigation and that the plaintiff gave up the management of the property into the hands of the defendants agreeing that they should pay him one-fifth, would not possibly bring the document within the provisions of S. 17 (1) (b) of the Registration. AIR (Vol 13) 1926 Bom 24 : 27 Bom L R 1441 : 91 Ind Cas 817 (DB).

——S. 17 — The right of a mortgagee can be transferred only by a registered instrument. AIR (Vol 13) 1926 Mad 903 : 1926 M W N 569 : 51 M L J 95 : 95 Ind Cas 447.

——S. 17 — Agreement modifying rate of interest on a mortgage for more than Rs. 100 is compulsorily registrable and oral evidence is inadmissible to prove its terms under Evidence Act, S. 92 (4). AIR (Vol 13) 1926 Nag 321 : 93 Ind Cas 95 (DB).

——S. 17 — Deed relinquishing reversionary rights under the Customary Law of the Punjab in immovable property for a consideration of Rs. 100 or upwards falls within S. 17 (1) (b) of the Registration Act and is compulsorily registrable. AIR (Vol 11) 1924 Lah 641 : 76 Ind Cas 35.

——S. 17 — Agreement to pay a share of the crops or a certain sum of money needs no registration. AIR (Vol 11) 1924 Lah 149 : 5 L L J 366 : 72 Ind Cas 480 (DB).

——S. 17 – Deed disinheriting son, requires registration.

Where a deed recited that from the date of its execution the executant Ram Dat would cease to have any connection with Karam Chand that Karam Chand would also have no concern with any of Ram Dat's property and that after the death of Ram Dat and his wife, Karam Chand would have no rights as a son, and the other sons would perform the funeral ceremonies.

Held, the meaning was that Karam Chand was to lose all his rights in his father's property from the date of the execution of the document and that the recital that he would not have the rights of a son after Ram Dat's death referred to rights of a religious character and not to rights in the property. The document is, therefore, not a will and is inadmissible in evidence for want of registration. AIR (Vol 9) 1922 Lah 421 : 67 Ind Cas 431 (DB).

——S. 17—The undertaking given by one brother not to contest, any alienation which his brother might make in future as to one half of the land does not require registration. AIR (Vol 9) 1922 Lah 95 : 3 Lah 112 : 4 L L J 52 : 67 Ind Cas 417 (DB).

——Ss. 17 (1) (b) and 49 — Relinquishment—Relinquishing interest — Registration.

A document relinquishing rights and interest in land and a building over it, is compulsorily registrable. If not registered it is inadmissible in evidence. AIR (Vol 6) 1919 Lah 350 : 50 Ind Cas 922.

——Ss. 17 (1) (b) and 49 — Lease — Agreement to occupy vacant site, build on it and retain it for life.

An undertaking to occupy land contained in a document and to build on it is neither a lease nor an undertaking to occupy within S. 17 (2 or S. L. (7), Registration Act. The undertaking to occupy not being a lease no right or interest in the land was created and registration of it was not, therefore, compulsory. S. 17 of the Act must be construed very

strictly as read with S. 49 it imposes a serious disability. AIR (Vol 6) 1919 Lah 51 : 124 P R 1919 : 53 Ind Cas 451.

——S. 17 (1) (b)—Sale—Agreement to re-sell if compulsorily registrable.

An agreement to re-sell a property for the same price creates a right of redemption for that amount and is compulsorily registrable. A I R (Vol 3) 1916 L B 18 : 31 Ind Cas 890.

——S. 17 (1) (b) — Transfer of future interest—Consent of reversioner.

Assent of reversioner to alienation in writing was not compulsorily registrable as the executant had no more than spes successionis. A I R (Vol 1) 1914 Bom 187 : 38 Bom 224 : 15 Bom L R 1142 : 22 Ind Cas 292 (DB).

——S. 17 (1) (b)—Mortgage—Right of redemption.

The right to redeem a mortgage comes within the expression "other intangible thing" in clause (2) of the section and as such cannot be transferred without registration. (1913) 11 ALJ 407: 19 Ind Cas 818 (DB).

——S. 17 (1) (b) — Relinquishment by widow — Admissibility of unregistered deed.

The right of a widow to hold possession of land left by her husband till death or remarriage amounts to "a right title or interest" in that land within S. 17. An agreement by a widow relinquishing her life-estate in such land in favour of her husband's collaterals is compulsorily registrable, and if unregistered, would be inadmissible in evidence. 92 P R (1912) : 97 P W R 1912 : 14 Ind Cas 749 (DB).

——S. 17 (1) (b) — Trusts—Trustees, title, by registration—Destruction after execution.

Registration of a trust-deed in the absence of an intention to the contrary, conveys title to the trustee even if the deed is not delivered. Destruction by the author after registration is ineffectual to destroy trust. (1911) 2 M W N 376: 10 M L T 44: 11 Ind Cas 24 (DB).

15. "Whether vested or contingent".

——S. 17 (1) (b) — Plot of land purchased by wife for Rs. 255—Husband to build house on site — As consideration, husband given right to live for lifetime—Both to have right of residence—Daughter to inherit it on their death :

Held, agreements created contingent interest and were compulsorily registrable. A I R (Vol 23) 1936 Lah 1002 : 167 Ind Cas 720 (DB).

——Ss. 17 (1) (b), 21—Sale-deed—Property mentioned as existing in district where deed is registered not actually existing but introduced as fictitious item—Deed containing clause making it non-testamentary instrument creating vested rights :

Held, on construction that the clause in the document satisfied the requirements of S. 17, sub-s. (1), cl. (b), inasmuch as the document, by reason of the clause, would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the plaintiffs. That being the position, the document would be registrable in the District of Dacca even though as a kobala transferring the three items of property mentioned in the document, it would not be so registrable.

Held further, that treated as a kobala, the document could not be registered in any Registration Office in the District of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the District of Dacca was a tin shed which had no existence whatever and inasmuch as the introduction of a fictitious item of property in the sale-deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But the document, regarded as a non-testamentary instrument falling within cl. (b), sub-s. (1), S. 17 could be registrable at a Registration Office in the District of Dacca and it was not invalid. AIR (Vol 22) 1935 Cal 203 : 60 C L J 243 : 39 C W N 120 : 155 Ind Cas 926 (DB).

16. "Of the value of one hundred rupees and upwards".

——S. 17—Words "value of hundred rupees"—Interpretation of.

Per (Meredith and Chatterjee JJ.) — Under S. 17 (1) (b), it is the right, title or interest affected which has to be of the value of Rs. 100 and upwards and not the immovable property itself. AIR (Vol 30) 1943 Pat 433 : 11 B R 149 : 217 Ind Cas 49 (DB).

——S. 17—Test.

Where there is a pecuniary consideration stated in the deed of assignment of the decree itself, it is that consideration which would form the test for the purpose of registration under S. 17 and not the amount due under decree. A I R (Vol 29) 1942 Bom 134 : 44 Bom L R 164 : I L R (1942) Bom 190 : 200 Ind Cas 440.

——S. 17 — Mere statement by owner that he had given his property worth more than Rs. 100 to another.

A mere statement in a Magistrate's Court by an owner of property that he had given up a portion of the property worth more than Rs. 100 to another is not sufficient to effect a transfer of the same which cannot be done except by a registered instrument. A I R (Vol 26) 1939 Sind 128 : I L R (1939) Kar 563 : 181 Ind Cas 982 (DB).

——S. 17—Transfer of property in lieu of dower.

No registration is required for a deed of transfer in lieu of dower which is fixed at less than Rs. 100, but where the dower is fixed, not in terms of money but in property itself, the deed transferring such immovable property, which is worth more than Rs. 100 requires registration, even if the deed is stamped with a stamp of one rupee only. AIR (Vol 24) 1937 Pesh 107 : 172 Ind Cas 447.

——S. 17 (1) (a) — Transfer of house worth more than Rs. 100 to wife in lieu of dower which is less than Rs. 100.

Section 17 (1) does not contemplate the market value of the property at the time when it was transferred to be the criterion for deciding whether the document by which it was transferred should be registered or not. It is the consideration which governs the matter.

Where a husband executes a deed of transfer of his house, the market value of which is over hundred rupees, to his wife in lieu of her dower, which was below Rs. 100, the transfer deed does not require registration. A I R (Vol 24) 1937 Pesh 39 : 168 Ind Cas 390.

——S. 17 (1) (b)—Surety bonds—Cattle of judgment-debtor attached in execution — Applicant executing surety bond, mortgaging certain properties and undertaking to produce cattle and in case of failure, binding himself to pay Rs. 90, value of cattle :

Held, that the document was neither mortgage nor charge and registration was not essential. A I R (Vol 23) 1936 Rang 303 : 164 Ind Cas 52.

——S. 17—"Right, title and interest of the value of one hundred rupees", meaning of — Grant of life interest in rent.

The value of one hundred rupees referred to in S. 17 (1) (b), is the value of the right, title or interest created by the document in question.

Where a husband executes a deed in consideration of marriage granting to his wife life-interest in the rent of a house fetching annually Rs. 90 for her residence and maintenance, the value of the right granted is worth more than one hundred rupees and con-

sequently, requires registration. A I R (Vol 19) 1932 Bom 217 : 34 Bom L R 459 : 138 Ind Cas 274 (DB).

——S. 17 (1) (a) — Father making gift to his daughters by registered deed—Daughters passing an unregistered writing in father's favour, agreeing that the father may revoke the gift — Suit by one of the donees for the recovery of the gifted share :

Held, that the agreement was not in contravention of S. 17 (a) there being no evidence to show that the value of the right, etc., affected by it was of the value of Rs. 100 or more. The agreement, therefore, may be looked at in evidence. A I R (Vol 19) 1932 Bom 188 : 34 Bom L R 218 : 137 Ind Cas 580.

——S. 17 (1) (b)—Bond.

Security bond hypothecating immovable property upwards of Rs. 100 to stay a sale in execution proceedings is compulsorily registrable. A I R (Vol 14) 1927 Lah 763 : 103 Ind Cas 702.

——S. 17—Test for.

The question of liability to registration is to be determined with reference to the consideration in money entered in the deed and not the real value of the property. A I R (Vol 8) 1921 Oudh 167 : 63 Ind Cas 551 : 8 O L J 311.

——S. 17 (1) (b) — (1864), S. 13 — Ascertainment of value of property transferred.

The value of the right on the date of the execution of the document determines the question of the registration of a document transferring any right in property. If the value of such a right is more than Rs. 100, then the document ought to be registered and when registered is admissible under S. 13. A I R (Vol 4) 1917 All 375 : 39 Ind Cas 931 (DB).

——S. 17 (1) (b) — Dower deed—Kabin Nama.

A Kabin nama or a deed of dower hypothecating immovable property worth Rs. 100 or more for the satisfaction of dower claim is compulsorily registrable. 71 PWR 1910 : 6 Ind Cas 931.

——S. 17 (1) (b) — Assignment bond.

Where the hypothecation bond amounts to more than Rs. 100 at the time of assignment though it was below Rs. 100 originally, the assignment must be registered. (1910) MWN 73 : 7 MLT 379 : 5 Ind Cas 852 (DB).

——Ss. 17 (1) (b) and 49—Unregistered surety bond —Evidence.

A surety bond affecting a house worth over Rs. 100 though unregistered is admissible in evidence to prove a distinct and separate personal undertaking to pay the debt. (1910) 3 Bur LT 141 : 8 Ind Cas 985.

——S. 17 — Document creating a future right of the value of upwards of one hundred rupees in immoveable property.

Where M sold property to D by a registered sale deed for Rs. 399 and on the same day agreed by an unregistered deed to re-transfer the property for Rs. 150 on the last day of Jeth in any year. Held, that the latter document not having been registered, effect could not be given to it. 1906 AWN 180 (181).

17. To or in immoveable property.

——Ss. 17 (1), 49—Settlement deed—Trustees to pay to the widow and the children of the settlor—Vested right in income and contingent right in corpus given:

Held, that the nature of the interest in future rents and profits was such as to constitute immovable property and the deed required registration. AIR (Vol 23) 1936 PC 230 : 1936 ALJ 832 : 40 CWN 1253 : 38 Bom LR 1011 : 2 BR 709 : 71 MLJ 440 : 17 PLT 653: 14 Rang 400 : 1936 AWR 809 : 44 L W 595 : 1936 MWN 1267 : 63 IA 340 : 65 C L J 275 : 163 Ind Cas 418.

——S. 17—Hypothecation — Document hypothecating movables and immovables not registered — Validity.

Where, by a document purporting to be a mortgage-deed movable and immovable properties were hypothecated and the document was unregistered :

Held, that so far as the immovable property was concerned, there was no valid mortgage and that the movables were not confined to machinery only but referred to all movables specified in the deed and that the mortgage in respect of it was valid. AIR (Vol 22) 1935 Cal 388 : 60 CLJ 515: 156 Ind Cas 520 (DB).

——Ss. 17, 49 — Unregistered document mentioning amount of dower and dealing with rights in immovable property.

An unregistered document contained a recital of the fact that the marriage between the parties had been performed and that the bride was being given in lieu of a prompt dower of Rs. 10,000 ornaments worth Rs. 2,500 and four items of immovable property described therein. This was followed by a separate agreement on the part of the husband to pay Rs. 10,000 as dower, Rs. 30 per mensem as pandan expenses or pin money and an undertaking on his behalf not to misappropriate the nuptial ornaments or the articles of dowry or usurp the immovable property mentioned above. Finally, the father of the bridegroom made a personal covenant to indemnify the bride in case the dower or the pandan expenses were not paid and he had also added a declaration to the effect that his rights in the property mentioned above had been extinguished :

Held, that the covenant relating to the dower stood altogether detached from all declarations regarding the immovable property and was clearly separable from them, and that the document in question could be used for the purpose of proving the amount of dower and the contract of guarantee entered into by the bridegroom's father relating thereto. AIR (Vol 22) 1935 Lah 375 : 37 PLR 210 : 16 Lah 1105 : 157 Ind Cas 69 (DB).

——Ss. 17, 49 — The interest under a settlement of landed property is an interest in immovable property, and falls within the ambit of S. 54, T. P. Act. Consequently, no sale or transfer of that interest can be made or effected otherwise than by a registered instrument. AIR (Vol 22) 1935 Rang 84 : 12 Rang 589 : 154 Ind Cas 9 (DB).

——Ss. 17, 49—Agreement to remove sand and level land — Whether creates interest in land—Whether compulsorily registrable.

Where, under an unregistered agreement in writing of August 1927, the defendants, in payment of compensation, were given liberty to remove sand and earth from the plaintiff's land up to a certain level and to level the land and the plaintiff instituted a suit for damages for breach of the agreement:

Held, that the agreement was one creating an interest in immovable property and was, therefore, compulsorily registrable :

Held, also that the covenant to level the lands was, however, collateral to the agreement and one which did not affect the land within S. 49 and could, therefore, be proved by other evidence. AIR (Vol 19) 1932 Mad 734 : 1932 MWN 897 : 63 MLJ 587 : 36 LW 626 : 56 Mad 69 : 139 Ind Cas 870 (DB).

——S. 17 (b) — Right to hold market — Agreement regarding same — Need for registration.

The right to hold a market is an incident to the ownership of the land. The allocation of a particular day for holding the bazaar coupled with the condition that the parties are not to be allowed to hold the bazaar on certain other days is a restriction on the general right possessed by the owner to hold the market, and so where agreement deals with such a right and the value of the same is more than Rs. 100 the document requires registration. AIR (Vol 18) 1931 Oudh 110 : 5 Luck 504 (DB).

——S. 17 — A contract for sale of mango and other fruit crop not in existence at the time of contract is indubitably a contract with regard to movable property only and as such does not require registration. AIR (Vol 12) 1925 All 411 : 23 ALJ 430 : 47 All 738: 6 LRA Civ 382 : 88 Ind Cas 109 (DB).

——S. 17 — Right to execute decree is not a right in or to immovable property—Agreement not to exercise such right is not necessarily registrable. A I R (Vol 12) 1925 Mad 1149 : 49 MLJ 675 : 1925 MWN 543 : 91 Ind Cas 618.

——S. 17—No registration necessary — Othi deed.

If an Othi deed of Palmyrah trees does not place any restriction on the right of the owner's enjoyment of the land on which trees are standing, it does not need registration though the value is Rs. 100. A I R (Vol 11) 1924 Mad 542 : 19 MLW 494 : 1924 M W N 451 : 79 Ind Cas 2 (DB).

——S. 17 — Surrender of equity of redemption — Agreement acted upon.

Although a surrender of the equity of redemption in immovable property worth over Rs. 100 could not have been made except by a registered instrument, equity will support the transaction after it has been acted upon by the parties for a long time.

Where the mortgagee got possession by virtue of the surender in tacit recognition of the validity of the previous foreclosure proceedings and enjoyed the same in his capacity as purchaser or proprietor.

Held, that the mortgagor's title is exinguished on the principle that the locus penitentae which exists when the parties stand on nothing but an engagement which is incomplete is excluded where the parties have acted thereon. AIR (Vol 9) 1922 Oudh 133 : 25 OC 83 : 10 OLJ 1 : 68 Ind Cas 223.

——S. 17 (1) (b)—Option to purchase—Registration.

An option to purchase, not being an interest in land, requires no registration according to S. 17 of Registration Act. AIR (Vol 4) 1917 LB 72 : 9 Bur LT 177 : 37 Ind Cas 91 (DB).

——Ss. 17 (1) (b) and 49—Unregistered letter, converting the sale of the previous day into a mortgage or depriving it of its legal effect—Whether admissable in evidence.

A letter written to say that a sale executed the previous day is in effect a mortgage or that it conveys no title, is one that "affects immovable property" under S. 17 of the Registration Act and is not admissible in evidence without registration. 26 M L J 151 : (1914) M W N 178 : 1 L W 157 : 23 Ind Cas 409 : AIR (Vol 1) 1914 Mad 639 (FB).

——S. 17 (1) (b)—Lease—Lease for drawing toddy if should be registered.

A lease for drawing toddy does not create an interest in "immovable property" within the meaning of S. 17 (b) of the Registration Act and does not require registration. 38 Mad 883 : 15 M L T 237 : (1914) .M W N 327 : 23 Ind Cas 102 : AIR (Vol 1) 1914 Mad 362 (DB).

——S. 17, Cl. (a)—"Immoveable property"—Future rent—Lease of melwaram — Lessee in occupation under unregistered lease a trespasser where lease registrable—Damages.

Future rent is a benefit to arise out of land within the meaning of the Registration Act ; and consequently a lease of the melwaram right for a future year is compulsorily registrable if the value of the interest created by the document is Rupees one hundred or upwards. A person occupying land under a lease inadmissible in evidence for want of registration is a trespasser and consequently liable in damages to the real owner. (1911) 34 M 64 : 8 M L T 91: 20 M L J 966 : 1910 M W N 263 : 6 Ind Cas 504 (DB).

——S. 17—Documents compulsorily registrable not registered—Evidence for collateral purposes.

A document of which registration is compulsory under the Registration Act may be used as evidence for any collateral purpose—for any purpose other than that of creating or extinguishing a right to immoveable property. (1907) 9 Bom L R 393 (399) (DB).

——S. 17 — Sale of standing timber — Immoveable property.

Held, that a document which purported to be a 'theka' of a certain portion of a forest 'for all kinds of trees' for two years was not a document conveying an interest in immoveable property and did not require to be registered. 1906 A W N 4 (5) : 3 A L J 138 : 28 All 277.

——S. 17, Cl. (a)—'Immoveable property'—Right of management—Registration as to part good and part bad.

The right of a manager of a Hindu temple, even though involving the holding of immoveable property forming part of the endowments of the temple, is not immoveable property within S. 17. A document transferring among others the right to manage a temple and its endowments is sufficiently descriptive if it mentions the name of the temple, its situation and the extent of the lands and the registry. Where the description is sufficient only as to part, although defective as to others, the refusal to register the document with reference to the portion as to which the description is sufficient is bad. (1904) 15 M L J 30 (31) (DB).

——S. 17, Cl. (a)—Right to the status of Karnavan not an interest in immoveable property — See (1904) 14 M L J 415 : 28 M. 182 (196) (FB).

——S. 17, Cl. (a)—Immoveable property—Fixtures——Goods and chattels—Necessity for registration.

Fixtures cannot be said to be goods and chattels or immoveable property for all purposes. Though fixtures are not goods and chattels within the doctrine of reputed ownership under the insolvency law, they are not always immoveable property requiring a registered conveyance under S. 17 of the Registration Act. (1901) 25 Bom 659 (666) : 3 Bom L R 426 (DB).

SUB-S. (1) (c)

18. Scope.

——S. 17—Entry of advance without receipt, for purchase if receipt.

The entry that is no more than a memorandum of a sum advanced for a purchase of a property is not a receipt of money received for a sale of an immovable property and therefore, does not need registration. AIR (Vol 26) 1939 Lah 562 : 41 P L R 513 : 185 Ind Cas 613.

——S. 17—Receipt of payment of mortgage money missing—Mutation entry not stating that receipt by itself extinguished mortgage—Receipt could not be said to state things which would make it registrable. AIR (Vol 26) 1939 Lah 185 : 41 PLR 38 : 182 Ind Cas 747 (DB).

——S. 17—Certain amount left with vendee to be paid to creditors named by vendor—Amount not part of unpaid purchase-money—Vendee paying to vendor —Receipt acknowledging payment signed by vendor Held, receipt required no registration. AIR (Vol 24) 1937 All 636 : 1937 A L J 749 : 1937 AWR 659 : 171 Ind Cas 415 (DB).

——S. 17—Receipt merely acknowledging payment.

A receipt which merely acknowledges payment and refers to the payment as a naked fact does not fall within S. 17 (1) unless the fact is referred to as a consideration for a contractual engagement whereby the interest created by the principal registered instrument is limited or extinguished. AIR (Vol 24) 1937 Nag 402 : 174 Ind Cas 7.

——S. 17 (1) (b) and (c) — Section 17 (1) (c), is very wide in scope. Its simple meaning is that any document which records the receipt of money due on a mortgage or on any other instrument indicated in S. 17 (1) (b) comes within it : (1) A I R (Vol 13) 1926 Lah 220 : 8 Lah L J 73 : 27 Pun L R 140 ; 93 Ind Cas 359 ; (2) AIR (Vol 12) 1925 Lah 348 : 86 Ind Cas 101 Overruled. AIR (Vol 21) 1934 Lah 970 : 36 PLR 211 : 16 L 485 : 156 Ind Cas 376 (DB).

——Ss. 17, 49—Sale — Execution of receipt two months after sale—Receipt, if compulsorily registrable.

Where a sale has taken place two months before the execution of the receipt, the receipt cannot be regarded as a contract of sale. It merely evidences the payment of consideration for a contract, but had been completed two months previously and is, hence, admissible in evidence without registration. Even if it were compulsorily registrable, the payment of money can be proved by oral evidence. AIR (Vol 21) 1934 Lah 472 : 35 P L R 491 : 151 Ind Cas 884.

——S. 17 (1) (c)—Construction of.

Unless a document is clearly brought within the purview of S. 17, its non-registration is no bar to its admissibility. The portion in a receipt for a decree-debt dealing with the release of immovable property is distinct and separate from that acknowledging receipt of the sum paid on account of the decree. The fact that the decree-holder wrote out a receipt for the whole amount and stated by way of addendum that he had given up his title to the property, should not make any difference. AIR (Vol 4) 1917 Lah 90 : 12 P L R 1917 : 39 Ind Cas 15.

——Ss. 17, 49—Promissory note—Letter and memorandum of deposit of title deeds—Necessity of registration—Suit to enforce mortgage—Power to give decree on promissory note.

A executed a promissory note to B. On the next day, there was an agreement to deposit certain title-deeds and on the following day, the title-deeds were sent with a letter expressing the intention of delivering and depositing the same. The promissory note, letter and the memorandum read together contained all the particulars of the transaction. B instituted a suit to enforce the mortgage. In addition to the general prayer for such other and further reliefs, there was a prayer in the plaint for a personal decree if the proceeds were insufficient :

Held, that the letter and the memorandum must be, read together as they were intended to be and so read, they constituted a document within the meaning of S. 17 and as they were not registered the mortgage was invalid for want of registration. AIR (Vol 18) 1931 Mad 124 : 1930 M W N 865 : 32 L W 666 : 60 M L J 309 : 129 Ind Cas 814 (DB).

——S. 17 (b) and (c) — Scope — Registration — Sale-deed—Receipt.

If a document when properly interpreted is an instrument acknowledging the receipt of consideration, on account of the creation of certain rights in immovable property, it falls within clause (c) and not clause (b) of S. 17 of the Act. 57 P W R 1910 : 75 P L R 1910 : 6 Ind Cas 645.

19. Receipt of consideration for an agreement to sale.

——Ss. 17 (1) (c) and 49 (c)—Unregistered document acknowledging receipt of payment of consideration on account of the creation of a lease of immovable property — Admissibility.

The document falling within S. 17 (1) (c) of the Registration Act need not of itself effect the creation of a right, title or interest in immoveable property and it is sufficient for the bar of S. 49 (c) of the Act to operate in respect of such a document, that on account of such creation of interest even though effected otherwise than by the document in question, the document acknowledges the receipt of payment of any consideration. But if the document is not to be received as evidence of any transaction affecting immovable property comprised therein, but only to be received in evidence for the collateral purpose of deciding on its terms, that an anterior contract of lease had come into existence between the parties before the document in question itself came into being, the document is admissible. AIR (Vol 37) 1950 Mad 603 : 63 L W 222 : (1950) I M L J 446.

——S. 17 (2) Expln. — Sale contract — Unregistered agreement for sale—Earnest paid under—Sale-deed to be executed at future date— Agreement if admissible in evidence.

Held, that an unregistered byanapatra under which certain money was paid and which provided that the sale-deed was to be executed at a later date is admissible in evidence. Effect of Amending Act II of 1927 indicated. A I R (Vol 18) 1931 Cal 171 : 34 C W N 881 : 52 C L J 158 (DB).

——S. 17 (1) (c)—Receipt.

A receipt for a certain amount, in lieu of an oral sale of a certain land is only a receipt and not a contract of sale; and this receipt is inadmissible for lack of registration. AIR (Vol 15) 1928 Lah 51 : 28 P L R 604 : 104 Ind Cas 585.

——S. 17—Agreement for sale of immovable property —Earnest money over Rs. 100 paid — Buyer pressing for specific performance — Registration is necessary.

AIR (Vol 14) 1927 Bom 157 : 51 Bom 231 : 29 Bom L R 269 : 101 Ind Cas 155 (DB).

——S. 17 (1) (b) and (c) — Sale — Promise to sell by regular deed and acknowledgment of earnest money.

Section 17 (1) (b) of the Act does not require the registration of a promise to sell by a duly executed deed together with acknowledgment of the receipt of earnest money. AIR (Vol 4) 1917 Lah 43:98 P R 1916 : 37 Ind Cas 132 (DB).

——S. 17 (1) (c)—Receipt acknowledging consideration for sale — If compulsorily registrable.

In the absence of a sale deed or mutation order a receipt executed by a vendee in favour of the vendor acknowledging price of sale of land of the value of more than Rs. 100 requires compulsory registration. AIR (Vol 4) 1917 Lah 109 : 50 P W R 1917 : 39 Ind Cas 44.

——S. 17 (1) (c)—Receipt of earnest money.

Under S. 17 (1) (c) of the Act the receipt of earnest moneys is required to be registered. AIR (Vol 4) 1917 Lah 43 : 98 P R 1916 : 37 Ind Cas 132 (DB).

——S. 17 (1) (b)—Sale—Receipt—Agreement to sell.

Where an unregistered document is a receipt and an agreement to sell, it could be admitted in evidence without registration. (1913) M W N 995 : 14 M L T 495 : 21 Ind Cas 778 (DB).

——S. 17 (1) (c)—Payment before sale.

Receipt for money paid before the actual sale, need not be registered if the sale is not completed on the date of payment. 54 P L R 1910: 6 P W R 1911 : 8 Ind Cas 233 (DB).

20. Endorsements and receipts by mortgagees.

——S. 17 (1) (c) — Receipt showing mortgage extinguished.

A receipt evidencing not merely payment of money, but also extinguishing a mortgage in virtue of a fresh agreement entered into on the sale of the execution requires registration under S. 17 of the Act and is inadmissible without it. AIR (Vol 2) 1915 Mad 914 : (1915) M W N 33 : 26 Ind Cas 360 (DB).

——S. 17 (1) (c) — Un-registered receipt — Admissibility.

Mortgagee passed an unregistered receipt "The bond is returned; no money remains due;" it is admissible so far as it refers to the full payment of

money. The expression "no money remained due" does not extinguish the mortgage. (1912) 34 All 528 : 10 A L J 25 : 16 Ind Cas 179 (D B).

——S. 17 (c)—Agreement extinguishing a mortgage debt.

An agreement extinguishing a mortgage debt and converting the lien under the mortgage bond to one under that document is one that requires to be compulsorily registered under Cl. (c) of S. 17. (1903) 31 C 89 (94) (DB).

21. Receipt itself creating, declaring etc. rights in property.

——S. 17 (1) (c)—Applicability—Mortgage—Part of consideration agreed to be paid later — Receipt for subsequent payment of balance — Registration — Necessity.

Unless a receipt by itself acknowledges receipt of payment of consideration for a mortgage or sale of immovable property, etc., as distinguished from payment or receipt of what is due by the time as a debt, and contains terms amounting to creating, declaring, assigning, limiting or extinguishing any right to or interest in immovable property of the value of Rs. 100 or upwards, it does not require registration under S. 17 (1) (c) of the Registration Act. A receipt acknowledging receipt of balance of consideration money agreed to be paid later on, which is only evidence of payment, cannot be regarded as receipt acknowledging payment of consideration on account of the creation, assignment or extinguishment of an interest in immovable property. The receipt for the payment of balance of consideration can be viewed in the light of an acknowledgment of payment or satisfaction of a debt. AIR (Vol 34) 1947 Pat 300 : 25 Pat 523 : 27 P L T 386 (DB).

——S. 17 (b) and (c) — Sale deed — Receipt.

A document of the following description, "bai karki zar-i-bai kul hum ne wasul paliya hai . . . . . mushtarika ikhtiyar hai kujab chahe registri kara leve lihaza yeh chand haruf bataur rasid ke likh diye hain ke sanad ho" is not a sale-deed falling within Cl. (b) but falls under Cl. (c) of S. 17 and is compulsorily registrable. 73 P L R 1910 : 57 P W R 1910 : 6 Ind Cas 645.

SUB-S. (1) (d)

22. Scope

(a) What is—Test for registration.
(b) Oral agreement to.
(c) Agreement to.
(d) Present demise.
(e) License.

(a) What is—Test for registration.

——S. 17 (1) (b) and (d)—Applicability—Document amounting to lease, but also falling under categories dealt with under Cl. (d)—Duty of Court to class it under Cl. (d)—Interpretation of Statutes.

It is a well-established cannon of construction that when the Legislature enumerates various classes for any specific purpose, if a document falls under one specific class for the purpose of construction, the Court should put that document in that particular class rather than in a wider or more residuary class; therefore, if a document is a lease, although it may also fall under S. 17 (1) (b) of the Registration Act for purposes of Registration Act it must be looked upon as falling under S. 17 (1) (d) and not under Cl. (b). because Cl. (d) deals with a specific class of documents and not general documents which may fall in some other class. AIR (Vol 36) 1949 Bom 402: ILR (1949) Bom 465: 51 Bom LR 788 (DB).

——S. 17 (d)—Test—Ultimate effect of document—Relevancy.

The test of registration of a document is not its ultimate effect but the immediate provision made by the wording employed in a document. The mere fact that the ultimate effect of a document (rent-deed) is to demolish the case of a permanent tenancy cannot make it registrable under S. 17 (d). AIR (Vol 31) 1944 Lah 9: 45 PLR 339: 211 Ind Cas 366 (DB).

——S. 17 (d)—Where a rent note (kabuliyat) is only for a period of six months, it does not require registration according to S. 17 (d) and is admissible in evidence even if unregistered. AIR (Vol 27) 1940 Nag 143: 1940 NLJ 110: 189 Ind Cas 753.

——S. 17—Bazar dues—Lease.

The bazar dues constitute a benefit arising out of the land and, therefore, a lease of bazar dues is a lease of immovable property within the meaning of S. 3 (25) of the General Clauses Act and must be registered under S. 17, Registration Act. AIR (Vol 27) 1940 Oudh 409 : 1940 OWN 782: 1940 AWR 327: 16 Luck 191: 190 Ind Cas 143 (DB).

——Ss. 17 and 49—Quarry lease — Covenant against assignment—Lessee transferring subject to sanction —Transfer not registered.

Held, that it being an interest created in an immovable property of more than Rs. 100, the document was compulsorily registrable under S. 17, and not having been registered, had not affected the property under S. 49. AIR (Vol 25) 1938 PC 20: 18 PLT 1001: 4 BR 198 (2): 1938 ALJ 72: 1938 OWN 158: 47 LW 3: 1938 RD 214: 1938 MWN 145: 65 IA 45: 32 SLR 276: 1938 AWR 19: (1938) 1 MLJ 209: 17 Pat 69: 40 Bom LR 292: 66 CLJ 485: 42 CWN 593: 172 Ind Cas 443.

——S. 17 (1) (d)—Deed of agreement relating to theka for cutting timber.

In determining whether a document has to be registered, one is concerned, not with the object which the transaction relates to, but with the right which the instrument creates or declares. If the right in question amounts to a right, title or interest in immovable property, then the instrument (being non-testamentary) must be registered.

The defendant executed an ikrarnama that he had taken the plaintiff's jungle on theka for cutting teak wood for two years. The instrument dealt with a good deal more than the sale of trees coupled with the right to enter upon the land, in order to cut and remove them. The exact trees sold were not specified nor were they capable of determination. They were to be cut over a period of two years. Only those over 11 inches in girth were to be cut. At least 25 to 30 trees per acre were to be left. These provisions made it impossible to fix the exact subject-matter of the sale beforehand. A time limit was fixed with a provision for a six months' extension. The consideration was Rs. 7,000 and this had to be paid whatever the amount of timber cut, and even if no timber was cut at all. There was a provision for the payment of this sum in instalments and also for the payment of interest. In addition, there was a forfeiture clause in case of default of two instalments with rights of re-entry:

Held, that the document created rights or interests in immovable property itself and required registration under S. 17 (1) (d). AIR (Vol 25) 1938 Nag 497: 1938 NLJ 306: ILR (1939) Nag 81: 181 Ind Cas 825 (DB).

——S. 17 (1) (d)—Lease, what is.

Registration is required of a lease under S. 17 (1) (d) which includes an agreement to lease as well, because of S. 2 (7), but a lease is one complete transaction in itself and when in writing, can be embodied in but one instrument, even though it may consist of several separate documents. Of course, its terms can be subsequently added to, altered, or varied by a distinct new agreement validly entered into, but such agreement must from one complete transaction itself. Until that stage is reached, the rest are but

preliminary negotiations which have no binding effect. AIR (Vol 24) 1937 Nag 289: ILR (1938) Nag 31: 171 Ind Cas 553.

——Ss. 17 (1) (d), 90 (1) (d)—Lease for use and occupation of buildings—Exemption under S. 90 (1) (d).

Each case must be adjudged on its merits. Where the wording of the leases so clearly and definitely refers to the use and occupation of each of the buildings, they must be taken as leases of immovable property falling under S. 17 (1) (d), but not exempt under S. 90 (1) (d) as grants or assignments of an interest in land. AIR (Vol 23) 1936 Lah 26: 38 PLR 770: 161 Ind Cas 918.

——S. 17—Delivery of possession.

Whether the premises were actually occupied or not is immaterial provided possession was given after agreeing to take it on rent.

Delivery of key of a vacated bungalow is a sufficient delivery of possession. AIR (Vol 21) 1934 Pesh 81: 148 Ind Cas 548 (1).

——S. 17—A declaration signed by the Gummastha and Manager of the firm, purporting to set forth the terms of tenancy of the land which on that day had been granted to the firm, is not receivable in evidence without registration being either a lease or counterpart of a lease within S. 17. AIR (Vol 14) 1927 PC 102: 52 MLJ 663: 8 Lah 573: 54 IA 178: 29 Bom LR 870: 31 CWN 677: 1927 MWN 481: 39 MLT 161: 25 ALJ 959: 28 PLR 658: 26 MLW 634: 101 Ind Cas 355.

——S. 17—Not lease.

The right to go and cut and take the bark of trees away from the land, when no further right is given to the person to whom that right has been given, will amount only to a license. It is certainly not a lease. Such a license as that does not require a registered instrument for its creation under any law. AIR (Vol 13) 1926 Mad 978: 24 MLW 340: 1926 MWN 633: 97 Ind Cas 548.

——Ss. 17 (1) (d) and 49—Memorandum—Reclamation lease—Entry into possession—Admissibility of.

Where a person enters into possession of a jungle land under a reclamation memorandum fixing the terms of the tenancy, the memorandum is inadmissible in evidence if unregistered. AIR (Vol 6) 1919 PC 42: 46 IA 279: 37 MLJ 578: 17 ALJ 1061: 1 UPLR (PC) 91: (1920) MWN 160: 24 CWN 369: 11 LW 296: 53 Ind Cas 522.

——S. 17 (1) (d)—Lease constituted by a number of documents.

S. 17 does not apply to a lease constituted by a number of documents none of which can be regarded as a lease if taken singly. AIR (Vol 4) 1917 Mad 712: 35 Ind Cas 108 (DB).

——S. 17 (1) (d)—Dowl—When registrable.

When Dowl is only a memo showing the rent payable by tenants, signature of tenants, and that there had been commutation of rent, it does not require registration, but when it embodied an agreement between landlord and tenant and where it is in essence a lease and creates a tenancy it is compulsorily registrable. (1909) 11 CLJ 22: 2 Ind Cas 89 (DB).

——S. 17—Of limited interest—Rights of permanent lessee—Registration—Admissibility in evidence.

A limited interest such as the interest of a permanent lessee, can be acquired in law by adverse possession. An unregistered permanent lease is inadmissible in evidence to prove the nature of the possession which the lessee had. (1907) 17 MLJ 469: (470, 471): 3 MLT 187 (DB).

(b) Oral agreement to.

——S. 17 (1) (d)—Lease—Oral agreement.

An oral agreement to grant a permanent lease is valid though there is no stipulation as to the time of commencement of the lease. AIR (Vol 6) 1919 Cal 837 : 22 CWN 190 : 50 Ind Cas 177 (DB).

——S. 17 (1) (d)—Oral agreement to lease — Possession under—Ejectment.

Possession of a lessee under an oral agreement to lease which could be specifically enforced against the lessor, cannot be disturbed by the lessor or a purchaser from him. AIR (Vol 2) 1915 Mad 807 : 2 L W 152 : 27 Ind Cas 877.

——S. 17 (1) (d)—Oral agreement to lease—Eviction of lessee—Estoppel.

Where there is only an oral agreement to lease and not a lease registered under S. 17, there is no lease and the supposed landlord is not estopped from evicting the tenant. AIR (Vol 1) 1914 Mad 84 : 24 Ind Cas 790 (DB).

——Ss. 17 (d), 49—Lease, oral—Proof by written evidence—See (1909) 32 Mad 532 (534) : 6 MLT 175 : 4 Ind Cas 1039 (2).

(c) Agreement to.

——Ss. 17 (1) (d) and 49 — Applicability — Agreement to lease effecting actual demise—Admissibility without registration.

Where an agreement to lease immovable property effects an actual demise, it creates a present and immediate interest in the land, and therefore requires registration under S. 17 (1) (d) of the Registration Act, with the result that S. 49 of the Act will come into play and the document would be inadmissible in evidence unless the matter can be brought within the proviso to S. 49. AIR (Vol 36) 1949 Nag 389 : I L R (1949) Nag 849 (DB).

——S. 17 — Agreement to lease on kabuliyat already executed.

Where a compromise is an agreement for a lease upon the terms of a kabuliyat already executed, the terms of the compromise amount to a present demise and therefore, it requires registration before it becomes admissible. AIR (Vol 29) 1942 Pat 323 : 8 B R 547 : 23 PLT 673 : 199 Ind Cas 341 (DB).

——S. 17 — An agreement for payment of a certain sum in consideration of the plaintiff withdrawing his objection to the acquisition of the land is not an agreement to lease and does not require registration. AIR (Vol 21) 1934 Bom 140: 36 Bom LR 174: 151 Ind Cas 156 (DB).

——S. 17—The plaintiff is not debarred from proving the contract by provisions of the Registration Act because, in case of lease, he cannot succeed and in an agreement for lease, he can. AIR (Vol 18) 1931 Nag 89 : 13 NLJ 222 : 27 NLR 288: 132 Ind Cas 455.

——S. 17 (1) (d)—Lease — Miscellaneous — Letters containing an agreement to lease must be registered.

P sued D for rent on account of a lease of certain shop. To prove that the lease was for three years (which D denied) P sought to prove two unregistered letters which were as follows : (1) With reference to our conversation that we recently had, you should alter the three shops herein described by making them into one shop of which I will pay Rs. 165 per mensem with house tax, and I shall require you to execute an agreement for three years. Possession is to be given on 31st December 1921. Therefore please proceed with repairs and amalgamate the three shops into one. (2) I have received your letter of 26th December 1921, and I agree to what you write. I have given you three shops at Rs. 165 per mensem including house-tax. I will execute an agreement for three years as from 31st December 1921, whenever you like. Possession will be given from 31st December 1921.

Held, that the two letters amounted to an agreement to lease and therefore required registration, without which they could not affect the property or be received in evidence. Nor could an oral agreement

prior to the letters be admitted in evidence under S. 91, Evidence Act. AIR (Vol 17) 1930 Lah 675 : 12 LLJ 77.

——S. 17—Agreement to lease.

Where the terms of a document show that it is not a present demise, it does not require registration as a lease-deed. AIR (Vol 17) 1930 Pat 601 : 129 Ind Cas 81 (DB).

——S. 17 — Compulsory registration applies to an amaldari lease which contains all the essential terms of a lease. The real test is whether the document purports to be a lease or an agreement to lease or not. If it does not amount to a lease it does not require registration. AIR (Vol 12) 1925 Cal 370 : 82 Ind Cas 949.

——S. 17—Receipt embodying terms of a lease must be registered, where it amounts to an agreement to lease.

The plaintiff came into Court on the strength of a document by which he alleged that defendant No 1 on the 8th May 1917, acknowledged receipt of Rs. 25 as earnest money and agreed to lease plaintiff some land for five years on an annual rental of Rs. 180. The terms of the lease, its duration, the annual rent and the date on which possession was to be given were set forth in detail in the document, which was clearly an agreement to lease.

Held, that in a view of S. 2 (7) and S. 17 (1) (d) the document must be registered. AIR (Vol 11) 1924 Lah 27 : 4 Lah 44 : 5 LLJ 257 : 73 Ind Cas 927 (DB).

——S. 17 —'Agreement to lease embodied in letter—Registration is necessary.

Where a letter in terms states that the letter really embodies the terms and conditions agreed upon in respect of the lease to be executed and that it is the letter which is to be the binding formal unalterable record of the conditions and where the party treated it as the agreement itself, it requires registration under S. 17, and S. 2, Definition. AIR (Vol 10) 1923 All 112 : 45 All 220 : 71 Ind Cas 452 (DB).

——Ss. 17 (1) (d) and 49—Agreement to lease—Creation of future rights.

An agreement, that upon the happening of a future uncertain event a lease will be granted of certain lands, is not an "agreement to lease" within S. 2 (7) of the Registration Act, and does not require registration under S. 17 (1) (d). To fall within these provisions, a lease or agreement to lease must be a document which effects an actual demise and operates as a leases in praesenti. AIR (Vol 6) 1919 PC 79 : 24 C WN 177 : 46 I A 240 : 37 MLJ 525 : 17 A L J 1117 : (1920) MWN 66: 27 MLT 42: 11 LW 301: 53 Ind Cas 534.

——S. 17 (1) (d)—Agreement to lease—Receipt containing agreement to accept rent-deed, if compulsorily registrable.

A document which, besides being a receipt for money paid, contains an agreement to accept a rent-deed, is an agreement to lease and is inadmissible in evidence without registration. AIR (Vol 3) 1916 Mad 1170 : 29 Ind Cas 246 (DB).

——S. 17 (1) (d) — (1877), S. 17 (h) — Amalnamah—Construction of.

Where the intention of the parties to an Amalnamah was that as soon as possession was taken under the document, the title of the grantee should commence held, that it was an agreement to lease within S. 17 (h) of the Act and that it was therefore compulsorily registrable. AIR (Vol 1) 1914 Cal 300: 18 CWN 38 : 19 CLJ 464 : 20 Ind Cas 907 (DB).

——S. 17 (1) (d)—Unregistered lease — Admissibility in evidence to prove agreement to lease.

A compulsorily registrable lease which is unregistered is admissible in evidence in a suit to enforce specific performance of the contract which must be deemed to have precluded the execution of the lease. (1910) 12 CLJ 464 : 8 Ind Cas 794 (DB).

——S. 17 (1) (d) — Agreement to create lease in future.

An agreement to create a lease on a future day on terms to be settled by documents to be executed hereafter, is not a lease and does not come under Cl. (h) and need not be registered. (1910) 37 Cal 808: 14 CWN 874 : 6 Ind Cas 443 (DB).

——S. 17 (1) (d)—Agreement to lease—Admissibility in a suit for specific performance.

An agreement for lease in writing which requires registration, cannot be received in evidence in a suit for specific performance of such agreement, whether the possession was or was not granted under the agreement: 17 MLJ 218, Overruled. (1910) MWN 743 : 35 Mad 63: 21 MLJ 44: 9 MLT 142: 8 Ind Cas 520 (FB).

(d) Present demise.

——S, 17 (1) (d) — Lessor put in possession— Parties acting on tenancy.

Where possession of the property was given under the agreement to lease and from that date the parties acted exactly as though the tenancy was in force, the fact that the tenancy was to commence at a date subsequent to the agreement does not, of course, prevent there being a present demise and the contract contained in the writing requires registration. That a formal lease was contemplated by the parties does not prevent the agreement being a present demise. AIR (Vol 28) 1941 Bom 346 : 43 Bom L R 603 : ILR (1941) Bom 529 : 198 Ind Cas 188 (DB).

——S. 17 (1) (d)—Lease—Present demise.

A letter from D to P was to the following effect that the writer agreed to take a lease from the addressee. The lease was to be for a period of five years; that the rent for each month was to be paid by the writer in advance on the first day of the month and that the writer had given a cheque for Rs. 151 which sum was to be kept by the addressee as a deposit during the continuance of the lease. The premises were referred to as demised premises. A formal lease was to be executed between the parties with a proviso for re-entry in case of default in payment of rent or breach of conditions agreed upon :

Held, that it was immaterial whether possession had passed or not. The agreement arrived at, as set out in the letter, constituted a present demise of land and the condition that a formal lease was to be thereafter drawn up and executed was in the nature of a further assurance only. The letter fell under S. 17 (1) (d) and S. 49 and was inadmissible in evidence for want of registration. A I R (Vol 17) 1930 Bom 210 : 32 Bom L R 188.

——S. 17—Scope.

Where the terms of the lease show that it is not a present demise, it does not require registration. A I R (Vol 17) 1930 Pat 601 (DB).

——S. 17—No present demise — Registration not necessary.

A written agreement to grant a lease after calculation of the area of the land and giving the lessee permission, to take possession, not for his immediate use but for clearing the jungle in order that the land might be measured is not a present demise of the land and does not require to be registered. A I R (Vol 16) 1929 Cal 186 : 49 CLJ 12 : 116 Ind Cas 630 (DB).

——S. 17 — Where only on the happening of some contingent event a demise is intended to come into existence, it does not amount to a document operating as a present demise and thus requires no registration for admissibility. AIR (Vol 14) 1927 Mad 699: 101 Ind Cas 836.

——S. 17 — Terms of lease to commence in future — Formal document not executed— Lease can still be a

"present demise." 14 CWN 65, Dissented. AIR (Vol 12) 1925 Cal 1087 : 52 Cal 695 : 91 Ind Cas 320.

——S. 17 — Document — Construction of — Wards indicative of present demise — Document is a lease deed.

A document purporting to create a lease ran as follows : — "And be it known hereby that if the lessors transfer this house by sale before this term of five years, then a notice will have to be given to me six months beforehand and the Salami money which is paid for a period of five years will have to be returned to me proportionately taking into consideration the number of months before the expiry of which the house is sold." It purported to be in the form of a memorandum of agreement but in its operative clause it used the language of a present demise for 5 years :

Held, it was lease within the meaning of S. 17 (1) (d) of the Act. AIR (Vol 9) 1922 Cal 436 : 49 Cal 507: 26 CWN 329 : 69 Ind Cas 877.

——S. 17—Mere agreement to lease — No present demise— No registration is necessary. AIR (Vol 8) 1921 Bom 200 : 45 Bom 8 (DB).

——S. 17—No present demise — Registration not necessary.

An agreement to lease which does not effect an immediate demise is admissible in evidence, although it is unregistered, in a claim for damages for failure to give the lease as promised. 35 Mad 63 (FB), held not good law. AIR (Vol 8) 1921 Mad 72: 44 Mad 399: 13 MLW 327 : 1921 MWN 145 : 40 MLJ 161 : 62 Ind Cas 354 (DB).

——S. 17 (1) (d) — Memo of arrangement— Admissibility in evidence.

A memorandum embodying an arrangement for reclamation of land is not a demise of property and is admissible in evidence without registration. Where there is no provision in it for enhancement of rent after a certain maximum, held, that the tenure is not enhanceable after the specified maximum is reached. A I R (Vol 2) 1915 Cal 54 : 19 C W N 56 : 25 Ind Cas 274 (DB).

(e) Licence.

——S. 17 (1) (d)—License.

Obiter.—A license, whether revocable or not, does not in itself create an interest to or in immovable property. A I R (Vol 25) 1938 Nag 497 : 1938 N L J 306 : ILR (1939) Nag 81 : 181 Ind Cas 825 (DB).

——S. 17 — A grant of right to collect and remove leaves for certain period is license with grant amounting to profits a prendre and requires registration under S. 17 (1) (b). AIR (Vol 25) 1938 Nag 377 : ILR (1939) Nag 432 : 181 Ind Cas 126 (DB).

——S. 17—No registration necessary—License.

A license which is not a lease does not require compulsory registration. (1929) 30 PLR 746 : 120 Ind Cas 673 (DB).

23. Term of lease.

——Ss. 17, 49—Unregistered lease-deed—Admissibility to prove terms.

Where the terms of a lease which could be effected by an oral agreement accompanied by delivery of possession have been embodied in a written document, the document can be referred to for finding out the terms of the lease even if it is unregistered. A I R (Vol 18) 1931 Mad 352 : 60 M L J 293 : 33 L W 763 : 131 Ind Cas 621.

——S. 17 (1) (d)—Dastak allowing tenant to take possession.

A "Dastak" which merely allows the tenant to take possession of the land and cultivate, is not a lease for a term exceeding one year, or a lease from year to year reserving a yearly rent, and is not compulsorily registrable. (1909) 13 C W N 267 : 4 Ind Cas 511 (DB).

24. Year to year

——S. 17 (1) (d) — Fact that lease covered by S. 17 (1) (d) is embodied in decree.

If there is a lease of an immovable property from year to year or for a term exceeding a year reserving a yearly rent, the fact that it is embodied in a decree will not save it from the necessity of registration. A I R (Vol 27) 1940 Bom 281 : I L R (1940) Bom 480: 42 Bom L R 501 : 190 Ind Cas 653.

——S. 17 (1) (d)—Lease from year to year or reserving yearly rent.

Where a lease is for a fixed period of one year, the mere fact that a fixed rent is to be paid under the lease for the year to which it relates does not make the lease a lease from year to year or reserving a yearly rent. A I R (Vol 26) 1939 Lah 234 : 41 P L R 29 : 182 Ind Cas 952.

——S. 17 (1) (d) and 49—Unregistered lease.

An unregistered lease for three years is admissible in evidence to prove a tenancy or its terms but payment and receipt of rent by lanlord may be proved to establish tenancy from year to year and the rents. AIR (Vol 4) 1917 Mad 735 : 3 L W 408 : 30 M L J 492 : (1916) 2 M W N 79 : 34 Ind Cas 6 (DB).

25. For any term exceeding one year.

——Ss. 17 (1) (b) and (d) and 17 (2) (vi) — Compromise decree creating lease for term exceeding one year.

Per Nasim Ali and Pal JJ.—(In Letters Patent appeal):—A compromise decree in a rent suit by which lease is created for a term exceeding one year at an annual rent is compulsorily registrable under S. 17 (1) (d). It is not protected from registration under S. 17 (2) (vi). It does not come under cl. (b) as cl. (b) refers to certain non-testamentary instruments while cl. (d) specifically refers to leases. AIR (Vol 31) 1944 Cal 89: 212 Ind Cas 317 (DB).

——S. 17 (1) (d) — Fishery rights constitute immovable property. Under S. 107 of the T. P. Act, a lease of fishery right for any term exceeding one year can be made only by registered instrument. A I R (Vol 29) 1942 Oudh 93 : 1941 O W N 1065 : 17 Luck. 205 : 1941 R D 883 (2) : 1941 A W R 823 : 196 Ind Cas 237 (DB).

——S. 17 — Where a patta is for one year only, the fact that it contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the patta into a lease for more than one year so as to require registration. A I R (Vol 27) 1940 Mad 379 : 51 L W 366 : (1940) 1 M L J 391 : 1940 M W N 333 : I L R (1940) Mad 487 : 188 Ind Cas 136 (FB).

——S. 17—Lease for 7 years is compulsorily registrable. (1936) 38 P L R 590.

——S. 17 (1) (d) — A executed a lease to B for six years. The document began by describing itself as a lease and reciting the annual amount of lease money but it was also finally described as a mortgage :

Held, on a construction of the deed that it was a lease for a term and not a mortgage. A I R (Vol 20) 1933 Lah 786 : 149 Ind Cas 509 (DB).

——S. 17—Lessee at liberty to continue occupation.

Where a lease deed which was signed by the lessee and not by the lessor, inter alia, contained the term by which the binding period was only six months and lessee was at liberty to continue occupation :

Held, that the document provided for two agreements, one of them being a lease for a period of six months binding on both parties, and the other an agreement permitting the tenant to continue in occupation so long as he wished but subject to his tenancy being terminated at the wish of the lessor in the event of the lessor selling the property.

Held, also that the document was not a lease properly so called and did not fall within S. 105, Transfer of Property Act.

Held, further, that treating the document as evidence of a lease for six months, it did not require registration under S. 17 (d). A I R (Vol 19) 1932 Sind 217 : 26 S L R 377 : 140 Ind Cas 681 (DB).

——S. 17 (1) (d) — Lease — Exceeding one year — Lease is compulsorily registrable.

A sarkhat between N and K provided that K had taken the shop on rent for a period of two years, and that if K vacated the shop before the expiry of two years, he would be liable to pay the rent, water rate and house tax in respect of the unexpired portion of the term for which the shop had been let, K vacated the shop before expiry of two years and N brought a suit claiming rent. water tax and house tax for the unexpired period. The sarkhat in question was not registered.

Held, that sarkhat was a lease as defined by Registration Act and it being not registered although the lease was for more than one year it was not admissible in evidence to prove N's claim which was based essentially on the terms of the contract embodied in the sarkhat and so K was at liberty to leave the shop at any time he liked and N could not make K liable as he could not prove the contract.

Held further : that if N's claim had been for compensation for the use and occupation by K of N's shop the sarkhat would 'have been admissible in evidence for determining the amount for which the shop could be let. AIR (Vol 16) 1929 All 831 : 1929 A L J 1134 (DB).

——S. 17—The word "year" in S. 17 (d), Registration Act, means a year according to the Gregorian calendar and if the lease relates to a period for more than one year it is compulsorily registrable under S. 17, Registration Act. A I R. (Vol 15) 1928 Nag 27 : 23 N L R 152 : 10 N L J 169 : 105 Ind Cas 43.

——S. 17—Document embodying lease for two years signed only by lessee — It is a lease within S. 2 (7) though not under S. 105, Transfer of Property Act.

Where a document purporting to be a lease for a period of two years is signed only by the tenant and not by the lessor it cannot have the effect of a transfer of right to enjoy property and therefore it is not a lease within S. 105 of Transfer of Property Act. Nevertheless it is clearly within the definition of a lease given in S. 2 (7) of the Registration Act and hence is compulsorily registrable : 32 Mad 532, Diss. from. A I R (Vol 14) 1927 Rang 169 : 5 Rang 95 : 102 Ind Cas 105.

——S. 17 — Lease of immovable property for a term of years is to be registered.

Where a document provided "You will have an authority during the term of the contract to pluck or purchase both crops yourself or to give others permission to pluck or purchase them and if you are unable to purchase their goods yourself then you are to allow the other traders who have purchase' goods to take them out after levying the tax according to the assessment rules of the estate."

Held, that the document amounted to a lease of immovable property for a term of years and required registration. The document meant that nobody could gather or purchase any of the produce without the grantee's permission, which would of course be taken for granted in the case of the "forest people" who gathered it, and that "unable to purchase" meant only "do not choose to purchase". AIR (Vol 13) 1926 Nag 466 : 95 Ind Cas 824 (DB).

——S. 17—A lease for a term exceeding one year to the validity of which a registered deed is necessary cannot be proved by an oral contract of lease. A I R (Vol 13) 1926 Nag 147 : 89 Ind Cas 1019.

——S. 17—Lease for one year or for term of years — Test is whether there is a present demise for a year only or otherwise.

A lease deed which was on the face of a lease for one year only provided "If you do not pay the rent year by year at the expiry of the term, we will settle the joti elsewhere or bring the lands in our possession; To this you will not be able to make any objections. You will not get credit for any rent which is paid without obtaining a receipt and even after the expiry of the term of this pattah, if you pay to us, year by year the settled rent, without objection, we will not settle the said land elsewhere. To this effect we give settlement by this anumali pattah for the year 1920 B. S. for a term of one year.

Held, that the test to be applied in determining whether a lease is for a term of years or not, is whether there was a present demise for a year only, or for a period of more than one year.

Held further that in the present case there was no demise for a longer period than one year and that although the tenant had the option at the end of the term of one year to continue his tenancy, that did not make the lease a lease for a longer term than one year. A I R (Vol 10) 1923 Cal 670 : 37 C L J 475 : 70 Ind Cas 570 (DB).

—— S. 17 (1) (d)—Correspondence.

Where correspondence consisting of a number of letters goes together to make up a lease of immovable property for more than one year, that correspondence is a lease and requires registration. AIR (Vol 4) 1917 Mad 274 : 3 L W 370 : 30 M L J 519: (1916) 1 MWN 373 : 19 M L T 377 : 33 Ind Cas 439 (DB).

—— Ss. 17 (1) (d) — Agreement to take a lease — Inadmissibility owing to want of registration.

A proposal in writing if accepted in writing becomes a lease or at least an agreement to lease and if it is for a period of more than one year it is compulsorily registrable. The fact that the parties intended to execute formal instruments does not entitle them to rely upon an unregistered instrument which is in itself operative as a lease. AIR (Vol 4) 1917 Nag 199: 42 Ind Cas 629.

——S. 17 (1) (d) and (b)—Lease for two years—Enjoyment of toddy—Undertaking not to cut leaves.

A document purporting to be a "lease for two years . . . . . for enjoyment of toddy, palmyra fruit, etc., the palmyra trees" in a garden but whereby the leaves of any could not be cut is neither a lease of immovable property nor one creating an interest therein. AIR (Vol 1) 1914 Mad 362 : 38 Mad 893: 15 M L T 237 : (1914) M W N 327:23 Ind Cas 102 (DB).

——S. 17 (1) (d) — Kabuliyat for indefinite period—Act (XX of 1866), S. 17.

A kabuliyat that is executed not for any period expressly but, which shows from its contents more than one year, requires rigistration and if not registered is not admissible in evidence. (1911) 8 A L J 609 : 10 Ind Cas 314.

——S. 17 (1) (d)—Lease exceeding one year — Registration.

A lease, under which the lessor agrees to let his premises for a period of one year and also agrees "not to increase the rent nor to have the premises vacated for further two years if the said tenant wish to occupy it for that period" is not compulsorily registrable under the provisions of S. 17 (d). (1906) 8 Bom L R 580 (583) (DB).

26. Lease for a term with a provision for renewal or for continuation thereafter.

——S. 17 (1) (d) — Lease only for one year with option to landlord to allow tenants to continue to live thereafter.

A lease for one year certain, with the option to the landlord to permit the tenants to continue to live

thereafter is not a tenancy from year to year or for the term exceeding one year or for an indefinite period in which yearly rent had been reserved and does not require registration. AIR (Vol 27) 1940 Lah 409 : 42 P L R 442 : 190 Ind Cas 493 (DB).

27. Lease entitling lessee to hold as long as he pays rent or as he may wish.

——**S. 17—Lease entitling tenant to hold on so long as he pays rent—Lease must be compulsorily registered.**

Where in a lease nothing remains to be done by the tenant, no fresh document being required nor any notice having to be given and the tenant is entitled to hold on so long as he continues to pay the stipulated rent or render the stipulated service, the tenancy is one for a period exceeding one year and the lease must be registered compulsorily under S. 17 (1) (d) : (Case law considered.) 123 Ind Cas 293: AIR (Vol 17) 1930 Sind 178.

——S. 17—Where a written lease which enabled the tenant to continue in possession so long as he paid his rent was substituted for a former lease limited to a year.

Held, it amounted to a totally fresh lease and could not be said to be one simply varying the terms of the former lease limited to a year, and therefore it was inadmissible in evidence for want of registration. (1921) 66 Ind Cas 904 : 3 L L J 14.

——**S. 17—Darkhast for lease—Endorsement granting application—Lease not exceeding five years nor reserving rent exceeding Rs. 50—Compulsory registration—Incidents attached by custom, effect of, on registration.**

The criterion for the necessity of registration of a document is what is expressed on the face of the document and not what incidents attach by custom to a transaction of the kind mentioned in the document. Where, upon a darkhast application for the grant by lease of certain lands the manager of the temple to which the lands belonged made an endorsement granting the application and the endorsement was communicated to the applicant.

Held, (1) that such endorsement was an agreement to lease and was subject to the provisions of the Registration Act as if it were a lease ; (2) that such agreement in terms not purporting to be for a period exceeding 5 years and not reserving a rent exceeding Rs. 50 per annum did not require registration under the Registration Act; (3) that the fact that by custom, if any, a lease of this kind would entitle the grantee to hold permanently did not render registration necessary. (1903) 13 M L J 356 : 27 M 43 (44, 45) (DB).

28. Lease for indefinite period.

——S. 17—A lease for an indefinite period does not require registration if it is not in express terms for a period exceeding one year. AIR (Vol 15) 1928 Lah 937 : 113 Ind Cas 543.

——S. 17—Lease for an indefinite time fixing yearly rent but making it payable half-yearly is compulsorily registrable. 88 Ind Cas 872 : 6 Lah 319 : 7 L L J 504: 26 P L R 483 : AIR (Vol 12) 1925 Lah 491 (DB).

——**S. 17 — Lease granting mokarari interest for indefinite period at fixed rent, must be registered if effected in the form of a Sanad.**

A lease of immovable property granting mokarari interest for an indefinite period at a fixed rent need not be in writing. It may be effected by oral agreement in which case no question of registration arises and the lease may be proved in the same way as any other verbal agreement, and even documentary evidence may be admissible in support of the oral agreement, but if the lease or grant is in the form of a document (as in this case by a Sanad) then the only evidence admissible in proof of the terms of the document is the document itself and unless it is registered even the document itself cannot be admitted in evidence as proof of any transaction affecting the property. 79 Ind Cas 26 : 3 Pat 349 : 1924 P H C C 185 : 5 P L T 541 : AIR (Vol 11) 1924 Pat 641 (DB).

——S. 17—Lease for an undefined number of years but not certain to last for more than one year—S. 17 (d) does not apply. 65 Ind Cas 836 : 20 A L J 211 : AIR (Vol 9) 1922 All 54 (DB).

——**S. 17 (1) (d) — Lease for an indefinite period—Registration, if necessary.**

Only a lease for more than a year or from year to year in express terms is compulsorily registrable and a lease for an indefinite period which could be terminated by either party at the end of any month need not be registered. 97 P R 1915 : 193 P W R 1915 : 32 Ind Cas 35 : AIR (Vol 3) 1916 Lah 353 (DB).

——**S. 17 (1) (d)—Lease for an indefinite period at an annual rent for less than 50 Rs. :**

A lease for an indefinite period at an annual rent is one for a term exceeding five years, for either party might determine it before the expiry of five years. As the annual rent was under Rs. 50 registration was optional. (1901) 24 M 421 (426) (DB).

29. Lease from month to month.

——**S. 17—Lease reserving monthly rent need not be registered.**

When an entry in the plaintiff's book showed that the plaintiff, let a hut to the defendant who agreed to pay Re. 0-8-0 per mensem by way of rent and in the event of a default in the payment of the rent, the tenant was liable to be ejected with a further provision that Rs. 6 was to be paid by him at the time of Nimani. Held, that the lease reserved a monthly rent, and that it was not a lease from year to year or lease for a period exceeding one year and did not need registration. AIR (Vol 9) 1922 Lah 43 : 2 Lah 300 : 4 L L J 1 : 110 P L R 1921 : 27 P L R 1922 : 65 Ind Cas 254 (DB).

——**S. 17 — Lease on monthly terms — Registration not necessary.**

A lease of a hut or house for Re. 0-8-0 per mensem with a provision for ejectment if the rent be not paid, and that though the rent is payable monthly, it shall be actully paid at Nimani each year; and the first payment of Rs. 6 was to be made some 5 or 6 months after the commencement of the lease, is a lease on monthly terms and does not require registration. AIR (Vol 8) 1921 Lah 98 : 3 L L J 222 : 60 Ind Cas 226.

30. Perpetual lease.

——**S. 17 — Kabuliyat declaring rights in property of more than Rs. 100 to be registered.**

A built a house on site belonging to B, a Sardar, and executed an agreement as follows: "The house which I have built at my own expense I am not entitled to sell or mortgage. I will pay the Sardar annas eight every six months. The Sardar will not be entitled to eject me." The house was worth more than Rs. 100.

Held, that the document is either a kabuliyat and would require registration as it creates a perpetual tenancy, or at best it was a document declaring rights in property of more than Rs. 100 and it would need registration even if it were not a lease. AIR (Vol 14) 1927 Lah 497 : 9 L L J 281 : 28 P L R 640 : 103 Ind Cas 516.

——S. 17 — Lease in perpetuity of sir land for premium over Rs. 100 must be registered — If unregistered, the tenancy is from year to year and landlord desiring to eject must return the premium amount according to S. 65, Contract Act. AIR (Vol 14) 1927 Nag 353 : 102 Ind Cas 305.

——**S. 17 — Hukumnama creating perpetual lease, but unregistered is not admissible in evidence.**

An unregistered document, with a stamp of one anna affixed thereon and purporting to create a lease without fixed terms is of the nature of a perpetual lease. Such a document comes well within cl. (d) of S. 17 of the Registration Act under which it is compulsorily registrable. Such document is inadmissible in evidence under S. 49 (c) of the Act. AIR (Vol 9) 1922 Pat 265 : 1922 P H C C 10.

31. Tenancy at will.

——S. 17 (1) (d) — Lease — Year to year—Tenancy-at-will—Need not be registered.

A lease containing a provision for annual rent but reserving the power of the landlord to determine the lease at the end of the year or even before and the tenants agreeing to deliver possession whenever possession would be demanded is a lease of immovable property not from year to year but constitutes a tenancy-at-will and does not require registration. (1929) 118 Ind Cas 702 : 31 Bom L R 335.

——S. 17 (1) (d) — Applicability.

Where a lease provided for cultivation of land yearly by the lessees, giving the landlord power of re-entry on occurrence of a particular named event, and there was no date fixed for the expiry of the tenancy, held, that this was not a lease giving the landlord authority to resume possession at his will and was therefore compulsorily registrable. Test is whether the option to terminate the lease is with the tenant or with the landlord. AIR (Vol 4) 1917 Bom 274 : 41 Bom 458 : 19 Bom L R 285 : 39 Ind Cas 625 (DB).

——S. 17 (1) (d) — Rent—Note embodying tenancy-at-will — If compulsorily registrable.

A rent-note evidencing a tenancy-at-will and for no fixed term terminable at the option of the lessor does not require registration. AIR (Vol 3) 1916 Nag 114 : 13 N L R 30 : 39 Ind Cas 58.

32. "Reserving a yearly rent."

——S. 17 (1), Proviso and S. 17 (1) (d)—Punjab Government Notification No. 29 of July 4, 1888 — The word "reserve"—Meaning of.

The word "reserve" in S. 17 (1) (d), and also in the Punjab Government Notification No. 29 of July 4, 1888, is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee and in common parlance, it is equivalent to the word "fix." AIR (Vol 28) 1941 Pesh 30 : 193 Ind Cas 786 (DB).

——S. 17—Lease.

A lease for a fixed period of one year for a specified sum does not become a lease of immovable property reserving a yearly rent. (1940) 42 P L R 75.

——S. 17—Rent-note.

In case of a tenancy-at-will, even though the rent is fixed, and is payable annually, the document is not subject to compulsory registration. The mere recital that rent is to be paid annually will not make the document in question compulsorily registrable:

Held, on facts that the document in question was receivable in evidence notwithstanding the fact that it was not registered.

Held, also that in any event, the document, even though compulsorily registrable, could be used for a purpose, viz., to determine the nature of the possession of the executants. AIR (Vol 26) 1939 Lah 558 : 41 P L R 646 : 186 Ind Cas 106.

——S. 17—Lease for one year only.

The very words "reserving a yearly rent" in a lease negative the contention that a lease for one year only was contemplated under cl. (d), S. 17. AIR (Vol 21) 1934 All 902 : 18 R D 313:152 Ind Cas 757.

——S. 17 (1) (d)—Lease — Reserving yearly rent.

Mere recital of annual rate of rent in a lease does not make it one reserving yearly rent. (1926) 92 Ind Cas 526 (Lah).

——S. 17 (1) (d)—Lease for one year — Rent fixed — Meaning of.

A lease for one year with a fixed rent does not create tenancy from year to year, or one reserving a yearly rent so as to require registration under S. 17 (1) (d). AIR (Vol 4) 1917 L B 133 : 10 Bur L T 109 : 36 Ind Cas 378.

——S. 17, cl. (d) — Annual rent reserved—Lease.

The clause means that if an annual rent is reserved it should not exceed Rs. 50; and not that annual rent must be reserved. It is doubtful whether where in a lease for a term of less than 5 years a consolidated rent, say a thousand rupees, is fixed, it can be said that because there is no annual rent, the annual rent reserved does not exceed Rs. 50. (1911) 34 Mad 90 : 8 M L T 103 : (1910) M W N 395 : 6 Ind Cas 382 (DB).

——S. 17 (1) (b) and (d)—Lease—Registered lease — Subsequent unregistered agreement to take less—Inadmissible in evidence.

Where there is a registered lease fixing a yearly rent, a subsequent unregistered agreement to take less than the amount fixed is inadmissible in evidence. 41 Cal 493 : 40 I A 223 : 26 M L J 25 : 15 M L T 68 : 19 C L J 95 : 18 C W N 66 : (1914) M W N 1 : 16 Bom L R 42 : 21 Ind Cas 750 (PC).

33. Proviso to clause (d).

——S. 17 (1) (d)—Notification under proviso—Lease for three years reserving Rs. 400 as rent for third year only.

Where a lease deed for a period of three years provided that no rent was payable for the first two years and fixed Rs. 400 as the rent for the third year:

Held, that the deed fell within the notification issued by the Madras Government under the proviso to S. 17 (1) (d) and was not compulsorily registrable. AIR (Vol 22) 1935 Mad 305 : 41 L W 351 : 1935 M W N 605 (1) : 156 Ind Cas 825.

——S. 17 (1) (d) — Notification by Govt. — Registration Act subsequently coming into force—Effect of.

Government issued a notification exempting certain agricultural lease from registration in 1885 and the notification was neither modified nor cancelled after passing of the Regn. Act of 1908.

Held, the notification was still in force in view of S. 24 of the General Clauses Act (X of 1897) and the unregistered lease was admissible in evidence. AIR (Vol 1) 1914 All 554 : 12 A L J 792 : 28 Ind Cas 577 (DB).

——S. 17 (1) (d) — Proviso—Rent in kind.

The proviso to S. 17, Cl. (1) (d), of the Registration Act, is not confined to cases where the rent is payable in money; it applies also where the rent is wholly or partly payable in grain. (1912) 11 M L T 405 : (1912) M W N 918 : 15 Ind Cas 682 (DB).

——S. 17 (2) (d)—Proviso

The proviso does not apply unless the law reserves an annual rent. (1910) 33 Mad 216 : 7 M L T 30 : 4 Ind Cas 303.

——S. 17 (d) Proviso — Applicability.

The proviso to S. 17 is not applicable to leases not reserving an annual rent. The proviso exempts lease for a tenure and reserving as rent provided the term does not exceed 5 years and the rent Rs. 50. (1909) 33 M 216 (217) : 7 M L T 30 : 4 Ind Cas 303.

34. Lease by Government.

——S. 17 (1) (d) — Lease — Applicability.

There is no reason why a lease of Crown lands granted by the Secretary of State, whilst acting under the powers conferred upon him by status as the representative of the Crown, should be treated as a lease granted by a private individual and therefore subject to registration. AIR (Vol 14) 1927 Pat 319 : 6 Pat 446 : 104 Ind Cas 209 (DB).

35 Variation of lease.

——S. 17 (1) (d)—Document not creating new lease but merely altering amount of rent provided in previous lease.

Where there is a variation in the terms of the lease about the rent, the document containing those terms does not require registration as a new lease.

Where a document provides that in addition to the stipulated rent, (which is varied), the tenant agreed to pay the Govt. revenue, local fund tax and any other Govt. tax which may be imposed, this is not a condition varying any other terms of the lease but only varying the amount of the rent payable by the tenants. The case, therefore, is not covered by S. 17 (1) (d), Registration Act, and the document does not require registration. AIR (Vol 27) 1940 Bom 281: ILR (1940) Bom 480 : 42 Bom L R 501 : 190 Ind Cas 653.

——S. 17 — If one wishes to vary the rent on which the land is held under a registered lease, it should be by a registered instrument whether the previous lease was compulsorily registrable or not. AIR (Vol 26) 1939 Cal 416: 69 C L J 163 : 183 Ind Cas 62.

——S. 17—A document varying the amount of rent payable under a registered darpatni lease must be registered. AIR (Vol 25) 1938 Cal 172 : 65 C L J 590: 174 Ind Cas 790 (DB).

——S. 17 — Compromise varying and defining terms of existing tenancy.

A compromise which merely varies or defines some terms of a tenancy which is already existing does not require registration and is admissible in evidence without registration. AIR (Vol 20) 1933 Pat 457 : 148 Ind Cas 353.

——S. 17 — An agreement permanently varying the terms of a tenancy to the benefit of the tenant is really a new lease on more favourable terms and requires registration. AIR (Vol 18) 1931 Mad 751 : 135 Ind Cas 345.

——S. 17 — Compromise varying terms of registered lease with regard to rent, must be registered although duly recorded by Court. AIR (Vol 16) 1929 Lah 291 : 11 L L J 50 : 30 P L R 112 : 117 Ind Cas 240 (DB).

——S. 17 (1) (d) — Landlord and tenant — Compromise petition varying rate of rent whether admissible without registration.

A document which embodies a contract for variation of rent in respect of a lease is in essence a lease and is compulsorily registrable. If not registered, it is inadmissible in evidence and does not even constitute a valid and operating contract between the parties. AIR (Vol 5) 1918 Cal 807 : 27 C L J 107 : 41 Ind Cas 804 (DB).

——S. 17 (1) (d) — Agreement to vary rent — Registration—Compulsory.

Agreement to reduce rent payable under a registered lease must be registered and a letter to the effect cannot be admitted in evidence under S. 49 of unregistered. (1912) 16 Ind Cas 52 (Cal) (DB).

——S. 17 (1) (d)—Agreement to reduce rent.

A document embodying an agreement for reducing the rent as per previously existing lease registered under the Act, must be registered and also a document varying the amount of rent under a previous lease registered as before and also the incidents of such payments must also be registered. (1912) 39 Cal 284 : 14 C L J 411 : 16 C W N 55 : 12 Ind Cas 728 (FB).

——S. 17—Unregistered letter varying the terms of lease — Rent payment of, at reduced rate for some time effect of.

A letter addressed to a lessee by a lessor, containing all the essentials of a lease is inadmissible in evidence to prove the reduction of rent for want of registration. Even if the letter be treated as an agreement for reduction of the rent it is in effect an agreement purporting to limit an interest in an immoveable property. The mere fact that rent for some years has been received at the reduced rate does not bind the lessor to accept that rent at that rate in future. (1909) 10 C L J 570 : 37 C 293 : 4 Ind Cas 713 (716) (DB).

——S. 17, Cl. (d) — Dowl — Lease or agreement to lease—Varying rent — Registration.

In considering whether a dowl is compulsorily registrable or not, the question to be decided is whether it embodies a special agreement between the parties. If it does not, registration is not needed. Where as in this case, the dowl (a memorandum showing the rents payable by the tenants, bearing their signature) merely evidences that there has been a commutation of rent, that the rent which was previously payable partly in kind and partly in cash would henceforth be paid in cash, it is not an instrument relating to an interest in immoveable property and does not require registration. (1909) 11 C L J 22 : 2 Ind Cas 89 (90) (DB).

36. Agricultural leases.

——Ss. 17, 49 - Scope—Agricultural lease—Oral lease for 5 years—Lease in writing — Registration, necessity of—Oral evidence of contents.

The Registration Act strikes at documents and not at transactions and does not direct what transactions have to be reduced to writing and registered. The T. P. Act, on the other hand, enacts what transactions have to be reduced to writing and registered.

Provisions of Chap. V of the T. P. Act do not apply to agricultural leases and hence an oral agricultural lease for 5 years is valid in law. But if such a lease is reduced to writing, it must be registered, it is inadmissible if not registered and no oral evidence is admissible to prove its terms. A I R (Vol 32) 1945 Nag 69 : ILR (1944) Nag 704 : 1944 N L J 424 (DB).

——Ss. 17 (1) (d), 49—Tenancy of agricultural land, registration.

Tenancy in respect of agricultural land can be created by oral agreement, but when an instrument has been executed, it must be registered under S. 17 (1) (d).

Where, in a contract for sale of growing straw, it appeared that the straw grew on the land in a wild state and on the terms of the amalnama, it was quite clear that the defendants were to derive benefit from further vegetation and from the nutriment to be afforded by the land :

Held, that the amalnama created an interert in land and needed registration. AIR (Vol 23) 1936 Cal 770 : 62 C L J 534 : 167 Ind Cas 206.

——S. 17—An agricultural lease, if made in writing, requires to be registered under S. 17 of Registration Act. A I R (Vol 20) 1933 Mad 451 : 37 L W 672 : 64 M L J 676 : 1933 M W N 672 : 144 Ind Cas 27 (DB).

——S. 17—No registration necessary—Lease—Letter referring to lease.

Section 106 of the Transfer of Property Act excludes agricultural leases from the operation of its own provisions and so allows such leases or agreements to lease to be made without a written instrument. The Registration Act only comes into operation when a written document has been executed, either because the transaction cannot legally be carried out without one or because the parties choose to have one though it is not compulsory. A letter written by lessor to lessee and referring to already existing lease is evidence of the prior lease and is admissible without registration. A I R (Vol 13) 1926 Nag 9 : 90 Ind Cas 51.

——S. 17 (1) (d) — Permanent tenure — Registered lease—Necessity of.

A permanent tenure cannot be created under the B. T. Act or any other Act except by a registered instrument even where the land is agricultural land situate outside a town and let out for the purpose of growing thatching grass. AIR (Vol 5) 1918 Cal 667 : 40 Ind Cas 100 (DB).

37. Assignment of decrees and awards.

——S. 17 — Decree made prior to or simultaneously with assignment.

Per Wadia, J. — There is nothing in S. 17 (1) (e) to indicate that only assignments of decrees which are simultaneous with the making of the decrees are covered by that section, and where the decrees had already created the interest long before the assignment was made, the assignment would not be governed by cl. (e). The language of the clause is wide enough to cover all decrees whether made prior to the assignment or simultaneously with the assignment. AIR (Vol 28) 1941 Bom 71 : 42 Bom L R 1113: ILR (1941) Bom 136 : 193 Ind Cas 740 (DB).

——S. 17—Charge, creation of, by decree — Assignment of such decree.

An assignment of a decree creating a charge on immovable property falls within the purview of S. 17 (1) (e), as a charge is a right to or in immovable property within the meaning of that Act. A I R (Vol 28) 1941 Bom 71 : 42 Bom L R 1113 : I L R (1941) Bom 136 : 193 Ind Cas 740 (DB).

——S. 17—Final mortgage decree, assignment of.

A mortgage decree must be regarded as immovable property and its assignment falls under S. 17 (1) (e) and must be regarded as compulsorily registrable on the footing that such a decree represents an interest in immovable property. AIR (Vol 27) 1940 Mad 140: 50 L W 844 : 1940 M W N 313: ILR (1940) Mad 306: (1940) 1 M L J 922 : 187 Ind Cas 243 DB).

——S. 17—Deed transferring mortgage decree.

Where a deed transferring a decree does not disclose on its face what kind of decree is transferred, it cannot be made inadmissible, because it is not registered.

A deed transferring a mortgage decree does not require registration. AIR (Vol 18) 1931 Mad 302 : 131 Ind Cas 151 (DB).

——S. 17 — An assignment of a decree does not require registration as it has been incorporated in a decree and the assignment of a decree though it is one for possession of immovable property is not equivalent to a transfer of property. A I R (Vol 15) 1928 Lah 70 : 107 Ind Cas 603.

——S. 17 — No registration necessary — Personal decree.

Assignment of personal decree against one defendant does not require registration though in the same decree there is also a mortgage decree against another defendant. A I R (Vol 15) 1928 Mad 142 : 106 Ind Cas 485 (DB).

——S. 17 (1) (b) — Assignment — Decree — Right of election.

Decree-holder may give up his right to recover his amount from the mortgaged property and proceed against other property of the judgment-debtor; the two rights cannot be separated; hence assignment of either right requires registration. (1909) 11 Bom L R 858 : 2 Ind Cas 511 (DB).

38. Recitals and memoranda and admissions of past transactions.

——S. 17—Hukamnama evidencing commutation of rent—Registration.

A hukamnama which merely serves as evidence of commutation of rent which had already been effected is not a document requiring compulsory registration. A I R (Vol 32) 1945 Pat 67 : 23 Pat 693: 11 B R 270 : 218 Ind Cas 255 (DB).

——S. 17—Merely because deed recites that transfer has already taken place, proper registration cannot be dispensed with. AIR (Vol 22) 1935 Lah 122.

——S. 17 (1)—Proprietor making gift of a portion of his estate, in favour of his wife without sanction of the Commissioner — Wife filing petition that Commissioner may be pleased to sanction the gift — The petition did not declare any right in favour of the husband and was not compulsorily registrable under S. 17 (1). (1879-80) 4 Bom 590, Overruled. A I R (Vol 19) 1932 P C 55 : 9 O W N 43 : 56 C W N 250 : 35 L W 217 : 1932 A L J 188 : 55 C L J 136 : 62 M L J 296 : 34 Bom L R 463 : 13 P L T 279 : 11 Pat 272 : 59 I A 130: 1932 M W N 660: 136 Ind Cas 798.

——S. 17—Compromise arrived at between the debtor and creditors during insolvency proceedings under S. 344, old Civil P. C. 1899, held did not require registration under S. 17, Registration Act. A I R (Vol 19) 1932 Lah 281 : 13 Lah 70 : 33 P L R 1003 : 137 Ind Cas 820 (DB).

——S. 17—A applying for adjudication as insolvent—Subsequent compromise between himself and his creditors—Death of A—Punjab Land Alienation Act coming into force and the tribe to which A belonged notified as an agricultural tribe — On petition by A's widows, insolvency proceedings set aside — Declaratory suit by creditors—Question of registration :

Held, that the compromise did not require registration under S. 17, Registration Act. A I R (Vol 19) 1932 Lah 281 : 13 Lah 70 : 33 P L R 1003 : 137 Ind Cas 820 (DB).

——S. 17—No registration necessary — Document—Recitals of previous partition.

(Obiter). — Partition had taken place between the Parties 50 years ago and in accordance with it they were in possession of their respective shares. Then a document was executed by them which did not decide anything new but simply maintained the status quo ante of the parties.

Held : that the deed was neither a partition deed nor a relinquishment deed and, therefore, there was no necessity to have it registered. AIR (Vol 16) 1929 Nag 131 (DB).

——S. 17—Recital of past transaction.

There was an agreement between parties as follows : "We had an open site situate at Pharala joint with S. At the time of the partition an excess of three marlas of the said site remained in our possession. We have now of our own accord delivered possession of the three marlas in excess, which was in our possession to S. S not getting possession sued for it. The agreement was sought to be made inadmissible on the ground of non-registration.

Held : that the document did not require registration as it was a recital of an act already done, and possession of three marlas was delivered before the document was written. (1928) 108 Ind Cas 892 (Lah.).

——S. 17—No registration necessary—Letter.

A letter sent to a Patwari by an owner of land informing that he had given away the land and that entries should be made in the name of the particular person being neither gift nor sale requires no registration. (1928) 29 P L R 287 : 108 Ind Cas 191.

——S. 17—Recital of pledge.

Whether a document dealing with immovable property acquires registration or not, depends on whether the document in question constitutes the bargain between the parties or it is merely the record of an already completed transaction.

Where a document, dated 27th June 1924, recited: "I pledged with you as collateral security the Collector's certificate relating to the said house . . . on 23rd June 1924 . . . I borrowed from you on the 24th, 25th and 26th, sums amounting to Rs. 15,000 and agreed to pay interest."

Held, that the document recited only a transaction already completed. AIR (Vol 14) 1927 Mad 1145 : 53 M L J 179 : 39 M L T 69 : 26 M L W 28 : 102 Ind Cas 34.

——S. 17—Document reciting past act.

A document which recites a past act or disposition of property previously made does not come within the purview of S. 17. AIR (Vol 13) 1926 Nag 21 : 23 N L R 86 : 8 N L g 157 : 95 Ind Cas 979.

——S. 17—Order as to continuation of Inam for services.

Compulsory registration under S. 17 of the Registration Act does not apply to an order issued by an inamdar to the village officer pointing out that certain lands are continued from generation to generation on the grantees of the lands agreeing to do the mhorki work. AIR (Vol 12) 1925 Bom 194: 26 Bom L R 1203 : 85 Ind Cas 184 (DB).

——S. 17—Record of past agreement.

Where a solenama was not the foundation of the plaintiffs' claim and it was not produced before the Court as giving rise to the plaintiffs' cause of action but was for all intents and purposes a mere record of certain agreement which the parties had come to, out of Court for the settlement of their differences existing at that time by which the plaintiffs, agreed to accept the defendant as tenant with certain rights and at a certain rate of rent to give effect to which a formal document in the shape of a Kabuliyat would, in future, be executed by the defendants, and was merely a record of the oral agreement between the parties which was reduced to the form of writing only by way of a memorandum and the plaintiffs had treated it as such.

Held, that considering that its operation was not immediate but rather past, for, by it the defendants agreed to pay rent not from the date he filed the petition but from an antecedent period, it only recognized and recorded a certain understanding come to between the parties in respect of the property in dispute, it, therefore, need not be registered. A I R (Vol 10) 1923 Cal 432 : 69 Ind Cas 57 (DB).

——S. 17 (1) (b)—Document declaring existing facts.

Document declaring existing facts does not require registration. 8 P W R 1913 : 26 P L R 1913 : 18 Ind Cas 583.

——S. 17 (1) (b) — Acknowledgment of rights in immovable property not shown to be over Rs. 100 in value.

A stamped but unregistered acknowledgment by certain members of a tribe of a village that certain other tribe had shares in the Shamilat is not inadmissible, if it was not shown that the plaintiff's share of Shamilat exceeded Rs. 100 in value and it is also admissible as a document merely admitting an antecedent right. 94 P L R 1910: 8 Ind Cas 495 (DB).

——S. 17 (1) (b) — Record of occurrences at a public meeting when certain admissions, disclaimers and promises regarding immovable property were made.

A document purporting to be merely a record of occurrences, said to have happened at a public meeting in the course of which the plaintiff made certain admissions, disclaimers and promises, does not create or declare a right and therefore, need not be registered. 47 P W R 1910 : 6 Ind Cas 651 (DB).

——S. 17 (b)—Lease — Recital of prior arrangement —Admission of partner.

A document merely reciting an arrangement already arrived at need not be registered. A transaction by which a lessee admits a partner need not be registered. (1910) 7 M L T 419 : 20 M L J 555 : 6 Ind Cas 766 (DB).

——S. 17, cl. (a)—Assignment of arrears of profits— Lambardar and co-sharer — Transfer of Property Act, S. 54—Registration.

A deed of assignment of profits already due by a lambardar to a co-sharer does not require to be registered, either by virtue of S. 17, of the Indian Registration Act, 1877, or by virtue of S. 54 of the Transfer of Property Act, 1882. (1905) A W N 100 : 2 A L J 692 : 27 A 564 (566) (DB).

SUB-SECTION (2)

39. Scope.

——S. 17 (2)—Scope and applicability.

It is true that cl. 2 of S. 17 distinctly provides that nothing in cl. (b) (and it is only under cl. (b) that the document might require registration) applies to any composition deed; but this does not mean that if a document requires registration under any other enactment, e. g., S. 5 of the Trusts Act, the exemption contained in cl. 2 would prevail against that other enactment. What the Registration Act provides is that a composition deed, so far as it purports or operates to create, declare, assign, limit or extinguish .....any right, title or interest.....of the value of Rs. 100 and upwards to or in immovable property will not require registration ; but it does not say that any composition deed, if it purports to do or operates to do anything else, will not require registration either. Hence, a composition deed required to be registered under S. 5 of the Trusts Act. but not registered, does not have effect. AIR 1914 Bom 55, Overruled. A I R (Vol 32) 1945 PC 74: I L R (1945) All 241: 1945 M W N 29: 1945 ALJ 255: 47 Bom L R 612 : 11 B R 477 : 1945-1 M L J 82: 49 C W N 219: I L R (1945) Kar (P C) 108 Sup : 72 Ind App 76 : 220 Ind Cas 49.

——S. 17—Sub-section (2) of S. 17 reserves only those documents which are included in cls. (b) and (c) of of sub-s. (1), and cl. (d) of sub-s. (1) which mention leases of immovable property from year to year is not controlled by this sub-section. AIR (Vol 24) 1937 Cal 499: 42 CWN 107: 173 Ind Cas 996.

40. Composition deed - Clause (i).

——S. 17 (2) (i)—Construction and scope—If overrides S. 5, Trusts Act—Composition deed conveying properties to trustees on trust for benefit of creditors—Registration - Necessity.

A composition deed creating a trust of property for the benefit of creditors, by which debtors convey to trustees their movable and immovable properties upon trust for sale and conversion and division of the proceeds among the creditors of the debtors and payment of the surplus to the debtors is not, by reason of S. 17 (2) (i) of the Registration Act exempt from the requirement of registration made obligatory by S 5 of the Trusts Act. There is not in terms any direct provision enacting that no composition deed need be registered, or that no composition may be registered. S. 17 (2) (i) of the Registration Act should only be construed as meaning that all composition deeds are exempt from any requirement to be registered imposed by that Act and not as meaning that they are exempt from any requirement to be registered. S. 17 (2) of the Act does not mean that if a document requires registration under any other enactment the exemption contained in the former Act would prevail against the other enactment. AIR 1914 Bom 55, Overruled. A I R (Vol 32) 1945 PC 74: (1945) 1 MLJ 82: 1946 AWR (PC) 29: 1946 OA 29: 72 IA 76 ILR (1945) All 241: I L R (1945) Kar (PC) 108: (1945) Mad WN 29: 49 CWN 219: 1945 PWN 156: 47 Bom LR 612: 1945 ALJ 255: 11 BR 477 : 220 Ind Cas 49.

——S. 17 (2) (i) and (vi) — Insolvency petition— Agreement between debtor and creditors providing for full payment of debts and charging immovable property—Petition withdrawn in accordance with agreement.

Held, that the agreement was neither a composition deed within S. 17 (2) (i) nor any decree or order of a Court within S. 17 (2) (vi) and was not exempt from registration.

Though a reference to the terms of an unregistered agreement in an order of the Court would make those terms admissible in evidence, an agreement on account of which a petition is withdrawn is not exempt from registration under S. 17 (2) (vi) if the parties do not apply to the Court to record the terms of the agreement even though the Court might have considered the agreement in deciding whether leave to withdraw should be granted. AIR (Vol 21) 1934 Mad 697: 40 LW 615: 67 MLJ 836: 153 Ind Cas 541 (DB).

——S. 17 (2) (1)—(1877)—S. 17 (e)— "Composition deed"—Meaning—Stamp Act, Art. 22.

The term "Composition—deed" bears the same meaning as in the Stamp Act and so applies to a transfer of immovable property and not a new agreement to take fractional payment in settlement of claims. An assignment in trust for the benefit of creditors the creditors being parties thereto and realising their claims is a "Composition deed" with S. 17 (e), Registration Act: A composition deed does not require registration. AIR (Vol 1) 1914 Bom 55: 38 Bom 576: 16 Bom LR 236: 24 Ind Cas 730 (DB).

[Overruled in AIR 1945 P C 74].

——S. 17 (2) (1) — Composition deed—Transfer to trustees for payment of debts—Registration.

The essential test of a composition deed is that there ought to be compounding of debts due. Where the owner of property transferred it to trustees for the purpose of enabling them to pay off his creditors, and there was nothing to show that there was any settlement with the creditors, that the debtor should pay less than he owed to them and that they agreed to accept that composition, the deed is not a composition-deed but merely a conveyance or a trust-deed and is compulsorily registrable. (1912) 14 Bom LR 506: 15 Ind Cas 850 (DB).

——S. 17 (c) — Composition deed — Conveyance—Assignment of a portion of property—Some creditors only signing the deed—Rights of the other creditors.

The "composition-deed" contemplated by S. 17 (c) must in substance be of the nature of a composition, not a conveyance. Where a debtor transfers his property to a creditor or creditors in consideration of his debts, i. e., where he parts with his rights absolutely, the transaction may partake of the nature of a composition but in reality and substance it is not a composition but a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims and the trustee is authorized to deal with the property for that purpose. Hence, where certain immovable and movable property of the debtor and his account books are vested in the trustee for the purpose of paying his creditors and there is no conveyance of the immovable property of the debtor to the creditors, the deed amounts to a composition deed, and need not be registered under S. 17 (c). (1904) 6 Bom LR 296: 28 B 364 (369) (DB).

41. Debentures—Clause (iii).

——S. 17—Debentures creating charge— Registration.

A debenture creating a charge, whether floating or fixed over immovable property is compulsorily registrable under the Registration Act in addition to the provisions of the Companies Act. AIR (Vol 32) 1945 Cal 37: ILR (1944) 1 Cal 118 (DB).

——S. 17—Debenture—Necessity of registration—Advance on security of unregistered debenture—Creditor's rights over over-drafts advanced to customers on security of title-deeds - Charge over immovable property, whether requires registration.

The Imperial Bank advanced to the Bengal National Bank a certain sum of money upon the security of two debentures which purported to charge the whole undertaking, properties, assets and interests, present and future, including the uncalled capital, of the borrowing Bank for the repayment of the loan with interest. This debentures were duly registered under the Companies Act with the Registrar of Joint Stock Companies but neither debenture was registered. The Bengal National Bank suspended payment and the Liquidators applied for directions as to whether the security held by the Imperial Bank extended to, and was effective over the debts due to the Bengal National Bank from customers who had obtained loans or overdrafts upon the security of title-deeds deposited with it.

Held, that inasmuch as the debentures were not registered, the Imperial Bank was not entitled by virtue of the said debentures to any charge upon the sums payable to the Bengal National Bank, in respect of advances or upon its security therefor in any case in which such advances were, at the date on which the charge created by the said debentures ceased to float, secured by the deposit of title-deeds and such title-deeds had not at the said date been deposited with the Imperial Bank.

Per Rankin, C. J. A mere charge on immovable property is a right in immovable property and is within S. 17, cl. (b).

Clauses (a) and (c) of S. 49 have reference to the fact that certain kinds of transfer of immovables can only be effected by written instruments (e. g.,) sale, mortgage other than mortgage by deposit, lease, gift) ; whereas in other cases, (e. g., partition, surrender, release) the transaction is not required to be in writing but, if it is in writing, the instrument is required to be registered. In either case, the circumstance whichsubjects the instrument to the requirement of registration is that it purports or operates to create, declare, assign, limit or extinguish a right, title or interest to or in the immovable property. The Registration Act is not to be defeated in such a case by a contention to the effect that as no written instrument was necessary the transaction itself is independent of the written instrument which can be regarded simply as evidence thereof. Clause (c) makes the instrument inadmissible as evidence of the transaction. Unless, therefore, there has in fact been a transaction independent of the written instrument, and capable of proof without the evidence thereof, the right, title or interest in question has not been created, declared, assigned, limited or extinguished. Therefore, a debt secured upon specific immovable property while it can, without writing, be charged as an interest in land must be charged by a registered instrument if it is to be charged by an instrument at all.

In applying S. 17 to debentures, the requirement of registration must attach to all specific property capable of identification at the date of execution of the instrument and as regards immovable property, every sort of which the Company was at that time possessed, the instrument, in the absence of registration, cannot take effect. It cannot be held that although a specific mortgage of such property would require registration, a charge given upon such property would be exempt from this requirement by reason merely of the fact that the right of the Company to use its assets in the course of its business is a condition of the charge. AIR (Vol 18) 1931 Cal 223: 34 CWN 605: 58 Cal 136: 53 CLJ 269: 131 Ind Cas 689 (DB).

42. Document merely creating right to obtain another document—Clause (v).

——S. 17—Evidence Act, S. 92 (4)—Sale deed—Unregistered agreement to reconvey—Suit for specific performance.

The plaintiff, on her own behalf and as guardian of her minor son, sold certain properties under a

registered deed of sale to the defendant. On the same day, an unregistered agreement was executed by which the defendant undertook to reconvey the properties to the plaintiff. In a suit for specific performance of the agreement to reconvey.

Held, that the necessity for the registration of the agreement to reconvey had to be decided on the terms of the agreement and as there was nothing in it to create any interest in immovable property it was not compulsorily registrable. AIR (Vol 21) 1934 Mad 703 : 40 L W 646 : 67 MLJ 635 : 1934 M W N 1122 : 152 Ind Cas 634.

——S. 17 (2) (v)—Sale-deed.

An unregistered sale-deed cannot be treated as if it were merely a document creating a right to obtain another document within S. 17 (2) (v), made the basis of a suit for specific performance. AIR (Vol 19) 1932 Lah 276 : 33 P L R 227 : 137 Ind Cas 41 (DB).

——S. 17 (2) (v)—Agreement.

Neither an agreement to reconvey property sold by contemporaneous deed nor an agreement relinquishing such right to get reconveyance, require registration. 1930 ALJ 799 : AIR (Vol 17) 1930 All 101 (DB).

——S. 17 (2) (v)—Reconveyance.

Purchaser executing in 1872 unregistered document, to original owner agreeing to reconvey property to him if he paid certain sum of money within 51 years — Document was compulsorily registrable under Registration Act of 1871 in force at its execution but was not so registrable under Act of 1877 or later Act – Such document is entitled to benefit of mitigations of rigor of registration law embodied in S. 17 of new Acts and so was admissible if tendered in evidence after 1877 Registration Act (1871), S 17 (2)—Registration Act (1877), S 17 (h). 119 Ind Cas 793 : 31 Bom L R 493 : AIR (Vol 16) 1929 Bom 290 (DB).

——S. 17 (2) (v) — Lease — Letter entitling formal lease to be obtained, does not require registration.

In a suit for specific performance on the basis of an oral agreement to lease, the plaintiff filed a letter written to him by the landlord. The letter recited : "This is to inform you that as long as you occupy the room .... we shall not ask you to vacate the said room, the rent of which will be Rs. 5 per day."

Held, that the letter did not operate as a lease or an agreement to lease. It was a unilateral letter which at the most gave right to obtain another document, the formal lease. It was therefore exempt from registration under S. 17 (2) (v), and so could be admitted in evidence though unregistered. 117 Ind Cas 255 : 7 Rang 70 : AIR (Vol 16) 1929 Rang 164 (DB).

——S. 17 (2) (v)—Document.

Document referring to immovable property if not intended to be operative, requires no registration. 111 Ind Cas 596 : 10 L L J 93 : AIR (Vol 15) 1928 Lah 397 (DB).

——S. 17 Document creating right to obtain another is not registrable.

A document which does not by itself convey property but merely gives a right to call for another document does not require registration.

If the document is merely one which records a past transaction and gives another party a right to call for a formal document it is exempted under the Registration Act 103 Ind Cas 302 : 50 Mad 687 : 25 M L W 806 : 1927 M W N 269 : AIR (Vol 14) 1927 Mad 636 : 53 M L J 203 (FB).

——S. 17—An agreement to lease contemplating that another document would be executed later on does not require registration. 102 Ind Cas 305 : AIR (Vol 14) 1927 Nag 353.

——S. 17—Bond containing a covenant to reconvey and not to encumber immovable property is not compulsorily registrable. 97 Ind Cas 408 : 8 P L T 137 : AIR (Vol 14) 1927 Pat 17 (DB).

——S. 17 – Agreement to sell, reciting receipt of cash, and promise to execute registered sale-deed in future, is not compulsorily registrable. 96 Ind Cas 334 : 50 Bom 334 : 28 Bom L R 591 : AIR (Vol 13) 1926 Bom 375 (DB).

——S. 17—A mere agreement to reconvey the property sold on payment of a fixed sum within a fixed period is exempt from such registration under cl. (v) of sub-s. 2. 91 Ind Cas 360 : 49 Bom 862 : 27 Bom L R 1261 : AIR (Vol 13) 1926 Bom 97 (DB).

——S. 17 (2) (v) Scope—Agreement to divide properties requires no registration—Documents falling under S. 17 (2) (v)—Test of

An agreement to divide a property in certain shares is not an agreement conveying any property and therefore not compulsorily registrable. It is not necessary to bring the documents within the exempting cl. 17 (v), to say expressly that another document will be executed. The test in all such cases is not whether a document expressly contemplated execution of another document, but whether by itself it created any right to immovable property, and if it did not, then it does not require registration. 98 Ind Cas 39 : AIR (Vol 13) 1926 Mad 1117 : 51 M L J 418.

——S 17 (2) (v)—Receipt.

Receipt for money contributed in acquiring proprietary rights and merely giving to the payer a right to remain on land 'as before' need not be registered. 83 Ind Cas 98 : 6 L L J 402 : AIR (Vol 12) 1925 Lah 204 (DB).

——S. 17 - A receipt by vendee agreeing to restore property needs no registration.

A document called a receipt provided "I (the vendee) shall without any objection give up your (vendor's) land at any time that you may ask me to give up" and was signed by the vendee.

Held, that it was not inadmissible for want of registration It is at the most an agreement to reconvey when the vendor would ask him to give up the property. The document does not in terms come under S. 17 (b) or (c) of the Registration Act. It does not purport to do any of the things mentioned in that section, clause (b) or (c). But even if it did, it would clearly be saved under clause (v), sub-section (2) of S. 17. 82 Ind Cas 533 : 48 Bom 166 : 25 Bom L R 1207 : AIR (Vol 11) 1924 Bom 174 (DB).

——S. 17 – Receipt for earnest money, stating another document is to be drawn up, need not be registered.

A document was executed under which a sum of Rs. 50 was paid to the defendant-vendor by way of earnest money and the latter agreed to sell immovable property to the plaintiff for a sum of Rs. 180. Held, that the document merely evidenced the receipt of the earnest money and did not in any way create or declare any rights in immovable property of the value of more than Rs. 100 especially when it clearly recited that another document would subsequently be executed which would serve as a document of title in respect of the portion agreed to be sold under that receipt. Therefore the document clearly came within the purview of S. 17 (2) (v) and can be admitted without registration. 73 Ind Cas 1013 : AIR (Vol 11) 1924 Lah 163.

——S. 17—Writing giving right to obtain another document is not registrable. 71 Ind Cas 130 : 16 M L W 936 : 1923 M W N 57 : AIR (Vol 10) 1923 Mad 262 (DB).

——S. 17—Where defendant agreed to give half of certain lands to plaintiff, held the, agreement did not require to be registered as it was to be followed by a registered deed when the gift was actually made. 71 Ind Cas 40 : AIR (Vol 10) 1923 Nag 47.

——S. 17 — Memorandum providing for further deed. (1877 Act).

Where a memorandum of agreement specified the shares and provided for a further deed effectuating the partition.

Held, that it did not require to be registered. 69 Ind Cas 123 : 37 C L J 435 : 21 A L J 460: 27 C W N 561 : 46 Mad 373 : 50 I A 134 : 31 M L T 136 · 16 MLW 615 : AIR (Vol 9) 1922 P C 266 : 44 MLJ 745.

——S. 17 (2) (v) — Collateral agreement, whether registration necessary.

Where the defendants agreed to procure a loan of rupees three lakhs for the plaintiffs and the latter executed the lease-deed of certain lands to the former on a low rent in lieu of commission and a document of even date purporting to be an agreement to cancel the lease-deed on failure to procure the loan was executed. Held, that it was exempted under the terms of S. 17 (2) (v) and hence did not require registration. 30 M L J 302 : (1916) 1 M W N 129 : 32 Ind Cas 941 : AIR (Vol 4) 1917 Mad 543 (DB).

——S. 17 (2) (v) —Agreement for reconveyance—Not compulsorily registrable specific performance.

Plaintiff executed a registered sale-deed of a house in favour of the defendant and on the same day defendant passed in favour of the plaintiff an unregistered agreement to reconvey the property to plaintiff on repayment of the purchase money. Plaintiff sued for specific performance of the contract evidenced by the unregistered agreement; Held, that having regard to the form of the deed, it was an agreement to reconvey when called upon to do so and it was exempted from registration under exception 5 to S. 17 of the Registration Act, 1908. The plaintiff was entitled to have specific performance of the same. 38 Bom 703 : 16 Bom L R 582 : 28 Ind Cas 132 : AIR (Vol 1) 1914 Bom 231 (DB).

——S. 17—Agreement to retransfer property on payment of price with interest—Need not be registered.

Where contemporaneously with a registered deed of sale a document was executed whereby the transferee agreed to re-transfer the property to the transferor upon payment by the latter of the sale price with interest within a specified period. Held, that the document was not a re-conveyance and did not require registration. (1910) 14 C W N 703 (706) : 11 C L J 426 : 6 Ind Cas 549 (DB).

43. Document itself creating, etc. interest, in property not exempted under clause (v).

(a) General.

(a-1) Agreement for sale.

(b) Agreement to give mortgage.

(a) General.

——S. 17 (2) (v)—Dispute regarding immovable property award — Award only declaring right to get a conveyance—If compulsorily registrable.

Widow of respondents' undivided brother, who had right of maintenance — Suit by plaintiffs (widow's daughters) for a declaration that they were entitled to certain property in lieu of maintenance as a consequence of an award — Award merely deciding that property should be given to plaintiff— Defendant objecting to admission of the award as it was unregistered.

Held, that the decision of the arbitrator settled the dispute referred to him but did not of itself operate as a conveyance. A mere declaration cannot suffice to give title, when a conveyance is obviously necessary. The award, therefore, comes under S. 17 (2) (v) and does not require compulsory registration. AIR (Vol 34) 1947 Mad 168 : (1946) 2 M L J 345 : 59 MLW 627 (DB).

——Ss. 17 (1) (b) and 17 (2) (v) — An agreement to finance partition suit — Defendant agreeing to give half share of such property as he might get whether by suits by private settlement or in any other manner, from his father's estate—No suit was filed as the matters were amicably settled between the defendant and his brothers :

Held, that the agreement did not create or declare any right or interest in immovable property, either in the present or the future and so the case was covered not by S. 17 (1) (b) but by S. 17 (2) (v). A I R (Vol 27) 1940 Bom 143 : 42 Bom L R 165 : 188 Ind Cas 217 (DB).

——S. 17—Contract — Agreement to divide property if successful in acquiring it.

An agreement between certain persons providing the manner in which certain property should be divided between them in the event of their succeeding in purchasing the same is not an agreement falling under S. 17 (1) (b). Further, registration is not necessary by reason of S. 17 (2) (v) as the document merely creates a right to obtain another document later on. AIR (Vol 25) 1938 Lah 721 : 182 Ind Cas 220 (DB).

——S. 17— An agreement by which a partner assigns his interests in a firm owning immovable property in favour of another partner requires to be registered under S 17 of the Registration Act. AIR (Vol 18) 1931 Mad 580 : 60 MLJ 527 : 33 LW 576 : 55 Mad 72 : 132 Ind Cas 305 (DB).

——S. 17— The defendant having executed a promissory note for a sum of money entered into a written agreement by which it was agreed that he should deposit title deeds relating to immovable properties by way of equitable mortgage to secure the payment of the amount under the promissory note. On the next day after the agreement the defendant deposited with the plaintiff title deeds in pursuance of the agreement and a letter was passed evidencing the same :

Held, that the memorandum of agreement and the subsequent letter must be read together and that they must be registered because they constituted the bargain between the parties. AIR (Vol 18) 1931 Mad 124: 1930 MWN 865 (DB).

——S. 17—Document evidencing payment of earnest.

Where the buyer had paid earnest money over Rs. 100 under a written agreement and so far from refusing to accept delivery, was pressing for specific performance.

Held, that the agreement did in itself create an interest under T. P. Act, S. 55 (b) and therefore did not allow of the application of S. 17 (2) (v). The agreement was therefore compulsorily registrable under S. 17 and, not having been registered, was inadmissible in evidence under S. 49. A I R 1924 Lah 337, Overruled. AIR (Vol 13) 1926 PC 94 : 53 IA 214: 3 OWN 634 : 1926 MWN 602 : 24 ALJ 807 : 44 CLJ 97 : 24 MLW 396 : 28 Bom LR 1372 : 31 CWN 125 : 28 PLR 10 : 7 P L T 661 : 51 M L J 788 : 98 Ind Cas 508.

——S. 17— Agreements to lease under S. 2 (7)—Only such, as create immediate demise come under S. 17 (1) (d) — Such agreements are not protected by S. 17 (2) (v).

The defendants, executed a document, which described itself as a receipt and was so stamped, in favour of the plaintiffs. The gist of that document was as follows : 'We have this day given you a lease for twelve years of a half share in the lakh porasadi of our malguzari jungle for Rs. 7,000. We have received Rs. 6,000 of this to-day and you will pay us the remaining Rs. 1,000 at the time of execution and registration of the lease deed. As no eight anna stamp is available at this time we have passed this receipt. Within two months we will execute the deed of agreement and the deed of lease and get them registered. If we fail to do this we will pay you twice six thousand that is twelve thousand. From this day you may look after the jungle and propagate lac in it or you may sell the right in it to another per-

son. You are to take all the crops for twelve years, that is twenty-three crops.

Held, that the document created an immediate interest and was not protected by S. 17 (2) (v) but was covered by S. 2 (7). AIR (Vol 10) 1923 Nag 171 : 6 NLJ 151 : 19 NLR 186 : 71 Ind Cas 468.

——S. 17 (1) (b)—Transfer of future interest—Agreement by reversioner to transfer his right, whether requires registration.

An agreement by a reversioner to transfer a portion of the estate which may vest in him in future, to the promisee does not require registration. A I R (Vol 7) 1920 Lah 123 : 1 Lah 124 : 56 Ind Cas 272 (DB).

——S. 17 (1) (b) — Relinquishment — Letter reciting delivery of possession.

A letter reciting certain facts regarding certain property to the effect that the writer has delivered possession and has nothing to do with certain property is not an instrument which by itself purports or operates to create or declare any right, title or interest in the property and hence does not require registration. AIR (Vol 4) 1917 Lah 218 : 40 Ind Cas 455.

(a-1) Agreement for sale.

——S. 17 — A written agreement to sell need not be registered. AIR (Vol 24) 1937 Rang 402 : 1938 Rang LR 216 : 172 Ind Cas 929 (DB).

——S. 17—Mere contract for sale.

A mere contract for the sale of an immovable property does not require registration as it does not purport to create an interest in such property. AIR (Vol 20) 1933 All 846 : 1933 ALJ 1584 : 56 All 142 : 148 Ind Cas 229 (DB).

——S. 17—Agreement to sell immovable property.

By virtue of explanation added to S. 17, by Act II of 1927, an agreement to sell immovable property, whether effected before or after the passing of the latter Act does not require compulsory registration. AIR (Vol 19) 1932 Lah 95 : 32 PLR 807: 135 Ind Cas 669 (DB).

——S. 17—No registration necessary—Agreement.

Held, that an agreement to sell immovable property of the value of Rs. 100 or more is not compulsorily registrable. AIR (Vol 20) 1933 Lah 1020 : 31 P L R 636 (DB).

——S. 17 — Agreement to sell immovable property does not necessarily create interest in that property—Where no interest is created agreement to sell is admissible though unregistered. AIR (Vol 17) 1930 Mad 683 : 58 MLJ 688 : 31 MLW 817.

——S. 17—Agreement purporting to sell immovable property requires registration.

Where the language employed in an agreement of sale clearly purports to transfer the vendor's interest in the immovable property which he had inherited from his deceased brother, particulars of which are set out in the schedule annexed to the agreement, comes within the terms of S. 17 and requires registration. AIR (Vol 16) 1929 PC 269 : 57 M L J 765 : 33 CWN 1150 : 30 MLW 451 : 1929 ALJ 1060 : 6 OWN 835 : 56 IA 363 : 32 Bom LR 1 : 50 CLJ 487 : 1929 MWN 937 : 11 PLT 1 : 51 All 771 : 119 Ind Cas 633.

——S. 17 (2) (v) — Sale-deed.

Where an agreement for sale of immovable property was contained in two letters, and the buyer paid Rs 40,000 as earnest money, but the letters did not acknowledge the receipt of the earnest money.

Held, that the agreement was exempted from registration under S. 17 (2) (v) of the Indian Registration Act. AIR (Vol 14) 1927 Bom 195 : 51 Bom 247 : 29 Bom LR 19 : 101 Ind Cas 229 (DB).

——S. 17—The concluding words of the main portion of a deed ran as follows :— "The land has at any rate been sold and the vendee has become entitled to it. I am simply entitled to receive Rs. 9,000." But as against there two sentences, the deed throughout was an agreement to sell. Held, that the deed was merely an agreement to sell and did not require registration. AIR (Vol 11) 1924 Lah 337 : 6 LLJ 446 : 72 Ind Cas 1032 (DB).

[Overruled in A I R 1926 P C 94.]

——S. 17—Agreements to sell—Part performance.

Neither the provisions of the Transfer of Property Act nor those of the Registration Act preclude a suit for possession by transferor of an unregistered deed or by oral sale. The plea of a valid contract enforceable by specific performance or that of the doctrine of part performance is a valid defence and neither Transfer of Property Act, S. 54, or Registration Act, S. 17, affect the question.

What S. 54 of the T. P. Act enacts is that a document of title to land—a conveyance in short—can only acquire validity, can only in fact be proveable on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognises their existence, denying to them only the creation of an interest in or charge upon the land itself—and therefore leaving their contractual effect as between the parties to the contract unimpaired. The section prohibits unregistered conveyances, and does not, expressly or impliedly prohibit unregistered contract. (29 Mad 336 and 40 Mad 1134, Overruled.) AIR (Vol 11) 1924 Mad 271 : 45 MLJ 528 : 46 Mad 919 : 18 M L W 953 : 33 MLT 53 : 1924 MWN 14 : 76 Ind Cas 886 (FB).

— S. 17—Agreement to sell need not be registered —Doctrine of part performance.

Held, on a construction of the document in question, that in so far as they contained an agreement to sell and an agreement to execute a sale-deed they did not require registration. Applying the maxims that equity will support a transaction though clothed imperfectly in legal forms, where the agreement has been acted upon by the parties and that equity will also not allow a statute to be made an instrument of fraud, it must be held that the defendant had obtained a good title to the house. (1921) 63 Ind Cas 22 (Lah) (DB).

(b) Agreement to give mortgage.

——S. 17 — Memorandum entitling usufructuary mortgagees to registered deed.

A memorandum recording the fact that money had been borrowed on the terms of a usufructuary mortgage and that the mortgagees had been put in possession and giving the mortgagees the right to obtain a document in a proper registered form does not require registration. It is merely an agreement to execute a usufructuary mortgage bond. This agreement is specifically performable and can be set up as a defence to a suit for redemption. AIR (Vol 17) 1930 Pat 479.

——S. 17 (2) (v)—Mortgage — Letter, not constituting the bargain between the parties, requires no registration.

The plaintiff advanced Rs. 25,000, on condition to pay off the debt due to previous mortgagee, to get back the title-deeds and deposit it with him for the loan of Rs. 70,000 which the plaintiff had agreed to make to the defendant. The defendant subsequently made over the title-deeds to the plaintiff and the plaintiff made a further advance of Rs. 25,000 to defendant. On the same day, defendant drew up and signed a memorandum of the transaction already completed in the form of a letter addressed to the plaintiff as follows : "I applied to you for a loan of Rs. 70,000 which you agreed to advance as a deposit of the title-deeds. . . . I accordingly deposited with you the original conveyance from Pashupati Nath Deb in my favour. . . . which is the only document I received from my vendor on purchase of

the property. I never had any other title-deeds relating to the property. You have advanced to me Rs. 25,000 to day on my assurance that there is no encumbrance affecting the property. The further sum of Rs. 20,000 will be advanced by you when required by me. Yours faithfully."

Held, that the letter is not the contract for the mortgage, nor the agreement to give a mortgage, but it is a statement made by the defendant of the fact that he had deposited the title-deed of the property as the plaintiff had agreed to advance the money on the mortgage of the property and that it did not itself create any title and did not constitute the bargain between the parties and, therefore, does not require registration. AIR (Vol 14) 1927 Cal 538: 45 CLJ 233: 31 CWN 703 : 102 Ind Cas 871 (DB).

——S. 17—Mortgage or sale with covenant for re-purchase.

Per Full Bench. — When a registered deed of sale (A) of immovable property worth Rs. 100 or over is passed and as part of the same transaction and not as an independent transaction, the vendee executes an unregistered agreement (B) to reconvey the property to the vendor on payment of a certain sum of money, the document (B), where the transaction constitutes a mortgage, is inadmissible in evidence for want of registration under S. 17 (1) (b) and S. 49 of the Registration Act, but where the transaction is a bona fide sale with a contract for re-purchase, it falls under S. 17 (2) (v) and not being compulsorily registrable is admissible in evidence. In determining the nature of the transaction in each case intention of the parties must be looked to : 38 Bom 703, Overruled. AIR (Vol 13) 1926 Bom 497 : 50 Bom 566 : 28 Bom LR 954 : 98 Ind Cas 634 (FB).

——S. 17 (1) (c)—Agreement—Agreement to execute a sale-deed need not be registered.

Where the defendant orally sold a property to the plaintiff and thereafter executed a mortgage on the said property to a stranger and then executed an agreement to the plaintiff whereby he undertook to discharge the mortgage himself and to execute a registered sale-deed after the discharge, to the plaintiff in respect of the property already orally sold, held the agreement did not require registration as it fell within clause (v) of Sub-s. (2) of S. 17 of the Registration Act. It was part of the oral sale and was therefore for consideration. AIR (Vol 9) 1922 Lah 269 : 65 Ind Cas 524 (DB).

——S. 17 (1) (d)—Agreement to mortgage or lease — Registration.

Held, that the Swami bhogam deed in question was an agreement to grant a mortgage and not an agreement to grant a lease and as such did not require registration. AIR (Vol 6) 1919 Mad 322: 41 Mad 959: 35 MLJ 489 : 8 LW 438 : 24 MLT 315 : (1918) MWN 811 : 49 Ind Cas 291 (DB).

44. Clause (vi)—Scope of.

——S. 17 (2) — (Amendment of, in 1929) — Whether retrospective.

The words added in para. (vi) of S. 17, sub-s. (2), by an amendment made in 1929, have no retrospective effect. Before the said amendment, every decree or order of a Court was exempt from the operation of S. 17 so that even if the decree affected property worth more than Rs. 100, it was not required to be registered. AIR (Vol 26) 1939 Oudh 269:1939 O W N 809 : 1939 A W R 153 : 14 Luck 763 : 183 Ind Cas 808 (DB).

——S. 17 (1) (b) and (d) — Lease satisfying both cls. (b) and (d) — Benefit of cl. (vi) of sub-s. (2), if attracted.

Per Biswas, J. — Where a lease requires registration solely under cl. (d) of S. 7 (1), Registration Act, because it may not be brought within the terms of cl. (b), it will not attract the benefit of cl. (vi) of sub-s. (2). But cl. (b) is in such wide terms that leases would also easily come within its scope. And where a lease may be regarded as an instrument under cl. (b) as well as one under cl. (d), the exception in cl. (iv) of sub-s. (2) would apply. AIR (Vol 31) 1944 Cal 89 : 212 Ind Cas 317 (DB).

——S. 17 (2) (vi)—Scope.

Section 17, sub-s. (2) (vi) does not exempt from registration documents coming within S. 17 (1) (d). AIR (Vol 25) 1938 Cal 172 : 65 C L J 590 : 174 Ind Cas 790 (DB).

——S. 17 (2) (vi) does not exempt from registration documents coming within S. 17 (1) (d), Registration Act. AIR (Vol 25) 1938 Cal 172 : 65 C L J 590 : 174 Ind Cas 790 (DB).

——S. 17 (2) (vi) — Scope.

Section 17 (2) (vi) is not applicable to leases. AIR (Vol 16) 1929 Lah 291 : 11 L L J 50 : 30 P L R 112 : 10 Lah 685 : 117 Ind Cas 240 (DB).

45. "Any decree or order of a Court."

——S. 17 — Decree in maintenance suit creating charge — Registration—Necessity. See AIR (Vol 33) 1946 Mad 293 : (1946) 1 M L J 143.

——S. 17 (2) (iv)—Exemption under—'Any decree'—Decree that has been set aside wholly or in part.

Section 17, cl. (vi) exempts from registration any decree or order of a Court and not any final decree or order, etc. The exemption is not restricted to decrees which have become final and conclusive but includes within its purview decrees which have been set aside wholly or in part on appeal or review or have otherwise become inoperative. The circumstance that the decree is subsequently varied or reversed, might affect its enforceability but not its value as a "method" of proof of the terms of the transaction, which were embodied in it. Consequently, a party in a later suit can have the terms of the compromise proved by reference to the decree. AIR (Vol 21) 1934 Lah 721 : 18 Lah 27 : 37 P L R 798 : 154 Ind Cas 1049 (DB).

——S. 17—Agreement to abide by decree relating to immovable property.

An agreement to abide by the decree which has been passed by a Court of competent jurisdiction, even though the decree relates to immovable property, cannot by itself create, declare or extinguish any right or interest in immovable property because the right has already been declared or adjudicated by the decree and such agreement need not be registered. AIR (Vol 21) 1934 Pat 644 : 1 B R 271 : 153 Ind Cas 1098 (DB).

——S. 17 — Under S. 17 the provisions as regards registration do not apply to any decree or order of a Court. Section 29 (2) is only a permissive section and, though no doubt a copy of a decree may be presented for registration, there is no obligation to do so. AIR (Vol 17) 1930 Nag 17 : 120 Ind Cas 218.

——S. 17 — Agreements originally included in a decree but subsequently deleted from it, are also exempted from registration.

Srinivasa Ayyangar, J.—The principle is that once an agreement becomes embodied or incorporated in a decree or order of Court, the necessity for registration ceases, and the same can be proved and enforced, if otherwise provable or enforceable. AIR (Vol 15) 1928 Mad 713 : 27 M L W 544: 109 Ind Cas 872 (FB).

——S. 17 (2((vi) — Decree—Meaning of.

Simple recital by a Court in its proceedings or inclusion in pleadings does not fall within S. 17. (1913) 36 Mad 46 : 21 M L J 870 : 10 M L T 232 : (1911) 2 M W N 265 : 12 Ind Cas 317 (DB).

——S. 17 (2) (vi) and (1) (b) — Transfer of decree — Registration - Immoveable property.

A transfer of a decree for sale of mortgaged property does not create an interest in immoveable property and so the deed of transfer is not compulsorily registrable. (1913) 35 All 524 : 11 A L J 815 : 21 Ind Cas 462 (DB).

——S. 17 (2) (vi) — Compromise relating to a lease of immoveable property.

The Registration Act does not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or decrees or orders made by the Courts. In the absence of clear and unambiguous words, the legislature have not intended to make the proceedings of the Courts depend for their efficacy and validity on registration, by one of the parties. An unregistered compromise is enforceable though it relates to lands, not included in the suit. Decrees and orders even when they relate to leases are outside the scope of Registration Act. (1910) 33 Mad 102 : 20 M L J 20 : 6 M L T 313:3 Ind Cas 701 (DB).

46. Decrees and orders creating gifts or leases.

——Ss. 17 (1) (d) and 49 — Scope — Compromise decree creating or operating as lease for term of over one year — Registration — Necessity — Non-registration — Effect on admissibility.

A compromise decree which operates as a lease of immovable property for a period of more than one year, is compulsorily registrable under S. 17 (1) (d) of the Registration Act, and if it is not so registered, it cannot be admitted in evidence under S. 49 of the Act. A I R (Vol 36) 1949 Bom 402 : ILR (1949) Bom 465 : 51 Bom L R 788 (DB).

—— S. 17 — Scope — Compromise decree — Decree operating as lease requires registration.

A I R (Vol 31) 1944 Mad 273 : 57 L W 165 (2) : (1944) 1 M L J 230 : 1944 M W N 166 : ILR (1944) Mad 543 : 214 Ind Cas 327 (FB).

——S. 17—Compromise decree.

A compromise decree which merely varies the rent payable under the registered lease and which does not itself create a lease may not be registered when the property is a part of the subject-matter of the suit. AIR (Vol 31) 1944 Pat 293 : 217 Ind Cas 14 : 23 Pat 634 (DB).

——Ss. 17 (1) (d), 17 (2) (vi), 49—Compromise decree embodying fresh lease.

Section 17 (2) (vi) does not exempt from registration decrees embodying leases.

Where, after annulling the tenancy by notice under S. 167, Bengal Tenancy Act, the plaintiff sues the tenant as trespasser for rent arrears but the suit is compromised by the defendant taking a fresh lease, the compromise decree is not the recognition of an old lease but a new lease and hence is compulsorily registrable under S. 17 (1) (d). Where the compromise decree is not registered, it cannot be relied upon by the tenant for proving the rent of the tenancy. A I R (Vol 28) 1941 Cal 102 : 72 C L J 132 : 45 C W N 129 : 193 Ind Cas 635.

——S. 17—Punjab Relief of Indebtedness Act (7 of 1934), S. 17 (2) — M applying for settlement of his debts—His two brothers subsequently becoming parties to proceedings — Agreement arrived at duly signed by brothers and authenticated and creditor asking for its execution — Decree to the effect that debt would be liquidated by farm of property for 12 years—Held brothers of M were entitled to join proceedings - That Court executing decree could not go behind decree and was bound to execute agreement as if it were decree of its own —That the agreement did not require registration—40 P L R 567 : A I R 1938 Lah 685, Reversed. AIR (Vol 26) 1939 Lah 42 : 41 Pun L R 238 : 182 Ind Cas 338 (DB).

——S. 17 — Compromise decree creating lease is not exempted from registration.

AIR (Vol 28) 1941 Pat 536: 7 B R 767: 194 Ind Cas 428.

——S. 17 (1) (d) — Decree embodying contract not creating new lease but merely stating that existing lease would continue on same terms is not registrable. A I R (Vol 26) 1939 Lah 49 : 41 P L R 346 : 182 Ind Cas 533.

——S. 17 (2) (vi)—Agreement relating to lease for 12 years including property of persons not applicants before Board recorded by Board under S. 17, Punjab Relief of Indebtedness Act (VII of 1934).

If an agreement recorded by the Debt Conciliation Board under S. 17, Punjab Relief of Indebtedness Act, relating to a lease for a period of 12 years, includes properties of persons who were not applicants before the Board, it requires registration, even if such record of the agreement is considered to be a decree falling under S. 17 (2) (vi), Registration Act. A I R (Vol 25) 1938 Lah 685 : 40 P L R 567 : 178 Ind Cas 760.

[Reversed in A I R 1939 Lah 42.]

——S. 17 (2) (vi) — Compromise decree granting occupancy right—Registration is necessary.

A I R (Vol 25) 1938 Pat 140 : 4 B R 407 : 174 Ind Cas 200.

——S. 17 (2) (vi) — Compromise-decree declaring rights of persons in land in suit.

Where a decree passed in terms of compromise evidence by solenamas declares a howla right in a suit land, in favour of a tenant, the solenama does not require registration in order to be valid and operative in law and where the decree passed in terms of compromise evidenced by solenamas declares in favour of a tenant, a howla right in land in suit as the solenama relates to the subject-matter of the litigation, it does not require registration to be valid and operative in law. A I R (Vol 21) 1934 Cal 799 : 59 C L J 328 : 153 Ind Cas 313 (DB).

——S. 17 (2) (vi) — Compromise creating lease embodied in decree.

All decrees and orders are not excluded from compulsory registration but only those are excluded which partake the character of the documents mentioned in cls. (b) and (c) of sub-s. (1) and if a consent decree operates to create a lease, its registration is compulsory. AIR (Vol 19) 1932 Pat 97 : 12 PLT 871 : 11 Pat 98 : 136 Ind Cas 54 (DB).

——S. 17 (2) (vi)—Compromise.

Registration is necessary for compromise, operating as lease even though compromise embodied in decree — Statement in such unregistered compromise is however admissible as admission. A I R (Vol 17) 1930 Cal 559.

——S. 17 (1) (d)—Lease—Registration of.

The saving clause in S. 17 (2) (6) has no application to the case of a lease created by decrees, compromise decree or order of a Court and it falls under S. 17 (1) (d). AIR (Vol 17) 1930 Cal 94 (DB).

——S. 17 (1) (d)—Lease — Construction — Landlord plaintiff allowing raiyat defendant to hold permanently on enhanced rent by Solenama—New lease is created and Solenama is to be registered.

The plaintiffs who were raiyats sued the defendants under-raiyats, in ejectment on service of a notice to quit under S. 49. The defendant pleaded that the plaintiffs were not entitled to evict him relying upon a decree passed on the basis of a Solenama in a previous suit for rent which the plaintiffs had instituted against him. By the Solenama, the plaintiffs in consideration of an enhancement of rent, consented to allow him to hold this land permanently.

Held, that the Solenama created a new lease in respect of land which the defendant held from before. It would not be operative as a lease unless it was registered under S. 17, sub-s. (1), Cl. (d).

Registration Act, but S. 85, Cl. (2), Bengal Tenancy Act, bars its registration. The fact that this lease was embodied in a decree did not make it any the more operative as a lease because S. 17, sub-s (2), Cl. (6) excepts documents falling within Cls. (b) and (c) and not Cl. (d) of sub-s. (1). A I R (Vol 16) 1929 Cal 462 : 118 Ind Cas 895 : 56 Cal 427 (DB).

——S. 17 (1) (d) and (2) (vi)—Compromise decree — Landlord and tenant—Change in pre-existing terms.

A compromise between a landlord and tenant varying the terms of a contract previously existing regarding property of more than Rs. 100 in value is not affected by S. 17, if it is embodied in a decree of the Court even though the compromise creates rights and liabilities extraneous to the suits. The only exception is whether the compromise creates a lease requiring registration, under the provisions of the Registration Act.

A decree based upon and embodying a compromise, which does not transfer any interest in land, but merely changes the terms of the contract on which a tenant was already holding, does not amount to a lease within S. 17 (1) (d). AIR (Vol 7) 1920 Pat 602 : 4 Pat L J 667 : 52 Ind Cas 20 (DB).

47. Compromise and consent decrees.

(a) Meaning of.
(b) Compromise embodied in decree.
(c) Compromise embodied in order.
(d) In respect of property in suit.
(e) In respect of matters in and extraneous to suit.
(f) Compromise based on award.
(g) Compromise not recorded in suit—O. 23, R. 3, Civil P. C.
(h) Compromise decree creating a charge.
(i) Compromise decree varying or modifying terms etc.

(a) Meaning of.

——S. 17 (2) (vi) — Compromise — Proceedings of Court.

A compromise recorded by the Court needs no registration and secondary evidence of its contents is admissible. AIR (Vol 5) 1918 Lah 349 : 45 Ind Cas 331 (DB).

——S. 17 (2) (vi)—Compromise submitted to a Court.

A compromise submitted to and acted upon judicially by the Court is a step of judicial procedure not requiring registration. A I R (Vol 4) 1917 Lah 354 : 88 P R 1917 : 175 P W R 1917 : 42 Ind Cas 380 (DB).

——S. 17 (2) (vi)—Decree—Meaning of—Scope of — Application to pleadings etc..

Section 17 of the Registration Act has no application to proper judicial proceedings whether of pleadings or orders of the Court. Hence a compromise incorporated into a decree of the Court is admissible in evidence in a subsequent suit though not registered. AIR (Vol 3) 1916 Mad 536 : 18 M L T 497 : (1915) M W N 956 : 29 M L J 779 : 31 Ind Cas 260 (DB).

(b) Compromise embodied in decree.

——S. 17 (2) (vi) — U. P. Land Revenue Act (3 of 1901). S. 33—Application under—Compromise entered into — Compromise made part of order — Parties acting on compromise — Adjudication on question of title.

Where a petition of compromise relating to the entire subject-matter of a dispute pending in the Revenue Court on a application for correction of papers under S. 33, U. P. Land Revenue Act is presented to the Court and finally the Court accepts it and orders mutation of names in accordance with the terms which are incorporated in the order by means of a reference to the contents of the petition of compromise, the proceedings and the order of the Court are sufficient proof of the terms of the settlement and they clearly do not require registration for the admissibility in evidence, an order of a Court being exempted from registration under Cl. (vi) of sub-s. (2) of S. 17. An order that compromise shall be given effect to in the khetauni, amounts to the incorporotion of the compromise in it and it is quite immaterial that the actual terms of the compromise are not stated in the order. 1942 O W N 450 : 1942 A W R 119 & 300 (2) : 204 Ind Cas 389.

——S. 17—Compromise decree.

Where, in a suit, a compromise is arrived at and a deed of settlement is executed and the deed is embodied in the compromise decree, the deed does not require registration by virtue of S. 17 (2) (vi). The dedication contained in the terms of the settlement does not amount to a gift nor can the decree be considered to be in the nature of the deed of gift. A I R (Vol 26) 1939 Cal 23 : I L R (1938) 2 Cal 312 : 182 Ind Cas 605 (DB).

——S. 17 (2) (vi) — Compromise between parties to suit embodied in petition to Court—Court passing order recording compromise and passing decree on it —Terms of compromise not actually embodied in decree :

Held, that the compromise does not require registration according to cl. 6 of sub-s. (2) of S. 17, although the terms of the compromise are not actually embodied in the decree. The compromise can be proved by the petition embodying the terms thereof presented by the parties in the suit, as it formed part of the judicial order made by the Court thereon, by virtue of the reference made to the compromise. AIR (Vol 25) 1938 Lah 737 : 182 Ind Cas 353.

——S. 17—Mere passing of decree in accordance with compromise.

The mere passing of a decree in accordance with the compromise is sufficient to make all its terms a part of the decree. Therefore, where a decree is passed in accordance with the compromise, it makes the whole compromise a part of the decree so as to bring the exemption in cl. 6 of S. 17 (2), into operation. A I R (Vol 23) 1936 Pesh 125 : 163 Ind Cas 64 (DB).

——S. 17 (2) (vi)—Compromise decree substantially based on compromise.

In deciding as to admissibility of a compromise without registration, no hard and fast rule can be laid down. Each case would depend upon its own facts and circumstances. All that is necessary to see is whether the decree is substantially based upon the deed of compromise so that the terms of the compromise must be deemed to have been read into the body of the decree. The deed of compromise may be copied out verbatim in the body of the decree or it may be attached to the decree by means of a schedule. It would be equally permissible if there is a clear reference to the compromise which was before the Court and which must be taken to have been an integral part of the decree in view of the language used. (1935) 37 P L R 238 : 157 Ind Cas 959.

——S. 17—Compromise embodied in decree of Court.

A compromise which has been incorporated in a decree is admissible in evidence even though it is unregistered. (1931) 31 PLR 959: 132 Ind Cas 7 (DB).

——S. 17—Decree in terms of compromise is evidence of terms of compromise—It is exempt from registration. A decree though set aside or modified is a decree within the above mentioned clause. A I R (Vol 17) 1930 Lah 937.

——S. 17—Compromise need not be bodily transcribed in order of Court or in decree to exempt it from registration—Passing decree in terms of compromise is sufficient. AIR (Vol 17) 1930 Lah 855 : 12 L L J 113 (DB).

——S. 17—Compromise embodied in decree.

A compromise regarding a dispute as to immoveable property is not compulsorily registrable if it is embodied in a decree. (1930) 31 P L R 959 (DB).

——S. 17—Decree based on compromise need not necessarily recite verbatim all the compromise — Where decree passed on compromise uses words "hasab shariat maslihatnama" it must be considered to have incorporated all conditions of compromise and so, such compromise is admissible though unregistered. AIR (Vol 16) 1929 Lah 527: 11 L L J 127 : 118 Ind Cas 395.

——S. 17 (2) (vi)—Agreement.

Where the decree incorporates the whole of the compromise and the agreement, which led to the compromise of the suit, the registration of the agreement is unnecessary and the decree is sufficient evidence of its terms. AIR (Vol 16) 1929 Oudh 539 : 6 O W N 903 : 121 Ind Cas 81 (DB).

——S. 17 — Per Phillips, Offg. C. J. and Odgers J.— Compromise recorded in a decree — Portions which are not embodied in decree are also exempt.

Per Srinivasa Ayyangar, J. — Unless compromise is embodied in decree or directly indirectly exemption cannot be relied on. AIR (Vol 15) 1928 Mad 713 : 27 M L W 544 : 109 Ind Cas 872 (F B).

——S. 17—A decree embodying a compromise, purporting to grant a permanent tenancy, is not exempt from registration, because that requirement is only foregone in cases coming within cls. (b) and (c), S. 17. AIR (Vol 14) 1927 Cal 913 : 31 C W N 1099: 104 Ind Cas 812 (DB).

——S. 17—Compromise affecting immovable property embodied in the decree requires no registration. AIR (Vol 14) 1927 Lah 905: 9 L L J 566: 106 Ind Cas 826.

——S. 17 — Compromise embodied in a decree of Revenue Court does not require registration. A I R (Vol 14) 1927 Lah 156 : 99 Ind Cas 1002.

——S. 17—Where the decree stated that a solenama had been filed by the parties and the suit was decreed in terms of the solenama in favour of the plaintiff for one rupee,

Held, that this in substance incorporated the solenama as part of the decree and no such decree could have been passed without reference to the solenama and it was admissible in evidence without registration. AIR (Vol 13) 1926 Cal 666 : 30 C W N 307 : 96 Ind Cas 753 (DB).

——S. 17—Compromise incorporated into decree need not be registered. AIR (Vol 12) 1925 Lah 542: 6 Lah 844 : 26 P L R 691 : 89 Ind Cas 615 (DB).

——S. 17 (2) (vi)—Compromise.

A razinama embodied in a decree is exempted from registration. A compromise embodied in a decree about properties not in a prior suit between the parties, does not affect the title to such lands. (1913) 36 Mad 46 : 21 M L J 870 : 10 M L T 232 : (1911) 2 M W N 265 : 12 Ind Cas 317 (DB).

——S. 17(1)—Hypothecation clause in consent decree —Whether mortgage or charge — Consent decree — Terms introduced in consideration for relief.

In a suit for recovery of money due on bahikatta accounts a decree was made upon a petition of compromise for the payment by the defendant of a certain sum by instalments. The decree further declared that a certain immoveable property specified in the petition of compromise "shall be hypothecated for the realization of the money and that the defendants shall not be able to create any incumbrance upon the same."

Held that having regard to Cl. (I) of S. 17 the latter clause, even if it amounted to a mortgage, would not require registration. That the hypothecation of immoveable property was the consideration for the time allowed for payment of the sum decreed by instalments, and thus formed an integral and necessary part of the adjustment of the claim in the suit, and the court did not act contrary to the provisions of S. 375, C. P. C., inserting this clause in the consent decree. (1908) 12 C W N 849 : 35 C 837 (842, 843) : 7 C L J 492 (DB).

(c) Compromise embodied in order.

——Ss. 17 (2) (vi), 49 (as amended in 1929)—Order passed by Magistrate in case under S. 145, Criminal P. C., creating charge on basis of compromise — Registration.

Plaintiff instituted a suit for sale of certain properties on the allegation that a mortgage or charge was created in his favour, under either an oral award or in consequence of certain statements and proceedings in a Criminal Court, when defendant 1 had filed a complaint against him under S. 145, Criminal P. C. The order was passed by the Magistrate on 2nd February 1923, before S. 17 (2) (vi) was amended in 1929 to the effect that a mortgage was created in favour of the plaintiff in respect of the property in dispute. It was passed in consequence of the compromise arrived at between the parties and contained in their statements and without referring to the statements, the order was incomplete and incomprehensible :

Held, that the suit was maintainable. The order of the Court was exempted from registration without any qualification before the amendment of 1929, and being thus admissible in evidence, could be relied upon by the plaintiff in support of his case. AIR (Vol 25) 1938 Mad 531 : 47 L W 435 : (1938) 1 MLJ 536 : 1938 M W N 394 : 178 Ind Cas 667 (DB).

——S. 17 (2) (vi)—Terms of compromise recorded in order by mere reference.

Where some of the terms of a compromise were not included in the decree as they did not relate to the subject-matter of the suit, but in the order by which the compromise was recorded they were referred to under the expression 'hasab tasfiya bahami':

Held, that these terms must be taken to have been embodied in the order by virtue of the above expression and the order recording the compromise though it was not registered under the Registration Act, could be admitted in evidence to prove those terms. AIR (Vol 19) 1932 Lah 24 : 32 P L R 761 : 135 Ind Cas 203.

(d) In respect of property in suit.

——S. 17 (2) (vi) — Applicability — Compromise — decree — Interlocutory proceeding — Money suit— Attachment of property before judgment—Compromise creating charge on attached property — Registration.

Where certain immovable property is attached before judgment in a money suit, such property will not be the subject-matter of the suit or proceeding so as to exempt a compromise in an interlocutory proceeding, creating a charge, from registration as contemplated in S. 17 (2) (vi) of the Registration Act. 1935 Mad 232, not foll. AIR (Vol 37) 1950 Orissa 140: I L R (1950) Cut 120 : 16 C L T 45 (DB).

——S. 17 (2) (vi) — Applicability — Compromise decree in suit in which immovable property was also the subject-matter—Registration—Necessity.

In a suit for a settlement of the accounts of the profits, income and expenditure of a certain talkie concern in which the plaintiff claimed a three-annas share, the defendant pleaded in defence a compromise decree in a prior suit between the same parties according to which the plaintiff's right in the suit property in the later suit became extinguished. On a question whether the compromise required registration.

Held; That though the plaint in the earlier suit had asked only for a charge, immovable property which was the subject of the compromise decree was

also the subject-matter of the suit and so S. 17 (2) (vi) of the Registration Act, had a direct application to the facts of the case and registration was not necessary. AIR (Vol 36) 1949 Mad 245 : 61 L W 712: 1948 MWN 825 : (1948) 2 MLJ 475.

——S. 17 (2) (vi) — Compromise in respect of property in suit embodied in decree.

Where a compromise is with respect to the property in dispute in the suit and is embodied in the decree, it is exempt from registration in view of the provisions of S. 17 sub-s. (2) (vi), Regis. Act. AIR (Vol 29) 1942 All 12 : 1941 A L J 587 : I L R (1941) All 763 : 198 Ind Cas 13 (DB).

——S. 17—In a suit relating to the property compromised, the compromise even though not registered, can be received in evidence. AIR (Vol 25) 1938 Lah 69 : 176 Ind Cas 813 (DB).

——S. 17 (2) (vi) — Compromise decree referring to conveyance of property.

An unregistered compromise-decree referring to an out and out conveyance of the property, could under the old provisions of S. 17 (2) (vi) be received in evidence not only for a limited purpose for proving an agreement to convey but to prove the completed conveyance of the property. AIR (Vol 25) 1938 Mad 202: 1937 M W N 1254 : 176 Ind Cas 733 (DB).

——S. 17 (2) (vi)—Scope of — Pro-note by father — Sons impleaded as parties — Character of claim, if changed — Claim in personam, what is.

What cl. 2 (vi) of S. 17 contemplates is that specific immovable property must be the subject-matter of litigation. A claim to have a liability satisfied out of the general estate of a person is not enough; in such a case, it cannot be said that all the movable and immovable property belonging to him forms the subject of litigation and, therefore, the subject-matter of a suit. Where a claim is made against a legal representative of a deceased on a promissory note executed by him, the claim is really one in personam though the decree is sought against the assets left by the deceased. Where, therefore a claim is made on a pro-note executed by the father and the sons are impleaded as parties, the character of the claim is not changed. The object of impleading the sons is to have it declared that in respect of the claim sued on they are under a pious obligation to discharge the same. If that declaration is obtained by the creditor, he would be entitled to proceed against the entire joint family property in hands of the father. AIR (Vol 24) 1937 Mad 504 : 1937 M W N 239 : 45 L W 501 : (1937) 1 M L J 325: 170 Ind Cas 883.

——S. 17 — Compromise decree — Transaction extinguishing rights of one party and creating rights in favour of another.

If, by a decree of a Court made on compromise, a transaction is had which has the effect of extinguishing the right of a party and declaring or creating a right in favour of another party in any property which is the subject matter of the suit or proceedings, sub-s. (1), S. 17 would not hit that decree. AIR (Vol 22) 1935 Cal 478 : 39 C W N 485 : 157 Ind Cas 971 (DB).

——S. 17 (2) (1)—Proceedings in Court.

Solenama referring to the subject of the claim becomes when recorded, a proceeding of the Court and requires no registration nor stamp duty. (1913) 19 Ind Cas 551 (Cal).

(e) In respect of matters in and extraneous to suit.

——S. 17—Compromise decree—Charge on immovable property other than subject-matter of suit of over Rs. 100 in value — Registration—Necessity—Failure to register—Effect.

A money-decree made on a compromise affecting immovable property other than that which is the subject-matter of the suit is compulsorily registrable according to S. 17 (1) read with S. 17 (2) (iv) of the Registration Act when the value of such property is more than Rs. 100. If it is not registered, it cannot effectively create any interest in the immovable property in favour of the decree holder. 1949 R D 237.

——S. 17—Compromise in suit—Compromise relating to lands outside suit—Registration—Compromise as evidence of title and as acknowledgment—Limitation.

A compromise effected in a suit on June 18, 1926, besides settling matters in dispute, required the defendant to deliver to plaintiff certain lands outside the suit. The Court ordered the compromise to be recorded and filed on June 29, 1926. A decree in terms of the compromise was passed in respect of matters in suit. The defendant did not deliver the lands outside the suit in accordance with the compromise. On June 18, 1936, the plaintiff filed a suit for recovery of the said lands basing his claim on the compromise :

Held, (1) that if the compromise be regarded as an acknowledgment, it could not form the basis of suit, but could save limitation it title independent of it could be established, but this could not be done in this case :

(2) that if the compromise application be treated as an agreement, a suit for specific performance should have been filed within 3 years either from the date of compromise or from the date when the possession was demanded and refused ;

(3) that the agreement regarding land in suit being embodied in the decree, did not require registration ;

(4) that the agreement embodied in the compromise declared the title of plaintiff and hence, could form the basis of the suit and also served to save limitation ;

(5) that the suit was governed by 12 years' limitation under Art. 144, Limitation Act and time ran from the date of compromise. AIR (Vol 32) 1945 Bom 143 : 46 Bom L R 931 (DB).

——Ss. 17 (2) (vi), 29, 32 — Decree on compromise relating to immovable property worth more than Rs. 100 not subject-matter of suit—True copy of decree can be presented for registration. AIR (Vol 25) 1938 Bom 212 : 40 Bom L R 160 : 174 Ind Cas 954 (DB).

——S. 17—Consent decree affecting property not in suit.

A consent-decree creating a charge over properties which were not the subject-matter of the suit is compulsorily registrable under S. 17. (1936) 164 Ind Cas 1009 : 40 C W N 974 : I L R (1937) 1 Cal 65.

——S. 17—Decree—Registration.

The decree as a whole is not compulsorily registrable, and it does not matter if properties other than those in suit are also dealt with in it. AIR (Vol 23) 1936 Pesh 125 : 163 Ind Cas 64 (DB).

——S. 17 (2) (vi)—Where there is a compromise filed in Court before the amendment of 1929 which involves property which is not the subject of the case in that Court, then registration is unnecessary even in regard to that property. AIR (Vol 22) 1935 All 862 : 1925 A L J 910 : 1935 A W R 1034 : 58 All 230 : 158 Ind Cas 1106 (DB).

——S. 17—Compromise embodied in decree need not be registered, even if part of it relates to matters outside the suit. 98 Ind Cas 1069 : AIR (Vol 14) 1927 All 156 (DB).

——S. 17 — Compromise dealing with matters extraneous—Decree dealing only with subject-matter of the suit—Court disposing of the suit as per compromise—Compromise need not be registered and the decree is capable of execution. 2 P L T 38 : AIR (Vol 8) 1921 Pat 320 (DB).

——Ss. 17 (2) (vi) and 49 — Compromise - Decree of Court—Matters outside suit—Recital of C. P. Code, O. 23, R. 3.

The word "decree" in S. 17 (2) (vi) of the Registration Act, is not confined to so much of a decree as is operative under O. 23, R. 3 of the C. P. Code. The object of the registration is to provide for public registration of documents and its provisions have to be construed accordingly. Where on a compromise of a pending suit, it was provided, inter alia that one of the parties should grant a lease of certain lands not the subject of the suit on a certain contingency, and the agreement between the parties was recorded in a decree of Court under O. 23, R. 3 of the C. P. Code. Held, that even though the decree might be incapable of execution as a decree qua, the lands not included in the suit, it might be received in evidence of the agreement which it embodied. 46 I A 240 : 37 M L J 525 : 17 A L J 1117 : 24 C W N 177 : (1920) M W N 66 : 27 M L T 42 : 11 L W 301 : 53 Ind Cas 534 : AIR (Vol 6) 1919 P C 79.

——S. 17 (2) (vi) — Compromise—Decree recording terms not relating to suit—Effect.

A decree recording an agreement as a term of a compromise though not relating to the suit is a judicial record of the agreement of the parties and is admissible in evidence. Such an agreement when it gets recorded in a decree does not require registration and is admissible in evidence. 27 C L J 583 : 27 Ind Cas 640 : AIR (Vol 5) 1918 Cal 844 (DB).

——Ss. 17 (2) (vi) — Compromise decree—Registration.

A compromise dealing with matters within and without the scope of the suit and duly recorded is admissible in evidence without registration. A compromise not itself creating a lease is admissible in evidence without registration. In order to bring a case within S. 17 (2) (vi), not only the order, but the pleadings resulting in such order, may be looked into. 3 Pat L J 255 : 4 Pat L W 393 : (1918) Pat H C C 193 : 46 Ind Cas 358 : AIR (Vol 5) 1918 Pat 507 (FB).

—— S. 17 (2) (vi)—Compromise - Properties not comprised in suit — Decree — Admissibility without registration.

Where a suit for partition was compromised by which each defendant, admitted the plaintiff's right to certain portions of the claim made by him, in consideration of the plaintiff's admitting the claim of each of the defendant's, for certain property which each defendant desired to retain and the compromise related to properties not the subject of the suit but was incorporated in the decree. Held, that the compromise did not require to be registered even though it dealt with property not included in the suit. Such a decree, although not registered, is evidence of an agreement between the parties under which lands have been allotted to each. 3 Pat L J 43 : 3 Pat L W 141 : 43 Ind Cas 282. AIR (Vol 5) 1918 Pat 139 (DB).

——S. 17 (2) (vi) Compromise beyond the scope of the suit—Decree not embodying terms of the compromise—Non-registration—Actings of the parties—Part performance—Parties not entitled to resile from compromise.

In the course of certain proceedings between a mortgagor and mortgagee under mortgage of 1848 and 1871, the parties entered into a compromise in 1873, whereby it was agreed that a portion of the equity of redemption was to be released in favour of the mortgagee who was thenceforth to be the absolute owner thereof and that the mortgagor was to be absolutely entitled to the remainder free of the incumbrance. It was also agreed that a conveyance agreed to be relinquished by the mortgagor in favour the mortgagee. No conveyance, however, was executed but the parties had acted on the terms of the arrangement for a long time and enjoyed the properties allotted thereby absolutely as their own.

Held, that as the transaction took place before the T. P. Act, no writing or registration was necessary to validate it and that even if the transaction was defective or inchoate, the conduct of the parties and the actings of the mortgagor had supplied the statutory defects. 42 Cal 801 : 28 M L J 548 : 17 Bom L R 420 : 17 M L T 143 : (1915) M W N 621 : 2 L W 258 : 19 C W N 250 : 21 C L J 231 : 13 A L J 229 : 42 I A 1 : 28 Ind Cas 930 : AIR (Vol 1) 1914 P C 27.

——S. 17 (h)—Compromise decree, if need be registered—Document not creating present demise.

A document which does not make a present demise but is merely an agreement to create a lease on a future date the terms of which are to be defined by documents to be hereafter executed falls within cl. (h) of S. 17 and therefore needs no registration. Where the terms of a solenamah dealing with lands not forming the subject matter of the suit are embodied in the decree in the suit. Quaere—Where the solenamah would require registration in order to be admissible in evidence. Whether the decision in 35 Cal 837 : 12 C W N 849 does not give a truer exposition of the decision of the Privy Council in 22 M 508; 3 C W N 485; 26 I A 101. (1910) 6 Ind Cas 443 (444) : 14 C W N 874 : 37 Cal 808 (DB).

——S. 17, Sub-Ss. 1, 9, 3 (1) — Registration of compromise decree relating to cases if necessary.

The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by Court. Decrees and orders are clearly outside the scope of S. 17 whether they relate to leases or not ; and Sub-S. 2 of S. 17 has not the effect of making decrees and orders relating to leases compulsorily registrable. Provisos are often inserted unnecessarily excepting cases which would not otherwise fall within the enactment for the purpose of removing apprehensions, and cases not otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso. (2) That the compromise was not bad for want of registration whether it related to the lands included in the suit or not, either under S. 17 of the Registration Act or under S. 107, T. P. Act. (1910) 20 MLJ 20 : 33 M 102 (108, 109) : 6 MLT 313 : 3 Ind Cas 701 (DB); See also (1909) 5 C L J 611 (636) : 36 Cal 193 : 1 Ind Cas 913.

——S. 17—Compromise of suit embodied in a decree.

The provisions of S. 17 do not apply to proper judicial proceedings whether consisting of pleadings tried by the parties or orders made by the Court consequently. A compromise in a previous suit partly relating to lands not then the subject matter of that suit can be let in evidence in a subsequent suit and does not require registration. (1905) A W N 195 : 2 ALJ 564 : 28 A 78 (81) (DB).

(f) Compromise based on award.

——S. 17 — Award not registered — Decree passed thereon — Stranger to proceedings, whether can challenge its validity.

The law, as it stands, does not require every decree to be registered. According to the provisions of S. 17, sub-s. (2), cl. (vi), a decree passed upon an award is no exception to that rule. If such a decree were based upon an award which is unregistered, though compulsorily registrable under S. 17 (1) (b) and, therefore, inadmissible in evidence, it can be impeached in a proper proceeding, such as an appeal, review or revision. If it has not been set aside or challenged in a proper proceeding, it is not a nullity but would be binding on the parties. At any rate, a

stranger to the proceedings cannot challenge its validity or underrate its effect on the ground that the decree was founded upon an award which ought not to have been admitted in evidence. AIR (Vol 29) 1942 Bom 132 : 44 Bom L R 158 : 1 L R (1942) Bom 183 : 200 Ind Cas 456 (DB).

——S. 17 (2) (vi) — 'Compromise' if includes award —Decree based on award, if compulsorily registrable.

The word 'compromise' is used in S. 17 (2) (vi) in a technical sense and does not include an award. There is an essential distinction between an award and a compromise. While an award is not in any sense an adjustment by agreement, a compromise is and the decree passed upon such agreement would, if it falls within the provisions of S. 17 (2) (vi), be compulsorily registrable. Decrees and orders of a Court are not as a rule compulsorily registrable. The effect of the exception provided in S. 17 (2) (vi), should be limited strictly to the express word used in the excepting Cl. (vi) of sub-s. (2) of S. 17, that is, a decree made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding. The decree passed on an award is not, therefore, compulsorily registrable. AIR (Vol 29) 1942 Bom 132 : 44 Bom L R 158:I L R (1942) Bom 183:200 Ind Cas 456 (DB).

(g) Compromise not recorded in suit—O. 23, R. 3, C. P. C.

——S. 17 — Suit in respect of immovable property worth Rs. 100 or more — Compromise incorporated in decree — No registration is required — But where the order is "suit compromised and accordingly dismissed," registration is essential. AIR (Vol 31) 1944 Lah 394 : 46 P L R 220 : 218 Ind Cas 496 (DB).

——S. 17 (2) (vi) — Suit by mortgagee for recovery of certain amount as interest — Suit dismissed — On appeal parties entering into compromise whereby mortgagor agreeing to give possession of mortgaged land to mortgagee — Failure to deliver possession — Mortgagee suing for possession :

Held, that the compromise required registration. AIR (Vol 28) 1941 Lah 164 : 43 P L R 9 : 195 Ind Cas 227.

—— S. 17—While passing a decree in a compromise, the Court did not comply with the provisions of O. 23, R. 3, Civil P. C., and the compromise, so far as it concerned certain lands, was never ordered to be recorded in the suit :

Held, that portion of the compromise did not become a part of the judicial proceedings and was not exempt from registration. AIR (Vol 24) 1937 Lah 353 : 39 P L R 591 : 173 Ind Cas 277.

[Reversed in AIR (Vol 27) 1940 P C 70 : 187 Ind Cas 440 : I L R (1940) Kar (P C) 149 : I L R (1940) Lah 330 ; 67 Ind App 179.]

——S. 17 — Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. 23, R. 3, Civil P. C., the deed is not exempt from registration under S. 17 (2) (vi), Registration Act. AIR (Vol 23) 1936 Lah 605 : 165 Ind Cas 199 (DB).

——S. 17—Suit dismissed in accordance with compromise — Compromise not recorded in decree under O. 23, R. 3 — Subsequent suit based on same compromise — It is inadmissible in evidence if it deals with property over Rs. 100. AIR (Vol 14) 1927 Lah 865 : 28 P L R 143 : 100 Ind Cas 783.

(h) Compromise decree creating a charge.

——Ss. 17, 49—Suit on simple money-claim—Decree on compromise creating or assigning rights over property of value of over Rs 100—Decree, if compulsorily registrable—Decree unregistered—Effect.

Where, in a suit on a simple money claim a decree was passed on compromise transferring from the defendant to the plaintiff rights in immovable property of the value of over Rs. 100 but the decree was not registered :

Held, that the decree was compulsorily registrable under S. 17 (2) (vi), and being unregistered, could not be given effect to according to its terms in execution. AIR (Vol 24) 1937 All 282 : 1937 A L J 120 : 1937 A W R 22 : 168 Ind Cas 642.

——S. 17 (2) (vi)—Compromise — Decree based on compromise creating a mortgage on property for the amount and default sale.

A decree based on a compromise of parties to suit and creating a mortgage of the property for the amount and directing sale in default of payment within time, falls under S. 17, exception cl. 6 and does not require to be registered. AIR (Vol 5) 1918 Mad 1307 : 37 Ind Cas 764 (DB).

(i) Compromise decree varying or modifying terms etc.

——S. 17 (2) (vi)—Solenama recognising pre-existing tenancy and varying rent, incorporated in decree — Exemption from registration.

A solenama which does not create a present demise but merely recognises the pre-existing tenancy, varies the rent but maintains the status of the tenant, comes within S. 17 (1) (b), Registration Act, and is saved from registration by S. 17 (2) (vi) of the Act if it is incorporated in a decree. I L R (1948) 1 Cal 520.

——S. 17 — Compromise decree modifying rent of holding—If requires registration.

A compromise decree which does not create a new lease, but merely modifies the rent of a holding and leaves the tenancy otherwise unaffected, does not require registration. (1946) 50 C W N 166.

——S. 17 (2) (vi) and (1) (d)—Compromise — Variation of terms of a lease — Compromise not incorporated in decree.

A compromise entered into between landlord and tenant but not incorporated in the decree and which on a fair construction of its terms appeared to be a lease and not merely an agreement to create a lease, requires to be registered under S. 17 (1) (d) of the Registration Act and is inadmissible in evidence without registration. AIR (Vol 5) 1918 Pat 654 : 4 P L W 247 : 44 Ind Cas 638.

48. Petitions of compromise.

(a) Mere recitals of past arrangements.
(b) Dealing with question of title to immoveable property worth Rs. 100/- or over.
(c) Not embodied in the decree or order.
(d) Not creating any right, etc.
(e) Relating to matters covered by and extraneous to suit.

(a) Mere recitals of past arrangements.

——S. 17— Compromise petition containing terms of family arrangement composing disputes — Registration—Necessity

Where a bona fide dispute between the parties is composed, each party recognising an antecedent title in the other, and the parties make a petition to the Court informing the Court of the terms of the agreement there is no necessity to have such a petition registered as it does not purport to create, assign, etc., any right within the meaning of S. 17 (1) (b), Registration Act; it is merely a recital of fact by which the Court is informed of the agreement come to between the parties. It is a valid arrangement legally binding on the parties though unregistered. AIR (Vol 33) 1946 Pat 55 : 12 BR 688: 11 Cut LT 48: 226 Ind Cas 129.

——Ss. 17 (1) (b) and 17 (2) (b) — Compromise during pendency of suit— Terms of agreement put in writing embodying disputes in relating to property in suit as well as other matters in dispute — Parties agreeing

that compromise decrees should be obtained in terms of compromise — Document held, fell under S. 17 (2) (b) and not under S. 17 (1) (b) and did not require registration. A I R (Vol 27) 1940 Mad 897 : 1940 M W N 797 : 52 L W 339 : (1940) 2 M L J 319 : 192 Ind Cas 859 (DB).

——S. 17—Under no law is a compromise or a mutual settlement between parties required to be reduced into writing. When no writing is absolutely necessary no registration would be compulsory. A compromise of doubtful rights does not necessarily amount to a transfer of property. AIR (Vol 14) 1927 All 484 : 49 All 873 : 25 A L J 541 : 8 L R A Rev 164: 103 Ind Cas 37 (DB).

——S. 17—Merely describing compromise petitions as family settlement or merely holding that in their nature they are family settlements would not exempt them from the provisions of Section 17 (b) if they fall within the terms of that Section. A I R (Vol 11) 1924 Oudh 397 : 11 OLJ 213 : 178 Ind Cas 878.

——S. 17—Mere acknowledgment of antecedent title need not be registered.

Where petitions are clearly of a nature which purports or operates neither to create, assign or extinguish any right, title or interest in present or in future in immovable property nor had they "declared" any such right, title or interest.

Held, the true nature of such a settlement was an acknowledgment of an antecedent title.

Where all the parties were entitled to inherit the disputed estate and the only question in controversy was as to their respective shares.

Held, that the petitions of compromise defining the shares need not be registered. A I R (Vol 11) 1924 Oudh 397 : 11 OLJ 213 : 78 Ind Cas 878.

——S. 17 — Compromise in a partition proceeding in Revenue Court, was acted upon by parties and accepted by Court, is admissible without registration. The compromise does not by itself create any title in the parties. It is only an information given to the Revenue Court of the compromise at which the parties had arrived out of Court; and therefore the document was admissible in evidence without stamp and registration and the compromise having been acted upon the parties cannot be allowed to resile from it. A I R (Vol 10) 1923 All 438 : 71 Ind Cas 619.

——S. 17 (2) (i) — Kabuliyats and Razinamahs — Registration.

Although Razinamas and Kabuliyats are not in themselves documents of transfer they are fairly conclusive evidence that transfer has, in fact been made, and they are exempt from registration. AIR (Vol 5) 1918 Bom 222 : 42 Bom 359 : 20 Bom LR 358: 45 Ind Cas 492 (DB).

——S. 17 (2) (vi)—Compromise petition— If compulsorily registrable.

A compromise petition put into the Court with what is settled out of the Court in order to get mutation effected according to it and confined to the subject matter of the suit, is a step is a judicial proceeding and no registration is necessary. A partition between co-owners need not be effected by a written document and a petition admitting or reciting such a partition is therefore admissible without registration. AIR (Vol 5) 1918 Oudh 412 : 21 O C 346 : 39 Ind Cas 545 (DB).

——S. 17 (2) (1)—Razinama and Kabuliyat—If should be registered.

Razinamas and Kabuliyats are documents between the occupant and the superior holder reciting a transfer which has taken place between the occupant and his transferee and hence do not require registration. Even if they are said to fall under S. 17, they need not be registered unless it is shown that the interest extinguished is of the value of Rs. 100 or upwards. AIR (Vol 4) 1917 Bom 244 : 41 Bom 510 : 19 Bom LR 329 : 40 Ind Cas 68 (DB).

——S. 17 (2) (vi)— Compromise petition to Court not presented by parties themselves.

A deed of compromise which had been executed by the parties in the presence of the Tahsildar was forwarded by the latter to the Civil Court in which the suit was pending.

Held, that the intention being that the decree should be passed in accordance therewith, the document was merely a petition addressed to the Court and as such did not require registration. AIR (Vol 4) 1917 Lah 282 : 78 PR 1917 : 112 PLR 1917 : 95 PWR 1917 : 40 Ind Cas 675 (DB).

——S. 17 (2) (vi) — Compromise petition — Registration.

A petition to record an adjustment, not being the original contract between the parties does not require registration. A I R (Vol 4) 1917 Nag 1 : 46 Ind Cas 913.

——S. 17 (1) (d) and (2) (v) and (vi) — Agreement in compromise petition to grant permanent lease of property not subject to suit — Agreement, part of consideration of compromise— Decree passed on petition—Petition, if agreement for lease.

Per Mookerjee J.— Although an agreement in writing, which is not a present demise, but only an agreement for a lease, is (having regard to the term 'lease' as defined in S. 2 of the Act) required to be registered if the term exceeds one year, and the exemptions provided in Cls. (h) and (i) to S. 7 of the Act of 1877 do not apply to leases, S. 49 of the Act does not preclude its being received as evidence of any transaction not affecting such property. It can therefore be proved by the plaintiff in a suit for specific performance of the agreement to grant the lease Where a compromise petition recited that the parties, as part consideration for the compromise, agreed to let certain properties not in suit to the defendant on certain terms and where a decree in terms was passed.

Held, that the petition was not in itself an agreement to lease as it was a mere recital of the terms agreed upon and it was admissible to prove the agreement to lease. Documents in Cls. (e) to (n) of S. 17 of Registration Act of 1877 are excepted from Cls. (b) and (c) and not from Cls. (a) and (d), as these documents come within the document mentioned in Cls. (b) and (c) and not within (d) and (a). AIR (Vol 2) 1915 Cal 505 : 19 CWN 347 : 22 CLJ 44 : 28 Ind Cas 879 (DB).

[On appeal see 42 Cal 485.]

——S. 17 (2) (vi)—Compromise— Razinama if requires registration.

A razinama presented to a Court setting forth the terms of the compromise does not require to be registered and is admissible in evidence as such. A I R (Vol 2) 1915 Lah 240 : 90 PWR 1915 : 1 P L R 1916 : 29 Ind Cas 311 (DB).

——S. 17 (2), (1) — Petition for compromise— Registration if necessary.

A compromise petition presented to the Court with a prayer that it be acted upon, is a pleading and does not require registration even if it leads to the disposal of the suit. AIR (Vol 1) 1914 Mad 20 : 22 Ind Cas 35 (DB).

——S. 17 (d) — Petition of compromise containing a recital of a previous oral agreement for lease—Stamp —Registration—Evidence.

Where a petition of compromise merely contained a recital of a previous oral agreement for lease :

Held, that it did not require registration or stamp. It was evidence of an oral agreement but not an agreement in itself. (1908) 12 CWN 59 (60) (DB).

(b) Dealing with question of title to immoveable property worth Rs. 100/- or more

——S. 17—Compromise petition filed in Court dealing with title to property valued more than Rs. 100 —Necessity for registration.

A petition of compromise filed in a Revenue Court embodying the terms of a compromise dealing with a question of title to property exceeding Rs. 100 in value is compulsorily registrable. AIR (Vol 34) 1947 All 177: 1946 ALJ 409: 1946 ALW 480: 1946 AWR (HC) 602: 227 Ind Cas 265.

——S. 17—A compromise made after decree, affecting any immovable property of the value of over Rs. 100 and embodied in a petition presented under O. 21, R. 2, C. P. Code, which has been recorded by the Court is exempt from registration. AIR (Vol 14) 1927 Sind 66: 97 Ind Cas 321.

——S. 17 (1) (b) - Compromise.

Compromise petition affecting title to immovable property worth more than Rs. 100 filed in Revenue Court—Registration is compulsory.

There is no authority for the proposition that a document which would otherwise require Registration need not be Registered if it is thrown into the form of a petition presented to a Revenue Court. AIR (Vol 13) 1926 Lah 586: 96 Ind Cas 227 (DB).

——S. 17—Where petition of compromise filed in Court is the only evidence of title to property worth more than Rs. 100: Registration is necessary. AIR (Vol 11) 1924 All 842: 78 Ind Cas 1043.

——S. 17 (2) (VI)—Compromise affecting immovable property—Petition under O. 21, R. 2, C.P.C.—Registration.

A compromise affecting immoveable property of over Rs. 100 embodied in a petition under O. 21, R. 2, C. P. C. recorded by the Court, is exempt from registration. 36 Mad 46 and 27 MLJ 651 overruled. AIR (Vol 7) 1920 Mad 242: 43 Mad 688: 39 MLJ 77: (1920) MWN 431: 28 MLT 90: 12 LW 35: 58 Ind Cas 554 (FB).

——S. 17 (2) (VI)—Compromise in money suit—Mortgaging immoveable property—Registration.

A compromise petition in a money suit in which the deft. hypothecated certain immovable property to secure the payment of the decretal amount is inadmissible in evidence without registration as the mortgage was altogether outside the scope of the money suit. AIR (Vol 5) 1918 Cal 236: 46 Ind Gas 243 (DB).

——S. 17 (2) (1)—Compromise deed—Arrangements about certain estate.

A compromise deed which gives effect to some arrangement between the parties about an estate is compulsorily registrable. AIR (Vol 2) 1915 Lah 128: 254 PWR 1915: 26 Ind Cas 423 (DB).

——S 17 (2) (1)—Compromise affecting land—Non-registration - Effect of.

A compromise affecting immovable property cannot be given effect to if it is neither registered nor incorporated in a decree or order of a Court. AIR (Vol 2) 1915 Mad 639: 27 MLJ 656: (1914) MWN 900: 27 Ind Cas 379.(DB).

——S. 17 (2) (1)—Compromise.

An unregistered compromise dealing with property is not admissible in evidence, if the compromise relates to immovable property worth more than Rs. 100 and if the compromise is not embodied in a decree or order. (1911) 33 All 475: 8 ALJ 309: 10 Ind Cas 843 (DB).

——S. 17 (2) (1)—Razinamah deed in respect of immovable property over Rs. 100 in value—Registration whether necessary — Liability of parties not signing the deed.

A Razinama deed which affects immovable property of the value of Rs. 100 or over, made and filed in Court in which a suit relating to such property is pending, does not require registration. Such a Razinama binds also parties who, though they do not sign it, stand by and do not object to it. 90 PWR 1911: 11 Ind Cas 409.

——Ss. 17 (2) (1) and 49—Unregistered compromise deed.

An unregistered but compulsorily registrable compromise of suit creating a right of pre-emption by contract between the parties is not admissible to establish right of pre-emption affecting immovable property as it is not registered. (1910) 32 All 206: 7 ALJ 206: 5 Ind Cas 234 (DB).

——S. 17 (2) (1)—Rajinamah—Petition.

A rajinamah purporting to transfer absolutely, a part of the mortgaged property to satisfy the mortgaged debt and to retain the reminder to the mortgagor free from mortgage, does not release the equity of redemption nor does it declare, create, or extinguish any right in immovable property. It is admissible in evidence as an admission by the mortgagor of the agreement with the mortgagee, and no question of want of stamp or registration should arise. (1909) 2 Ind Cas 662 (668) (DB) (Cal).

——S. 17- Compromise petition affecting property over Rs. 100 in value unregistered.

An unregistered compromise petition which was the root of the plaintiff's title for increased rent is not admissible in evidence unless embodied in the order sanctioning the same if it related to immoveable property of more than Rs. 100 in value. (1908) 35 C 1010 (1012): 12 CWN 854: 8 CLJ 90 (DB).

——S. 17—Compromise Petition.

Per Harington J.—A petition of compromise purporting to declare the rights and interests of the parties to a suit in property worth more than one hundred rupees, and to deal with properties not included in the suit, must be registered, and such a compromise, if unregistered is inadmissible in evidence and cannot be enforced between the parties as a binding contract. Per Mookerjee, J.—A petition of compromise, in so far as it relates to properties in suit, does not require registration under S. 17 and the decree in so far as it gives effect to the settlement touching such properties operates as res judicata; in so far however, as it gives effect to the settlement touching properties extraneous to the litigation, the decree is clearly without jurisdiction and is inoperative; in relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding one hundred rupees in value. (1905) 1 CLJ 388 (406) (DB).

(c) Not embodied in the decree or order.

——S. 17—Compromise not embodied in the decree must be registered.

If a suit has been adjusted in the manner contemplated by Order 23, rule 3 of the Code of Civil Procedure, and the terms and conditions of the adjustment have been reduced to writing by the parties then the writing of the parties may be produced in evidence in any subsequent suit without being Registered only if the Court has duly recorded those terms and conditions and passed a decree in accordance with such of them as are the subject of the then existing litigation. Where the Court thinking that it could not record a compromise as it referred to properties extraneous to suit, dismissed the suit saying "case consigned to the Record Room according to the compromise."

Held, (1) that the Court should have recorded the whole agreement and then passed a decree in accordance with so much of the agreement as related to the suit and (2) that the document of compromise not having been rightly or wrongly recorded in the decree, is not admissible in evidence in the absence

of Registration. AIR (Vol 10) 1923 Lah 581: 4 Lah 263: 75 Ind Cas 461 (DB).

——S. 17—Compromise not embodied in decree but creating a personal liability.

An agreement or compromise though not embodied in the decree yet if it imposes only a personal liability need not be registered. (1910) 14 CWN 967: 7 Ind Cas 550 (551, 552) (FB).

——S. 17—Withdrawal petition setting out terms of compromise filed in court but not registered—Subsequent suit for land referred to in the compromise should be registered.

A suit was compromised, and a petition was filed in court setting out the agreement of compromise, and asking that the suit might be withdrawn. The court ordered the suit to be struck off the file, and made an order as to costs. The agreement was never registered. Plaintiff sued for recovery of the property to which he was entitled under it. Held, that the agreement should have been registered, and that the suit brought on it must fail. (1902) 25 M 553 (555) (DB).

(d) Not creating any right etc.

——S. 17—Compromise petition, it requires registration.

A compromise petition asking the Court to pass a decree on certain terms does not come within the purview of S. 17. Its provisions do not apply to a document which does not itself create, declare, assign, limit or extinguish any right, title or interest, but merely creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. AIR (Vol 20) 1933 Pat 306:14 P L T 1 Sup.: 12 Pat 359 : 145 Ind Cas 1 (DB).

——Ss. 17 (2) (vi) and 49 — Compromise filed in Court.

A compromise petition relating to property in suit, and incorporated in the order of the Court is not compulsorily registrable, and is admissible in evidence without registration. The mere fact that the parties undertake in the petition to execute a deed to assure each other in the properties respecting surreder to them would not render the petition compulsorily registrable. AIR (Vol 1) 1914 Lah 131 : 306 P L R 1913 : 205 P W R 1913 : 20 P R 1914 : 20 Ind Cas 817 (DB).

(e) Relating to matters covered by and extraneous to suit.

——S. 17—Compromise petition presented to executing Court relating to matters covered by the decree and also matters extraneous to it, does not require registration, for its admissibility. A I R (Vol 13) 1926 All 563 : 94 Ind Cas 210 (DB).

——S. 17 (2) (vi)—Compromise decree.

When a suit is disposed of according to the settlement which contains matters outside the scope of the suit, then registration of that is not necessary. A I R (Vol 8) 1921 Pat 320 : 58 Ind Cas 299 (DB).

——S. 17 (2) (vi)—Compromise—Property extraneous to suit—Necessity for registration.

A compromise relating to property extraneous to the suit requires registration. A I R (Vol 6) 1919 Lah 400 : 31 P R 1919 : 51 Ind Cas 273.

——S. 17 (2) (vi) — Compromise relating to property not in dispute.

If the Court takes into consideration the whole of the Razinamah, the same must be taken to have been submitted to and judicially acted upon by the Court and becomes part and parcel of the decree and is admissible in evidence without registration. A I R (Vol 5) 1918 Mad 1331: 6 L W 635: (1917) MWN 751: 33 M L J 615 : 42 Ind Cas 223 (DB).

——S. 17 (2) (vi)—Compromise—Matter outside suit.

A compromise so far as it relates to matters extraneous to litigation is inadmissible in evidence without registration. A I R (Vol 2) 1915 Cal 170 : 25 Ind Cas 377 (DB).

——S. 17 Cl. (2) (1) — Compromise — Agreement relating to matters not in dispute — Agreement not registered, whether admissible as to those matters.

Where a compromise agreement related also to matters not in dispute in the suit and the agreement is not registered, it cannot be admissible in evidence as to those matters in a subsequent suit. AIR (Vol 1) 1914 Cal 586 : 22 Ind Cas 687 (DB).

——S. 17 (2) (vi)—Compromise decree.

A petition of compromise need not be registered even if it is incorporated into the decree provided it deals with the properties in suit but where it gives effect to properties lying outside the sphere of the suit, it is inoperative and cannot without registration effectively declare or create title to immoveable property of the value of over Rs. 100. 36 Cal 193 : 5 C L J 611 (637) : 1 Ind Cas 913 (DB).

49. "Subject-matter of the suit or proceeding"

——S. 17 (2) (vi) — "Proceeding" in S. 17 (2) (vi), meaning of—Money suit — Attachment before judgment—Compromise decree creating mortgage of property falls under S. 17 (2) (vi) — Compromise decree not registered—Mortgage—Mortgage if invalid.

Meaning of "proceeding" in S. 17 (2) (vi) is an independent originating proceeding which may be contrasted with a suit; a proceeding that is under some Special Act. An interlocutory application for attachment before judgment is not a proceeding and the fact that land is attached before judgment does not make it the subject-matter of the suit. It is fantastic to say that in any circumstances immovable property can be regarded as the subject matter of a suit merely for a compromise decree in a money suit creating a mortgage of immovable property attached before judgment in favour of the plaintiff falls within the purview of S. 17 (2) (vi) and must be registered.

In a money suit, a compromise decree created a mortgage of immovable property attached before judgment in favour of the plaintiff, for securing the amount due to him. The decree, however, exempted the defendant from personal liability in respect of the amount secured by the mortgage. The mortgage was found to be invalid as the compromise decree was not registered under S. 17 (2) (vi).

Held, that although the decree could not be enforced as a mortgage decree, the property in question could be attached in execution of the decree regard as money decree. A I R (Vol 28) 1941 Bom 1 : 42 Bom L R 1016 : I L R (1941) Bom 34 : 192 Ind Cas 597 (DB).

——Ss. 17 and 49—Suit for accounts—Plaintiff agreeing to take only her share of income on reference to Vakils in consideration of her giving up her right to an account from defendants — Agreement relates to suit and is, therefore, subject-matter of suit within O. 23, R. 3—Decree on such agreement—Exchange of shares under decree does not require registration. A I R (Vol 24) 1937 Pat 232 : 3 B R 611 : 169 Ind Cas 741 (DB).

——S. 17 (2) (vi) — Compromise decree — Decree creating charge over properties attached before judgment.

Where, in a suit for the recovery of a sum of money from the defendants, certain properties were attached before judgment and on the date on which the suit and the application for attachment were posted for hearing, the parties entered into a compromise and a compromise decree was passed providing for the payment of the amount claimed in three months and creating a charge for the sum decreed over the attached properties :

Held, that whether or not the attached properties were the subject-matter of the suit, they were clearly the subject-matter of the application for attachment

which was a proceeding within the meaning of S. 17 (2)(vi) and, therefore, the compromise decree was not compulsorily registrable under the said section as amended by the Transfer of Property Amendment (Supplementary) Act (1929). AIR (Vol 22) 1935 Mad 232 : 68 M L J 41 : 41 M L W 301 : 1935 M W N 501 : 58 M 781 : 156 Ind Cas 791.

——S. 17 (2) (vi) – Decree.

Even where a material which does not concern the subject-matter of the suit has been embodied in a decree, there is no necessity for registration. This means in effect that the document embodying that material can be given in evidence and used as proof of title. AIR (Vol 17) 1930 All 118 : 1930 A L J 324 : 122 Ind Cas 763 (DB).

——S. 17 (2) (vi) — Compromise — Effective as conveyance.

A compromise which contains matter relating to a suit or covered by its subject-matter and embodied in a decree does not need registration even though the transaction amounts to a conveyance of properties worth more than Rs. 100. AIR (Vol 7) 1920 Cal 194 : 24 C W N 328 : 54 Ind Cas 538 (DB).

50. Mutation proceedings.

——S. 17 (2) (vi) — Mutation proceedings in revenue Courts, if covered by — Award being the basis of subsequent mutation — Registration — Necessity.

Mutation orders in Revenue Courts come within the scope of S. 17 (2) (vi) of the Registration Act. Compromises arranged in mutation proceedings are admissible in evidence without their being registered if they form the basis of the mutation order. But if the mutation order contains reference to any adjudication on the question of title of the parties, that portion of it would be inadmissible for want of registration. AIR (Vol 35) 1948 Oudh 88 : 1947 O A (CC) 196 : 22 Luck 407 : 1947 AWR (CC) 196 : 1947 OWN 306 (DB).

——S. 17 (1) (b) and (2) (vi) — Compromise affecting immovable property worth more than Rs. 100 embodied in compromise petition — Mutation order made on its basis — Mutation order does not require registration.

A petition of compromise affecting immovable property more than Rs. 100 in value, filed in mutation proceedings, whether constituting a family settlement or not, which purports to regulate the future rights of the parties in that property and upon which the order in the mutation proceedings has been founded, operates conclusively to determine all questions of title between the parties and is binding on the parties in respect of the property referred to therein even though it is not registered.

An order of a mutation Court cannot be designated as an instrument and certainly not one which purports or operates to create, declare, assign, limit or extinguish any right, title or interest in the property within the meaning of S. 17 (1)(b). It is an order of a Court as contemplated by cl. (vi) of sub-s. (2) of S. 17 and does not, therefore, require registration. AIR (Vol 31) 1944 Oudh 49 : 1943 AWR CC 205: 19 Luck 57 : 1943 OWN 523 : 212 Ind Cas 585 (FB).

——S. 17 — Application to Revenue Officer embodying terms of partition and requesting him to give effect to it.

On the question as to whether an application made to the Revenue Officer embodying the terms on which a partition has been effected and requesting him to give effect in the same requires registration, much depends upon the nature of the transaction in respect of which an application has been made to the Court and also on the terms of the application.

Where there was an application pending in the Revenue Courts for effecting partition of the joint property and the Revenue Officer was competent to make a partition of the property either with the consent of the parties or without their consent, the mode of partition was entirely in the hands of the Revenue Officer and if he had passed a final order effecting partition, an instrument of partition could have been executed which admittedly did not require registration under S. 17 (2) (viii).

An application made by the parties to a Revenue Officer for effecting partition does not require registration. AIR (Vol 23) 1936 Lah 708 : 38 P L R 567 : 161 Ind Cas 3.

——S. 17—Compromise accepted by Revenue Court and embodied in its order.

Where a compromise in a family dispute is accepted by the Revenue Court and embodied in its order, no question of registration under S. 17, arises and when the Revenue Court by its proceedings has given effect to a compromise, the proceedings and order of the Revenue Court do not require registration. AIR (Vol 20) 1933 Oudh 347: 10 OWN 624 : 17 RD 681 : 8 Luck 694 : 145 Ind Cas 805 (DB).

——S. 17 (2) (vi) — Officer disposing of mutation cases, whether Court — Petition of compromise recorded in order of Court — 'Instrument,' meaning of —Mutation proceedings, value of.

An officer seized of mutation proceedings is a Court within the meaning of S. 17 (2) (vi) and, if a petition of compromise relating to a mutation case is incorporated in the order of the Court, the order is sufficient proof of the terms of the settlement and they do not require registration for their admissibility in evidence.

Further, proceedings in mutation cases and orders passed therein do not require registration, because they are not instruments which alone are compulsorily registrable under S. 17 (1).

Proceedings in mutation cases are not wholly judicial proceedings but they are quasi-judicial proceedings. AIR (Vol 18) 1931 Oudh 296 : 8 OWN 764 : 15 RD 375 : 7 Luck 32 : 132 Ind Cas 537 (DB).

——S. 17 (2) (vi)—Solenama.

Unregistered solenama filed at the mutation proceedings before Collector, is not a part of the decree of the Land Registration Collector, and is not admissible in evidence. There should have been a deed of sale which in order to be effective was necessary to be registered having regard to the provisions of S. 54, T. P. Act. AIR (Vol 16) 1929 Cal 231 : 118 Ind Cas 574.

——S. 17—Compromise.

A compromise in mutation proceeding which is an arrangement purely mutual and family one for the enjoyment of the property without limiting or extinguishing of anybody's right, does not require registration. AIR (Vol 15) 1928 Nag 254 : 11 N L J 133 : 109 Ind Cas 624.

——S. 17 — Agreement for mutation of names not declaring title of parties need not be registered.

Where the question is whether a document presented to the mutation Court is compulsorily registrable or not, it is desirable not to found a decision on a particular phrase here and there, but to take a broad view of the circumstances under which the particular document was written.

Where a document purported that the parties had consented amongst themselves to the effect that certain areas of land shall remain in the possession of the several applicants respectively, that they will be liable for their own shares of the rent and shall have no concern with each other's shares, and they will be bound by this solenamah, and, after setting forth these facts, they prayed that entry may be made in the revenue records in accordance therewith :

Held, that the document in question was prepared merely with a view to indicating to the revenue Courts the manner in which the parties had agreed

that their names should be entered. It did not create any declaratory title and hence was not compulsorily registrable. AIR (Vol 14) 1927 All 616 : 25 ALJ 797 : 102 Ind Cas 692 (DB).

—S. 17—Kanhaiya Lal J.—It is open to the parties to a mutation proceeding to settle any dispute pending between them and to intimate to the Court before which the mutation proceeding is pending the manner in which they have settled their disputes.

A document merely acknowledging antecedent rights, till then in dispute, is not a document which falls within the purview of S. 17 of the Registration Act, and a petition stating the manner in which the parties had composed their differences and asking that mutation of names be effected in a particular manner does not require registration.

By the entry of names in accordance with it in the revenue papers, it is not open to either party to resile from it, for, as a family settlement, it is binding on them.

Ashworth J., differing:—For the purpose of deciding whether a compromise is one that requires registration under S. 17, it is necessary to consider the purpose of the parties to the document as indicated by the language of the document. If it is made for any other purpose than that of declaring a right, title or interest, then it will not require registration. But where the purpose of a document in mentioning some agreement is to define the agreement and to show that the parties intend that agreement thus defined to be acted upon, then the document must be held to be one declaring a right, title or interest within the meaning of S. 17. AIR (Vol 14) 1927 All 92 : 98 Ind Cas 86 (DB).

—S. 17 — A compromise filed in a mutation case containing a recital of the terms agreed upon under a family arrangement need not be registered. (1926) 95 Ind Cas 628 (DB) (Oudh).

—S. 17 (2) (vi)—No registration necessary — Compromise.

Per Kanhaiya Lal, J. — A petition filed by the parties to a mutation proceeding, stating that the parties had arrived at a settlement amongst themselves, fixing the shares which each was to get in the property of the deceased and asking that mutation of names might be effected in accordance therewith does not require registration.

Per Piggott, J.—Where parties approach the Revenue Court with a petition of compromise which, at the time, they hope, will serve as a document of title, that is to say, as an authoritative admission by each party as against the other, of the title of the other party, to whatever share has been agreed upon amongst them, any petition so drafted as to satisfy these conditions becomes a document purporting to declare the rights of the parties concerned in immovable property, and if that property is worth more than Rs. 100, it requires registration. In the absence of registration it is not admissible in evidence and if of no effect as a document of title. A I R (Vol 8) 1921 All 248 : 43 All 1 (DB).

—S. 17 (2) (1) — Petition in a mutation case compulsorily registrable — Admissibility in evidence in civil suit.

A petition for mere mutation of names based on compromsie in not compulsorily registrable and is admissible in evidence in a subsequent civil suit to prove an adjustment of a dispute between the parties. A I R (Vol 2) 1915 All 332 : 38 All 75 : 13 A L J 1122 : 31 Ind Cas 902 (DB).

—S. 17 (2) (vi) — Compromise—Mutation proceedings—Family settlement—Registration.

A family settlement come to in a mutation proceeding and creating rights in immovable property does not require registration. AIR (Vol 2) 1915 All 58 : 37 All 105 : 13 A L J 21 : 27 Ind Cas 497 (DB).

—S. 17 (2) (vi) — Compromise—Document declaring antecedent title.

Section 17 is aimed at those documents which operate by themselves to confer a fresh title and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of cartain persons by way of inheritance. Held, that the compromise in question in the course of mutation proceedings was enforceable though unregistered. AIR (Vol 2) 1915 Oudh 199 : 18 O C 51 : 2 O L J 67 : 27 Ind Cas 938.

—S. 17 (2) (vi)—Compromise in mutation proceedings—Registration.

A petition of compromise presented to a Court which declares the respective interests of the parties in property exceeding Rs. 100 in value, must be registered before it can be used as evidence of title, unless it is acted upon judicially by the Court. Written instruments are not exempt from registration merely because they evidence or carry out a family settlement. Neither does the fact that it is drawn up in the form of a petition and presented to the Court along with a petition take away the necessity of its being registered, if it is otherwise compulsorily registrable. A I R (Vol 1) 1914 All 555 : 12 A L J 998 : 27 Ind Cas 97.

—S. 17 (2) (1)—Mutation case—Compromise petition—Stamp—Registration.

A compromise petition in a mutation case praying that mutation may be sanctioned in accordance with the compromise does not require to be stamped or registered as a transfer of an interest in immovable property. A I R (Vol 1) 1914 All 464 : 12 A L J 1316 : 26 Ind Cas 791.

—S. 17 (2) (vi)—Compromise—Mutation proceedings—Executive acts — Unregistered compromise—Not admissible

A Revenue Court acts executively in mutation proceedings and an unregistered Razinamah filed therein is not admissible in evidence in a Civil Court though a statement made therein will be admissible. AIR (Vol 1) 1914 Oudh 235 : 25 Ind Cas 34.

—S. 17 (2) (vi) — Compromise — Revenue Court—Application in settlement of dispute to Revenue Court for mutation—Registration, if necessary.

An application to the Revenue Court for mutation of names by two rival claimants in settlement of a dispute between them is admissible in evidence without registration. (1913) 11 A L J 157: 18 Ind Cas 766.

—S. 17 (2) (vi) — Compromise filed in mutation proceeding—Admissibility.

A petition of compromise relating to immovable property of value less than Rs. 100 was filed in a Revenue Court in a mutation proceeding and the order of the Revenue Court was passed in accordance with the terms of the compromise. Held, that a petition of this sort should not be excluded altogether from evidence for want of registration. In view of the fact that the compromise related to property of value less than Rs. 100, it was capable of operation as a document of title although it was not registered. (1912) 15 Ind Cas 741 (All).

51. Petition of compromise in Criminal Court.

—S. 17 (1) (b)—Dispute between tenants for possession of certain land—Proceedings under Ss. 145, 146. Criminal P. C. — Land attached—Compromise limiting and defining interests of parties.

Proceedings under Ss. 145 and 146, Criminal P. C., were taken in respect of a dispute amongst certain tenants regarding possession of certain land and the land was attached. Subsequently, the parties entered into a compromise, which limited and defined for the future the interests of various tenants concerned who, at one time, had been holding the land as tenants-in-common or as joint-tenants. The interest

created by the compromise were exclusive of other parties and no party was to have any interest in the land allotted to other parties, as distinguished from the previous state of things :

Held, that the deed of compromise created title, and required registration. AIR (Vol 25) 1938 Pat 212: 4 B R 558 : 175 Ind Cas 256.

——S. 17 — Compromise about possession — Cannot transfer title.

Where a compromise as to possession but not as to title was arrived at in proceedings under S. 145, Criminal P. C.

Held, that the compromise is no substitute for the duly stamped and registered instrument. The compromise could at the utmost amount to an admission of title but could not be deemed to have the effect of estoppel. A I R (Vol 10) 1923 All 77: 76 Ind Cas 527 : 20 A L J 932 : 45 All 162 (DB).

——S. 17 — Annuity of life estate created by compromise – Compromise petition in Criminal Court is compulsorily registrable. A I R (Vol 13) 1926 Oudh 493 : 94 Ind Cas 1039 (DB).

——S. 17—Undertaking to Crimina Court.

An undertaking given by the appellants to the Criminal Court with the object of saving themselves from any further action under S. 145, Criminal P. C., and agreeing to abstain from interfering with certain immovable property is not a compromise and needs no registration. A I R (Vol 12) 1925 All 605 : 85 Ind Cas 586.

——Ss. 17 (2) (1) and 49—Admission in unregistered solenama—If admissible.

An admission by a party in a solenama filed in a certain criminal proceeding which arose out of a dispute regarding possession of the land is admissible in evidence against the party making it though the solenama was not registered. A I R (Vol 6) 1919 Cal 913 : 46 Ind Cas 442 (DB).

——S. 17 (2) (vi) – Compromise petition — Criminal Court—Agreement to give up possession of lands.

An agreement to give up possession of certain land contained in a petition of compromise filed in a criminal case does not require registration to be admissible in evidence. A I R (Vol 5) 1918 Cal 538 : 43 Ind Cas 26 (DB).

——S. 17—Compromise, petition of—Evidence—Admissibility of—Criminal proceedings, withdrawal of —Order not incorporating terms of petition.

On account of some dispute between the parties which resulted in criminal proceedings, a petition was presented in those proceedings and in consequence they were withdrawn but no order was passed incorporating the terms of the petition : A suit for increased rent was afterwards brought by one of the parties against the other on the basis of the petition: —Held, that the petition being unregistered and affecting immovable property exceeding Rs. 100 in value was not admissible in evidence. (1907) 8 C L J 90 (91) : 35 Cal 1010 : 12 C W N 854 (DB).

52. Compromise in execution proceedings.

——S. 17 (2) (vi) — Compromise in execution Court — Registration, if necessary—Admissibility in evidence.

Where the joint holders of a decree enter into a compromise as to the manner in which the decree should be executed and the executing Court acts upon it, the compromise did not require registration and it is admissible in evidence and binding upon the parties by reason of the order to that effect passed upon it by the Court executing the decree. AIR (Vol 2) 1915 All 303 : 29 Ind Cas 418 (DB).

53. Security bond in favour of Court.

——S. 17 — Security bond under S. 514, Criminal P. C., hypothecating immovable property.

If the security bond given under S. 514, Criminal P. C. is of immovable property then the bond has to be registered under S. 17, Registration Act. An unregistered bond cannot affect any immovable property and must, therefore, be invalid. AIR (Vol 32) 1945 All 389 : I L R (1945) All 639 : 1945 A L J 476: 1945 A W R (H C) 176 : 47 Cr L J 209 : 221 Ind Cas 544.

——S. 17 (2) (vi) (as amended in 1929) — Judgment-debtor executing by way of security, bond affecting immovable property — Court approving of its substance – Bond, it converted into document of title.

Where, in pursuance to a decree, the judgment-debtor executes, by way of security, a bond affecting immovable property, the bond so executed is not exempt from registration. The execution of the bond is not an act of the Court or a step of judicial procedure, and the Court, merely by approving the substance of the security tendered, cannot convert the bond which is incapable of affecting title to immovable property into an operative, valid and admissible document of title. AIR (Vol 22) 1935 Rang 168 : 13 Rang 359 : 156 Ind Cas 534.

——S. 17 — Security bond hypothecating immovable property — Court accepting bond—Registration.

A security bond executed in accordance with an order passed under O. 41, R. 5 or R. 6, Civil P. C. staying execution of a decree pending decision of the appeal does not require to be registered, as documents of this kind are not executed between the decree-holder and the surety, but between the surety and the Court and are steps in judicial proceedings and the decree-holder can move the Court to realise the decretal amount from the immovable property of the surety mentioned in the bond although it is not registered. AIR (Vol 6) 1919 Lah 8 : 1919 Pun Re No. 122 : 53 Ind Cas 463, Overruled. AIR (Vol 21) 1934 Lah 138 : 15 L 282 : 36 P L R 386 : 149 Ind Cas 300 (FB).

——S. 17 (2) (vi) — Security bond hypothecating immovable property — Assignment by Court — Registered sale-deed, whether necessary — Mere order of Court, sufficiency of.

Where a Court has obtained a security bond which hypothecated immovable property, to secure a proper disposal of money due to minors deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety need not be made by way of a regularly stamped and registered deed of sale but may be made by an order passed by the Court. AIR (Vol 18) 1931 All 389 : 53 All 786 : 1931 A L J 503 : 133 Ind Cas 904 (FB).

——S. 17 — No registration necessary — Security bond.

A security bond executed to a Court in which no person or officer is referred to as the mortgagee is not a mortgage document but only a document creating a charge and therefore does not require registration under S. 17 (b) of the Registration Act. AIR (Vol 17) 1930 Sind 159 : 121 Ind Cas 878.

—— S. 17 (2) (vi) — Security bond.

A security bond, being a part of judicial proceedings and incorporated with it, the provisions of S. 17, Registration Act, do not apply to it, as proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by the Court, do not require registration. AIR (Vol 15) 1928 Bom 42:52 Bom 72:30 Bom L R 19:107 Ind Cas 710 (DB).

——S. 17 (1) (b) — Security bond—Stay of execution.

A security bond by a judgment-debtor hypothecating lands worth more than Rs. 100, in pursuance of an order staying execution is registrable under S. 17 (1) (b). AIR (Vol 6) 1919 Lah 8 : 122 P R 1919 : 53 Ind Cas 463.

[Overruled in AIR 1934 Lah 138 : 149 Ind Cas 300 (FB).]

——S. 17—Security bond under S. 545, C. P. C. — Registration, necessity for. (1908) 31 M 330 (332, 333) : 3 M L J 317 (DB).

54. Compromise in testamentary proceedings.

——S. 17 (2) — Compromise decree Necessity for registration — Decree reciting that the defendant agreed to treat a will as valid and that he and his heirs would not question the will as they had no interest in the properties — Not a declaration of plaintiff's title requiring registration of the decree.

Where a compromise decree in a prior suit recited that the defendant in the present suit based on a will agreed to treat the will as valid and that he and his heirs would not question the will and that they had no interest in the properties, it cannot be said that it is a declaration of the plaintiff's title to the suit properties, requiring registration of the compromise decree. The title of the plaintiff is derived under the will and not under the compromise decree. As the compromise decree does not create or extinguish or declare any rights in the property, it does not require registration. AIR (Vol 36) 1949 Mad 811: 1949 M W N 227 : 62 L W 309 : (1949) 1 MLJ 459.

——S. 17 — An undertaking by a collateral not to contest a gift of ancestral property by a childless proprietor at any future time is not an extinguishment or assignment of any rights in immovable property and therefore the document does not require registration under S. 17 of the Registration Act. AIR (Vol 13) 1926 Lah 148 : 89 Ind Cas 212.

—— S. 17 — Reversioner's right — Assignment of — Registration.

A reversioner's right under the Punjab Customary Law to succeed to ancestral land in the hands of a widow is spes successionis. A deed purporting to relinquish or assign the reversioner's right is not compulsorily registrable. The deed can be used as evidence by the defendant assignee against the plaintiff reversioner as showing that the latter gave his assent to the assignment which he seeks to impeach. The agreement does not require registration. 214 P L R 1911 and 12 P L R 1914, Overruled. AIR (Vol 12) 1925 Lah 341 : 6 Lah 87 : 7 L L J 133 : 26 P L R 217 : 88 Ind Cas 550 (DB).

——S. 17 (1) (b) — Release of right to sue for declaration — Not compulsory registrable.

An agreement by the reversioners of a Hindu whereby they agreed to forgo their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after death, does not convey any right, title or interest nor does it purport to operate to create, extinguish any right etc., and therefore is not compulsorily registrable within S. 17. AIR (Vol 5) 1918 All 184 : 40 All 384 : 16 A L J 191 : 44 Ind Cas 629 (DB).

55. Awards.

(a) Affecting immoveable property of Rs. 100 or more.
(b) Acted upon by Courts.
(c) Creating new rights, titles etc.
(d) That do not require registration.
(e) Enforceability and effect of non-registration.

(a) Affecting immoveable property of Rs. 100 or more.

——S. 17 — Award allotting immovable properties jointly belonging to parties to one or other of them —Parties directed to execute documents, if desired or if necessary—Award, if requires to be registered.

Where an award allotted immovable properties jointly belonging to the parties to the arbitration to one or other of them, and directed that mutual releases and assurances were to be executed by them either if desired by parties or if necessary and the words used in the award were "hereby allot" and "hereby award and direct."

Held, that the award itself purported to create, declare or extinguish the right, title or interest of the respective parties in the properties and that the transfer or assignment of them was not necessary to bring the award within S. 17 (1) (b) of the Registration Act, and that, therefore, the award required to be registered. ILR (1945) 2 Cal 526 : AIR (Vol 36) 1949 Cal 549.

——S. 17 (2) (vi) as amended in 1929—Award creating charge on immovable property of value of Rs. 100 or more is compulsorily registrable.

Before the amendment of 1929, an award was exempt from registration by virtue of S. 17 (2) (vi). Now by the amendment it is no longer so exempt and as a document creating a charge on immovable property of value of Rs. 100 or more it must be registered. AIR (Vol 33) 1946 Nag 311 : ILR (1946) Nag 583 : 224 Ind Cas 224 : 1946 Nag L Jour 317 (DB).

——S. 17 — Award governed by Arbitration Act—Parties intending to regulate their rights in immoveable property without decree thereon—Need for registration—Application filed for decree on unregistered award — Order that can be passed thereon. I L R (1945) 1 Cal 454 : AIR (Vol 32) 1945 Cal 19 : 48 C W N 721.

——S. 17—Award—Registration.

Registration is compulsory of an award affecting immovable property where the arbitrator was appointed without the intervention of the Court, but no such registration is needed when the award is given by an arbitrator appointed by the Court. AIR (Vol 32) 1945 Oudh 1 : 1944 O W N 416 : 1944 AWR (C C) 265 (DB).

——S. 17—Award declaring right in kyaung and its site of value of over Rs. 100.

Per Letters Patent :—An award declaring right in kyaung and its site having value of more than Rs. 100, requires registration. It is inadmissible in evidence if not registered and a suit based on it must fail. AIR (Vol 27) 1940 Rang 228 : 1940 Rang L R 372 : 190 Ind Cas 683 (DB).

——S. 17—Court, if can file and pass decree on award which is compulsorily registrable.

An award comes under S. 17 (1) (b), and when it purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, it is compulsorily registrable. If the Court files an award which is compulsorily registrable and has not been registered and makes it a decree of the Court it is acting contrary to the provisions of S. 49, Registration Act. AIR (Vol 25) 1938 Bom 422 : 40 Bom L R 952 : 177 Ind Cas 911 (DB).

——S. 17—Amendment made by Transfer of Property (Amendment) Supplementary Act (XXI of 1929), S. 10—Private award falls within the class of documents specified in S. 17 (1) (b) whereas award of the other class does not. By amendment of S. 17 by Act XXI of 1929, the exception, contained in S. 17 (2) (b) has been removed and when a private award satisfies the requirements as to value, it is compulsorily registrable. AIR (Vol 21) 1934 Cal 815 : 60 C L J 259 : 39 C W N 54 : 62 C 201 : 153 Ind Cas 776 (DB).

——S. 17—Bona fide award need not be registered—But where it amounts to a partition deed or embodies agreement between parties it must be registered.

All that the Transfer of Property Act provides for is that certain specified transfers such as sales, gifts and mortgages of property exceeding Rs. 100 in value and leases for a period exceeding one year shall only be made by a writing duly registered.

A bona fide award affecting immovable property would not ordinarily fall within the definition of any of the specific transactions referred to in the Transfer

of Property Act, so as to require to be made by a writing duly registered, as it is not an act of the parties themselves but the act of a Judge chosen by the parties.

It is no doubt true that under certain circumstances an award may become inadmissible in evidence or inoperative as a valid transfer. For example, where an award effecting a partition of immovable property is signed by the parties in token of their consent thereto, the award cannot be received in evidence unless it is registered. In such a case, the award is not a mere award but something more. It is an instrument of partition executed by the parties as well. As such it is compulsorily registrable and is rendered both ineffective and inadmissible under S. 49 of the Registration Act.

Again, where an award is not a genuine award based on a bona fide reference but a disguise to give effect to the agreement of the parties arrived at before the reference to arbitration and intended to evade the law relating to stamps and registration the award is not inadmissible in evidence for want of registration but is no award at all and is therefore inoperative as an award. 102 Ind Cas 277 : AIR (Vol 14) 1927 Sind 206 (DB).

(b) Acted upon by Courts.

——S. 17—Arbitration without intervention of Court —Award—Registration—Necessity.

A private award without the intervention of the Court falls within the mischief of S. 17 (1) (b) and (c) of the Registration Act (as amended by the T. P. Amendment Supplementary Act, 1929), and requires registration. 27 Pat 86 : AIR (Vol 36) 1949 Pat 393 (DB).

——S. 17—Award without intervention of Court—Application to file it—Award decree creating charge on property mentioned in award :

Held, that registration is not necessary. (1940) 42 Bom L R 1123.

——S. 17—A decree on award should either reproduce the terms of the award or should be attached with the award as a schedule to it. Where, however, it does not reproduce the terms but only makes a reference, the terms must be deemed to be embodied in the decree. The award in that case is exempt from registration and is admissible in evidence to understand the decree. AIR (Vol 27) 1940 Lah 107 : 42 P L R 77.

——Ss. 17 (1) (e), (2) (vi) — Award in pursuance of reference under para. 17, Sch. II, Civil P. C. — Decree thereon, if compulsorily registrable.

An award made in pursuance of a reference filed in Court under para. 17, Civil P. C., purporting to create a mortgage or lien over immovable property of value of Rs. 100 or upwards is not compulsorily registrable. The award or decree passed in terms thereof need not be registered after the decree has been passed for it is not based on any compromise. The award merges into the decree, and unless it can be held that an award made with the intervention of the Court is a compromise within the provisions of cl. (vi) of S. 17 (2), the exception in that clause will not apply. AIR (Vol 23) 1936 Sind 79 : 30 Sind L R 115 : 163 Ind Cas 455 (FB).

——S. 17 (2) (vi)—Execution of decree—Decree, whether merely declaratory or executable—Tests.

The test to determine whether a decree is merely declaratory or it is directory is to see whether there is a direct order against any one or in favour of any one, or whether the decree merely declares rights and obligations on the part of any one.

Where neither an award nor the decree incorporating it gives any direction for the recovery of the decretal amount by the plaintiff from the defendant, but it is simply declared that for the amount, certain property of the defendant is to remain in mortgage with the plaintiff for a certain period and no immediate order is passed for recovery of the amount, the decree is merely declaratory of the rights and obligations of the parties and is not capable of enforcement in execution proceedings. AIR (Vol 20) 1933 Pesh 83 : 146 Ind Cas 1094 (DB).

——S. 17 (2) (vi) — Compromise—Award—Registration.

Where an award given by arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of Court, registration of the award is not necessary. 6 O L J 529 : 22 O C 300 : 54 Ind Cas 325 : AIR (Vol 6) 1919 Oudh 105 (DB).

——Ss. 17 (2) (vi) and 49—Award filed in Court by parties—Registration.

The parties to a suit filed an award in Court which was apparently acceped and acted upon by the Court. There was no evidence that the award had been embodied in a decree and the records have been destroyed : Held that the award having been acted upon by the Court does not require registration. (1918) M W N 134 : 8 L W 379 : 43 Ind Cas 697 : AIR (Vol 5) 1918 Mad 336 (DB).

(c) Creating new rights, titles etc.

——Ss. 17, 49—Award declaring rights of parties as basis of title.

When the declaration as to the rights of the parties being made in an award cannot be held to amount to mere recital of facts but becomes the basis of title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a Court of law, the rights of the parties as declared by the award can also be enforced, it should be registered. The mere fact that the defendant did not raise any objection to the admissibility of the award in the trial Court will not affect the question because S. 49 is mandatory. AIR (Vol 24) 1937 Pat 183: 15 Pat 579: 18 PLT 41: 3 BR 388: 168 Ind Cas 115 (DB).

——S. 17 — Where a clause in an award creates a new right in a party, it is a declaration within the meaning of S. 17 (1) (c) and the award is compulsorily registrable. AIR (Vol 22) 1935 Pesh 69: 155 Ind Cas 1022 (DB).

——S. 17—Award—Declaration in award that on default of payment, other party will have right to realise it by sale of mortgaged property.

A person dealing with property which it duly mortgaged is presumed to know that the property is liable to be sold in discharge of the debt, and it is immaterial whether the property is sold in execution of a mortgage decree or in execution proceedings taken to enforce an award passed in respect of the mortgage deed as a decree. The non-registration of an award of this kind does not, therefore, in any way prejudice a person who deals with the property with knowledge of the registered deed of mortgage.

The first part of an award asserted that the mortgage created by the award stood. The second part declared that in the event of default of payment of the amount awarded to respondent No. 1, he will have a right to realise the same in execution proceedings by the sale of the mortgaged properties. The mortgage was created by a prior registered instrument.

Held, that the award was not incapable of being enforced for want of registration. AIR (Vol 22) 1935 Sind 136: 29 Sind LR 344: 157 Ind Cas 28.

(d) That do not require registration.

——S. 17—Award deciding liability in respect of a mortgage—Provision for payment by instalments and realisation by sale on failure to pay any instal-

ment—Nature and effect of—If makes award compulsorily registrable.

An award in respect of a claim on a mortgage after fixing the amount due and making provision for payment by instalments proceeded to state that in default of payment of any of the instalments, the whole amount shall become payable and that "the amount may then be realised through a civil Court either by the sale of all the property" of the principal or sureties concerned. On a question as to the nature and effect of the above provision and as to whether the award required registration.

Held, the provision regarding realisation must be construed as stating as an existing fact the general consequences which by law were attached to non-payment of secured debts. It has no operative effect in creating any interest in any immovable property. The statement is little else than a warning. Hence, it cannot be held that S. 17 (1) (b) of the Registration Act has any application to such an award. AIR (Vol 34) 1947 PC 117: 60 LW 563: 1947 ALJ 490: (1947) 2 MLJ 304: 51 CWN 897: 1947 MWN 733: 1948 OWN 41: 1948 ALW 38.

——S. 17 – (as amended by Act XXI of 1929), S. 17 —Award of arbitrator in dispute between parties regarding interest in immovable property—Award not operating as a conveyance but only declaring a right to demand a conveyance in future — Award, if compulsorily registrable.

The plaintiffs, mother and daughter, had a right to maintenance and the first plaintiff the mother was demanding from the first defendant, her deceased husband's undivided brother, an assignment of property in lieu of the right to maintenance. The dispute concerned the quantum of property and the terms on which it should be assigned and it was referred to arbitration. The decision of the arbitrator settled the dispute by making certain arrangements for the enjoyment of the properties and making provision for the residence of the mother and daughter and the marriage of the daughter. It concluded by reciting that the first plaintiff should take immediate possession of the lands allotted to her and that both parties should get the necessary documents executed and registered incurring the necessary expenses in equal shares. On a question whether the award was compulsorily registrable.

Held, that the decision of the arbitrator settled the dispute between the parties only as to the quantum of property and the terms of its assignment, but it did not of itself operate as a conveyance; nor could a mere declaration suffice to give title to the plaintiffs when a conveyance was obviously necessary. The most that this award, read as part of the contract between the parties, could achieve was to give the plaintiffs a right to require the first defendant to convey to them the property selected by the arbitrator. The award stood on no higher footing than an agreement to transfer in future and having regard to the terms of S. 17 (2) (v) of the Registration Act, it did not require to be registered and would be admissible in evidence without registration. AIR (Vol 34) 1947 Mad 168: 59 LW 627: (1946) 2 MLJ 345: 1946 MWN 713 (DB).

——Ss. 17, 49—Contract for sale, registration—Award when requires registration.

A contract for sale does not require registration nor does an award, which is regarded as a release from the contract require to be registered. But where there is an immediate intention to create, declare, or assign, then alone the document is required to be registered. AIR (Vol 24) 1937 Pat 214 : 17 PLT 835 : 16 Pat 34: 3 BR 142: 166 Ind Cas 22 (DB).

——S. 17—Award directing that ownership in property shall not cease.

An award contained as one of its clauses, "the ownership of the second party in one-half of a particular property shall not cease till after the above sum of Rs. 61,000 as well as the amounts mentioned in the statement Ex-B together with interest specified in respect of both be fully paid up":

Held, that the language of the award directing that the ownership of the heirs should "not cease" until the money had been paid showed that the arbitrators intended to reserve the existing right to a conveyance of half the property in case their dues remained unpaid. The language did not show that the award was intended to operate as an instrument of title changing the status of the parties. It did not, therefore, require registration. AIR (Vol 24) 1937 Pat 214: 17 PLT 835: 16 Pat 34: 3 BR 142: 1936 PWN 858: 166 Ind Cas 22 (DB).

——S. 17 (2) (vi)—Award.

An award made by arbitrators appointed by the Court with a view to having its terms incorporated in a decree of the Court is not an award which can be compulsorily registrable. AIR (Vol 22) 1935 Rang. 16: 154 Ind Cas 557 (DB).

——S. 17 (2) (vi)– Award.

Award partitioning property though signed by parties to reference, does not amount to partition and is not registrable. AIR (Vol 16) 1929 All 365: 51 All 659: 1929 ALJ 393: 116 Ind Cas 875 (DB).

——S. 17 (2) (vi)—Award—Award if compulsorily registrable.

An award is not compulsorily registrable. AIR (Vol 4) 1917 Oudh 126: 4 OLJ 487: 42 Ind Cas 116.

——S. 17 (2) (vi)—Award—Registration.

The validity of an award does not ordinarily depend upon the place in which it is executed. An award does not require registration and it is not necessary that it should be made a rule of Court. AIR (Vol 4) 1917 Pat 241: 2 Pat LW 156 : (1917) Pat HCC 241: 42 Ind Cas 617 (DB).

——S. 17 (2) (vi) — Award—Award dictated and signed by parties—Validity—Registration, if necessary.

A document, signed by arbitrators as their award is an award though the settlement was arrived at by the parties and was also signed by them. Such a document does not require registration. AIR (Vol 1) 1914 Lah 238: 101 PWR 1914: 10 PR 1917: 134 PLR 1914: 22 Ind Cas 412 (DB).

——S. 17 (2) (vi) — Award—If compulsorily registrable.

A document amounting to an award does not require registration. AIR (Vol 5) 1918 Lah 268: 139 PWR 1918: 46 Ind Cas 685.

——S. 17 (2) (vi)—Award—Private award not filed in Court.

A private award not filed in Court is within S. 17 (vi) and is therefore not compulsorily registrable. But if the document purporting to be an award amounts to something more than an award and if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a document e. g., a partition deed, which is compulsorily registrable. AIR (Vol 1) 1914 Cal 273 : 19 CLJ 123: 18 CWN 475: 20 Ind Cas 860 (DB).

——S. 17 (2) (vi)—Award effecting partition—Partition lists.

Partition lists of the property divided, which form part of an award, do not require registration. 156 PWR 1913: 275 PLR 1913: 20 Ind Cas 185 (DB).

(e) Enforceability and effect of non-registration.

——Ss. 17, 49—Private award — Compulsory registration—Application for filing unregistered award—Procedure.

When according to the terms of the agreement for arbitration, it was not intended that a decree was to be passed on the award, but that award itself would be the operative document, and the award affects immovable property of the value of over Rs. 100, the award is compulsorily registrable even though it is one governed by the Arbitration Act 1940.

Such an award, if unregistered, cannot be used in evidence in support of an application for filing it in Court with a view to get a decree thereon. When such an application is made, the proper course for the Court to adopt is simply to dismiss the application on the ground that there is no legal evidence to show what the award was. The award cannot be set aside nor the arbitration superseded. AIR (Vol 32) 1945 Cal 19 : 48 C W N 721 (DB).

——S. 17—Award—Not registered—Court, if can enforce it.

The procedure for enforcing an award which has been made outside Court is laid down in Sch. II, Civil P. C., paras 20 and 21, and in those paras, it is not stated that the award must be registered. The Court, therefore, is prepared under the Civil P. C., to enforce an award although it is not registered. The Code, in fact, draws no distinction between an award made in accordance with a direction of the Court in Sch. II and an award made without reference to the Court. AIR (Vol 25) 1938 All 88 : 1937 A L J 1303 : 1938 R D 31 : 1937 A W R 1218 : 175 Ind Cas 397.

——S. 17—Award is not vitiated by being agreed to or signed by parties to it. AIR (Vol 14) 1927 Bom 656 : 29 Bom L R 297 : 101 Ind Cas 351 (DB).

——S. 17 (2) (vi) — Award — Applicability.

An award though not registered or properly stamped is admissible in evidence as the latter defect can be cured by levying the penalty prescribed. AIR (Vol 4) 1917 Lah 456 : 77 P W R 1917: 125 P R 1917: 39 Ind Cas 912 (DB).

——S. 17 (2) (vi) — Award signed by parties—Effect of.

The mere fact that parties have signed an award made by arbitrator does not affect its character as an award. 81 P R 1913 : 321 P L R 1913 : 211 P W R 1913 : 20 Ind Cas 868 (DB).

——S. 17 (b) — Agreement to refer to arbitration — Admissibility of, without registration.

Where the parties have settled the terms and put them in the agreement to refer the matter to arbitration, held that the agreement was inadmissible in evidence for want of registration. (1912) 13 Ind Cas 500 (Oudh).

56. Berar — Applicability of amended clause 1 (vi)

——S. 17 — Amendment of Registration Act by Act XXI of 1929—S. 17 (1) (b), applicability to Berar — Notification No. 3510-B by Governor-General in Council, issued in 1913, whether ultra vires.

Notification No. 3510-B issued in 1913 by the Governor-General in Council, stating that not only should the enactments specified in the Schedule (which included the unamended Registration Act of 1908) apply to Berar but also those enactments subject to any amendments to which the enactments are, for the time being, subject in the Central Provinces, is not ultra vires. It is not entirely impossible though the contruction is strained, to read cl. 4 of the Indian (Foreign Jurisdiction) Order in Council 1902 as meaning that the Governor-General in Council may, if he thinks fit, and if that is the more convenient way of introducing modifications of existing laws into Berar, (as indeed it is), pass general administrative measures. As a matter of broad practice, Berar is governed along with the Central Provinces as one large administrative unit although legally and technically it is entirely separate, and, in general, laws which obtain in the Central Provinces are introduced almost automatically into Berar as a mere routine of administration. Consequently, the amendment of 1929 to S. 17 can be regarded as legally applicable to Berar and therefore, award is compulsorily registrable under S. 17 (1) (b). AIR (Vol 26) 1939 Nag 233 : 1939 N L J 375 : I L R (1939) Nag 607 : 183 Ind Cas 845 (FB)

57. Grant by Government—Clause (vii)

——S. 17—No registration necessary—Sanad—Not a lease.

Where the terms of the grant of sanad are that a person is to claim land within certain boundaries and that at the end of the period of 3 years a lease would be entered at a rent to be fixed of the portions of the land reclaimed, the sanad is not a lease and it is not a title to land and therefore it is unnecessary to register it for being admissible in evidence. AIR (Vol 17) 1930 Pat 356.

——S. 17 (2) (vii)—Government grants.

It could not have been the intention of the legislature that the exemptions set out in S. 90, so far as they relate to Government grants, should be co-extensive only with the exemptions contained in cl. (vii), sub-s. (2), S. 17. 36 All 176 Diss. AIR (Vol 14) 1927 Pat 319 : 6 Pat 446 : 104 Ind Cas 209 (DB).

58. Endorsements and receipts— Clause (xi)

(a) Interpretation and nature of.
(b) Receipt of money not purporting to extinguish mortgage.
(c) Receipt of money purporting to extinguish mortgage.
(d) Oral release.
(e) Endorsements of payments on mortgage deeds.

(a) Interpretation and nature of.

——S. 17 (2) (xi)—Exemption contemplated by—"Due under mortgage."

The exemption in cl. (xi) of sub-s. (2) of S. 17 covers any endorsement on a mortgage-deed acknowledging payment of the whole or part of the mortgage-money irrespective of whether it contains words which expressly or by necessary implication purport to extinguish the mortgage. But as regards other receipts (i. e., receipts other than endorsements) for payment of money due under a mortgage, the exemption can be claimed only if they do not purport to extinguish the mortgage. AIR (Vol 28) 1941 Lah 246: 43 P L R 214 : I L R (1942) Lah 324 : 195 Ind Cas 581 (DB).

——S. 17 — Endorsement and receipt relating to reduction of interest on mortgage.

Where both the endorsement and the receipt relate solely to interest on the mortgage found to have been paid in excess and the receipt does not purport to extinguish the mortgage either in whole or in part but only limits the liability of the mortgagor thereunder so far as the interest is concerned, it is not necessary for the endorsement and receipt to be registered. AIR (Vol 28) 1941 Oudh 193 : 1940 R D 616 : 1940 O W N 1293 : 1941 A W R 8 : 16 Luck. 538 : 192 Ind Cas 434 (DB).

——S. 17 (2) (xi)—Words 'purporting to extinguish, interpretation of.

The words "purport to extinguish," in S. 17 (2) (xi) cannot be interpreted as being equivalent to the words "have the effect of extinguishing." Where, therefore, the words used in a receipt are to the effect that the whole of the mortgage-debt has been paid the words cannot be taken to be expressly purporting the extinction of the mortgage-deed and the receipt is not compulsorily registrable. AIR (Vol 26) 1939 Lah 272 : 41 P L R 104 : 183 Ind Cas 168.

——S. 17 — Law does not enquire into how receipt operates, but what it purports to do. AIR (Vol 13) 1926 Oudh 64 : 90 Ind Cas 505.

——S. 17 — Extinction of debt and that of mortgage are distinct — Receipt purporting to be a receipt in full of a mortgage debt is not compulsorily registrable. AIR (Vol 13, 1926 Oudh 64 : 90 Ind Cas 505.

(b) Receipt of money not purporting to extinguish mortgage.

——S. 17 (2) (xi) — Receipt pure and simple of mortgage money—Registration, if essential.

A receipt, pure and simple, of the mortgage money is exempt from registration in spite of the fact that as an inference in law, it leads to the result that the mortgage ceased to exist when it was executed provided it does not contain anything categorical to indicate that the mortgage had been extinguished. A I R (Vol 32) 1945 Pesh 14 : 1945 Pesh L J 14 : 220 Ind Cas 235.

——S. 17—A receipt which only evidences the payment of the whole consideration and does not purport to extinguish the mortgage is not compulsorily registrable. (1940) 42 P L R 27.

——S. 17—Receipt for money due under mortgage.

A receipt for payment of money due under a mortgage need not be registered if it does not purport to extinguish the mortgage, but if it purports to extinguish the mortgage, registration is necessary.

An unregistered receipt which purports to extinguish the mortgage cannot be used even to prove the admission of the mortgagee to return the mortgage bond. A I R (Vol 20) 1933 Cal 198 : 36 C W N 738 : 55 C L J 571 : 142 Ind Cas 517 (DB).

——S. 17 (2) (xi) — Receipt not extinguishing mortgage.

Where the plaintiff alleges fraud, he must specify and describe it and then he will have an opportunity to establish it. (1931) 133 Ind Cas 867 : 32 P L R 407 (DB).

——Ss. 17 (1) (b), 49—Agreement between mortgagor and mortgagee relinquishing sum exceeding Rs. 100 —Receipt not purporting to extinguish mortgage—Part performance, applicability of.

A document evidencing an agreement between a mortgagor and the mortgagee to vary the terms of a registered mortgage deed relating to the rate of interest payable under that deed which is, in effect, an agreement to relinquish a portion of the mortgage debt exceeding Rs. 100, falls under S. 17 (1) (b) and cannot be received in evidence when not registered, as evidence of any transaction affecting the mortgaged property. A I R (Vol 18) 1931 Oudh 388 : 7 Luck 16 : 8 O W N 279 : 132 Ind Cas 66 (DB).

——S. 17—Where the receipt makes no reference at all to the extinction of the mortgage, but being a receipt for the last payment it may have had the effect of extinguishing the mortgage, it does not require registration unless it purports to extinguish the mortgage. A I R (Vol 16) 1929 Lah 312 : 118 Ind Cas 533 : 10 Lah 709 : 30 P L R 717 (DB).

——S. 17 — Receipt not purporting to extinguish the mortgage need not be registered.

Where there is no question of any writing being admissible or inadmissible with reference to the provisions of Registration Act, if the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence, and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligors orally would stand on a different footing from the admission of a writing evidencing the payment. 44 Bom 55, Diss. from; Case-law referred. A I R (Vol 16) 1929 Mad 794 : 30 M L W 293 (DB).

——S. 17 — Receipt not purporting to extinguish mortgage—Registration not necessary.

When the mortgagee gives a written acknowlegment that the mortgage debt has been satisfied in full and that nothing further remains to be paid and goes on to say that he has returned the mortgage bond, the acknowledgment does purport to extinguish the mortgage and, therefore, such a receipt requires compulsory registration. AIR (Vol 13) 1926 All 693 : 97 Ind Cas 162 : 48 All 705 : 24 A L J 839 (DB).

——S. 17 — Receipt not extinguishing charge on immovable property is not compulsorily registrable. A I R (Vol 13) 1926 Mad 1167 : 98 Ind Cas 454 : 24 M L W 485.

——S. 17—No registration necessary—Receipt.

Where a mortgage was made and an entry was made in the mutation register at the request of the parties and afterwards a receipt for a certain sum was written which also embodied the conditions of the mortgage.

Held, the receipt was not of itself a mortgage deed and its registration was not compulsory. A I R (Vol 12) 1925 Lah 348 : 86 Ind Cas 101 : 7 L L J 34.

——S. 17 — Receipt for a payment of more than Rs. 100 made in full discharge of a mortgage need not be registered if it does not expressly extinguish the mortgage.

Per Srinivasa Aiyangar. J. — In the body of cl. (b) of S. 17 all instruments which purport, or operate to limit or extinguish certain rights, are included, but in the Exception 11 to the section the words 'or operate' are not repeated and the obvious conclusion to be drawn from this deliberate difference in the wording is that receipts granted for money may extinguish the debt and may, therefore, operate to extinguish the security; but if they do not purport in terms to extinguish the security, they need not be registered. A I R (Vol 12) 1925 Mad 348 : 85 Ind Cas 433: 20 M L W 931: 1925 M W N 134: 48 M L J 155 (DB).

——S. 17 — A receipt stating that the whole of the mortgage money has been paid off is not compulsorily registrable unless it recites that the mortgage is extinguished. AIR (Vol 11) 1924 Bom 447 : 80 Ind Cas 415 : 26 Bom L R 486 (DB).

——S. 17—Where the receipt states that the defendant had paid Rs. 200 on account of the mortgage but it does not recite that this sum was all that was due under the mortgage and that the effect of the payment was to extinguish the security, held, that the receipt was not compulsorily registrable. A I R (Vol 11) 1924 Cal 379 : 72 Ind Cas 454 (DB).

——S. 17 — Receipt for payment of mortgage money need not be registered though the payment is the last one.

A receipt for a payment of any part of the sum due on a mortgage is not a document which either operates or purports to extinguish the mortgage even if the payment is the last payment and the document recites that nothing furthe is due. The mortgage is extinguished by the payment, not by the document and the latter is merely evidence of the fact of the payment, which could be proved by oral evidence if no receipts had passed or by another documentary evidence that might be available. AIR (Vol 11) 1924 Nag 111 : 76 Ind Cas 615 : 6 N L J 78.

——S. 17 — A receipt of a sum of money in full discharge of mortgage-debt, the balance being excused, need not be registered for its admissibility in evidence. A:I R (Vol 7) 1920 Mad 742 (2) : 60 Ind Cas 255 : 43 Mad 803 : 12 M L W 269 (DB).

——S. 17 (2) (xi) — Receipt of full payment — Mortgage deed returned.

A receipt stating that the amount due on the mortgage is received in full, and the mortgage deed is returned, does not on its face purport to extinguish the mortgage, and therefore, registration is not necessary, such a document being exempted under S. 17 (2) (xi). A I R (Vol 4) 1917 L B 166: 10 Bur L T 35 : 35 Ind Cas 373 (DB).

——S. 17 cl. (b) (xi) — Registrable documents — Mortgage—Satisfaction.

Instruments acknowledging receipt of money paid in satisfaction of such a right as is referred to in Cl. (b) to S. 17 and not acknowledging receipt of moneys paid as the consideration for the extinction of a such a right by a new act or will are not compulsorily registrable. Similarly endorsements or receipts acknowledging satisfaction of a mortgage by the payment of the whole of the mortgage money are not compulsorily rsgistrable under Cl. (n) of the section. Clause (n) indicates that an operative instrument which not merely evidences the satisfaction of a mortgage but which is transaction annulling an interest by new act or will between the parties is compulsorily registrable. The distinction is as follows :— A payment made in discharge of an existing obligation as in paying off a mortgage-debt according to its tenor is a payment made in satisfaction of that obligation and is not technically "consideration" paid in order to obtain the extinction of that obligation. In other words the extinction of an obligation when it is effected by the performance or satisfaction of the obligation according to its terms follows from the terms of that obligation and is not induced by any new consideration. Neither Cl. (c) nor Cl. (n) of the section requires registration in respect of the mere satisfaction or performance of the pre-existing obligation. These clauses require registration only when money is paid as consideration for a novation or a new agreement by a fresh act of the parties the effect of which is to do away with the old obligation not by accepting performance thereof but on receiving a sum paid for the benefit of the new agreement. (1907) 9 Bom L R 254 (257, 258) (DB).

Where an endorsement does not, on its face, purport to extinguish the mortgage, it does not require compulsory registration. The return of the mortgage-deed by the mortgagee is not conclusive in such cases nor even of itself any indication that the mortgage is extinguished. AIR (Vol 19) 1932 Mad 141 : 34 L W 921 : 136 Ind Cas 317 (DB).

——S. 17—Receipt passed by mortgagee in favour of mortgagor — Former agreeing to relinquish his claim to interest due under mortgage—Interest more than Rs. 100—Agreement is not covered by S. 17 (2) (11).

Held, that the agreement purported to limit or extinguish interest in immovable property within the meaning of S. 17 (1) (b) and as such required to be compulsorily registered. AIR (Vol 17) 1930 Nag 13 : 119 Ind Cas 690 (DB).

——S. 17—Discharge of a debt though resulting in extinguishment of mortgage need not be registered.

There is a clear distinction between a discharge of a debt and the extinguishment of a mortgage, though one may be the result of the other. Where the mortgagee agrees to waive "after the litigation is over" the sum of Rs. 3,000 by way of principal and all the interest therein in consideration of mortgagor paying all expenses in connexion with certain litigation proceedings, the terms of the document amount only to a promise to release part of the mortgage debt in the event of the promisee performing his obligation and inasmuch as the interest in the mortgaged property cannot be held to be affected until the promisee had fulfilled his part of the bargain, the document does not fall within S. 17 (1) (b) or S. 17 (1) (c) and does not require registration. AIR (Vol 17) 1930 Rang 277 : 8 Rang 257 : 126 Ind Cas 218 (DB).

(c) Receipt of money purporting to extinguish mortgage.

——S. 17—A receipt reciting that the balance of the mortgage money had been paid to the mortgagee and possession had been restored to mortgagor must be registered. If it is not registered, it is not admissible in evidence. A I R (Vol 27) 1940 Lah 68.

——S. 17 (2) (xi) — Receipt reciting extinction of mortgage.

Where the mortgagor of a certain property subsequently sells it and the mortgage is redeemed by the purchaser out of the money left with him, the receipt reciting the fact of the extinction of the mortgage is admissible in evidence on the ground that the transaction is not between the original parties to the mortgage. The purchaser can institute a suit to enforce the contract. He can also, in a suit by the mortgagee, raise the question by way of a defence. AIR (Vol 25) 1938 Lah 485 : 40 P L R 777 : 178 Ind Cas 168.

——S. 17 — Receipt for payment of money under mortgage purporting to extinguish mortgage.

A receipt for payment of money due under a mortgage purporting to extinguish the mortgage requires registration. It is incorrect to say that unless there was a recital clearly expressed that a mortgage was extinguished, a receipt for payment of money due on the mortgage extinguishing the mortgage is admissible in evidence, though the document was not registered. AIR (Vol 24) 1937 Cal 178 : 64 C L J 10 : 166 Ind Cas 552 (DB).

——S. 17 (2) (xi)—Endorsement of payment on mortgage-deed—Return of mortgage-deed—Discharge of mortgage by payment of smaller sum, proof of.

The discharge of mortgage-debt by payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement.

——S. 17 — Promise to return the mortgage deed in the possession of co-mortgagee shows that the co-mortgagee accepting the money accepts the same in full satisfaction of the mortgage debt and the receipt embodying such acceptance of money is inadmissible without registration. AIR (Vol 13) 1926 All 693 : 48 All 705 : 24 A L J 839 : 97 Ind Cas 162 (DB).

——S. 17—No registration necessary — Registration Act, S. 2 (xi) — Receipt.

A receipt given for the payment made of a certain amount in full discharge of the mortgage does not require registration if it does not purport in express terms to extinguish the mortgage though its effect may be to extinguish the mortgage.

Per Srinivasa Aiyangar J.—In the body of Clause (b) of Section 17 all instruments which purport or operate to limit or extinguish certain rights, are included, but in the exception 11 to the section the words 'or operate', are not repeated and the obvious conclusion to be drawn from this deliberate difference in the wording is that receipts granted for money may extinguish the debt and may therefore operate to extinguish the security; but if they do not purport in terms to extinguish the security, they need not be registered. AIR (Vol 12) 1925 Mad 348 : 20 M L W 931 : 1925 M W N 134 : 48 M L J 155 : 85 Ind Cas 433 (DB).

——S. 17 — A sum of money more than Rs. 100 written off in consideration of transfer of immovable property.

Held, it made the document in question an instrument which acknowledges the receipt of payment of consideration on account of the assignment or extinction of a right, title or interest in immovable property of the value of more than Rs. 100 within the meaning of the words in S. 17 (1) and the non-registration of this document made it inoperative in so far as it purported to affect those of the executants in respect of whom it was never registered. AIR (Vol 11) 1924 All 277 : 74 Ind Cas 721 (DB).

——S. 17 (2), (xi)—Mortgage—Agreement relinquishing a portion of principal and interest — Whether registration necessary.

An agreement by which a mortgagee relinquishes a part of the principal and all interest present and future on the mortgage, is compulsorily registrable. Such an agreement cannot be regarded as an acknowledgment of payment within the meaning of the exception in S. 17 (2), Cl. XI of the Act. 35 All 202 : 11 A L J 253 : 19 Ind Cas 449 (DB).

(d) Oral release.

——Ss. 17 and 49 — Difference between agreement to release before purchase by stranger and after purchase.

Where in a suit to enforce a mortgage, one of the defendants who had purchased a portion of the property pleaded that in pursuance of an agreement by the mortgagee to release the portion purchased by him, he had paid a portion of the amount of the mortgage and produced an unregistered receipt which contained a recital of such release :

Held, that there was nothing in law to prevent an oral release as between the mortgagee and an intending purchaser being proved and the defendant was entitled to prove such release notwithstanding the fact that the receipt was unregistered and inadmissible in evidence. AIR (Vol 22) 1935 Mad 113:40 L W 942: 68 M L J 91: 58 Mad 371: 153 Ind Cas 668 (DB).

——S. 17 — An oral agreement to receive a lesser amount than is actually due on a mortgage in full discharge of it, as also its actual discharge, cannot be proved under S. 92 (4) of the Evidence Act and S. 17 (b) of the Registration Act. AIR (Vol 14) 1927 Mad 1111 : 52 M L J 224 : 100 Ind Cas 54.

——S. 17—Terms of mortgage orally settled—Report to patwari stating terms of mortgage — Payment to mortgagor before patwari — Receipt by mortgagor stating terms of mortgage does not require registration, as the mortgage was completed before the receipt. AIR (Vol 13) 1926 Lah 220 : 8 L L J 73 : 27 P L R 140 : 93 Ind Cas 359.

(e) Endorsements of payments on mortgage deeds.

——S. 17 (2) (xi) — Endorsement on mortgage deed, whether receipt — Exemption in cl. (xi), if applies to such endorsement.

An endorsement made on the mortgage-deed, though inadmissible in evidence to prove extinguishment of the mortgage, this ban would not prevent its being taken into evidence in proof of the payment of the money. A I R (Vol 29) 1942 Pat 315 : 23 P L T 46 : 8 B R 485 : 199 Ind Cas 30.

——S. 17—Endorsement in mortgage deed stating endorser has ceased to have any right - Registration.

A mortgage deed contained an endorsement as follows: "Received Rs. 1,200-0-0 paid by Seth Totaram Jawahar Lalji, the total being made up of Rs. 943-14-0 due on this mortgage deed in all and Rs. 256-2-0 on account of the mortgage debt of November 8, 1926. I have now ceased to have any right to field No. 172 under the mortgage deed :"

Held, that so far as the endorsement purported to extinguish the mortgage of field No. 172, it required registration. A I R (Vol 24) 1937 Nag 402 : 174 Ind Cas 7.

—— S. 17 (2) (xi)—Mortgage — Endorsement purporting to release some of the mortgaged properties — Innocent transferee of equity of redemption—Rights of.

Where an endorsement by a mortgagee purports to release only some of the mortgaged properties, the mortgage is not extinguished and the endorsement falls within S. 17 (2), cl. (xi) and does not require registration.

An innocent transferee of a part of the equity of redemption is entitled to urge on equitable grounds that when he took the transfer, there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back, he is entitled to claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage. AIR (Vol 20) 1933 Cal 588:37 C W N 424: 145 Ind Cas 657.

——Ss. 17 (1) (b) and 49—Sale — Evidence Act, S. 91 —Sale—Repurchase — Endorsement on sale deed — Inadmissibility for want of registration.

Defts. pleaded that plffs. had resold the land in suit to them and referred to a receipt for a consideration said to have been endorsed on the back of the original sale-deed. Held, that the receipt was not admissible in evidence and oral evidence could not be allowed to prove repurchase. 5 P L R 1919.

——S. 17 (2) (xi) and (1) (2).

Endorsement of payment on mortgage documents is exempt under S. 17 (2) (xi) from registration and is admissible in evidence though not registered. A I R (Vol 5) 1918 Mad 645:6 L W 44 : (1917) M W N 447: 40 Ind Cas 893 (DB).

——S. 17 (2) (xi)—Mortgage bond—Receipt showing simple interest charged — Admissibility — Evidence Act, S. 92.

A receipt showing that only simple and not compound interest is to be charged on a mortgage bond is admissible in evidence though the bond contained a provision for payment of compound interest. The receipt operates as full acquittance for the money paid and does not require registration. AIR (Vol 2) 1915 Cal 513 : 42 Cal 546 : 30 Ind Cas 804 (DB).

—— S. 17 (2) (xi)—Mortgage—Endorsement.

Transfer by mortgagee of his right for Rs. 100 or more by endorsement must be registered according to S. 17, 102 P W R 1912 : 132 P L R 1912 : 16 Ind Cas 125.

——S. 17 (2) (xi) —Endorsement on a registered deed.

Under S. 17 an endorsement on a registered mortgage deed merely acknowledging receipt of the mortgage money is not compulsorily registrable as such an endorsement is at most a memorandum containing a hint that redemption has been effected. It does not contain a contract of redemption. 37 P W R 1911 : 111 P L R 1911 : 10 Ind Cas 846.

——S. 17 (2) (xi)—T. P. Act (1882), S. 74 — Endorsements by puisne mortgagee.

Endorsements on a mortgaged bond of payments made in satisfaction of mortgage by puisne mortgagee for his own protection are covered by S. 17 (2) (XI) and are not compulsorily registrable. (1910) 37 Cal 589 : 11 C L J 551 : 6 Ind Cas 159 (DB).

——Ss. 17, 49—Document compulsorily registrable, registered by mistake in Book IV — Mistake not to affect parties — Document to be treated as properly registered—Endorsement releasing mortgaged property for a cash consideration.

A release whereby a father relinquished his share in the immoveable and moveable property in favour of his son was presented for registration. The document contained no description of the property released but it was capable of identification. The release was accepted by the Registrar and registered not in Book I but in Book IV, that is to say, not in the Book kept for registration of documents compulsorily registrable under S. 17.

Held, that the release must be considered as having been duly registered, since the error of the Registrar in registering the document in a wrong book should not be allowed to prejudice the parties. At the back of a deed of conveyance an endorsement was made by the mortgagee that the property covered by the conveyance was released in consideration

of the payment by the mortgagor of a sum of money. The endorsement was not registered.

Held, that in view of the provisions of S. 49 the endorsement was not admissible in evidence of either the redemption of the property or of the nature of the original transaction between the parties. (1909) 11 Bom L R 1321 : 34 B 202 (208) : 4 Ind Cas 588 (DB).

——S. 17 cl. (b) — Mortgage — Release of part of mortgaged property on part payment of mortgage debt effected by endorsement on bond — Registration.

A portion of certain property, the subject of a mortgage, was purchased by a stranger to the bond who paid of a portion of the mortgage debt, and on the bond the fact of payment, together with the release of a specified portion of the mortgaged property was endorsed. Held, that such an endorsement did not require registration. 1904 AWN 266 : 27 All 305 (307) : 1 A L J 693 (DB).

59. Sale certificate.

——S. 17 (2) (xii)—T. P. Act, S. 54 — Sale by Official Receiver of property of insolvent.

A deed of transfer executed by an Official Receiver of the property of an insolvent which he has sold by public auction to the transferee is not exempt from registration under S. 17 (2) (xii). An Official Receiver is not a Civil Officer within the meaning of the said section. A I R (Vol 22) 1935 Mad 55 : 40 L W 747 : 67 M L J 746 : 1934 M W N 1399 : 152 Ind Cas 988 (DB).

——S. 17 (o) — Sale certificate of Collector after sale of surplus lands—T. P. Act, S. 54.

Sale certificates issued by the Collector as regards surplus lands acquired by Government under the Land Acquisition Act are in themselves sufficient to validate the transfer of title to the transferee without being registered. (1908) 35 C 614 (617).

60. Explanation.

——S. 17 (2), Expl.—Agreement for sale containing recital of payment of earnest-money whether compulsorily registrable.

In view of the Explanation to S. 17 (2) enacted by Act II of 1927, an agreement for sale of immovable property which does not amount to an actual sale is not compulsorily registrable even though the document contains a recital of the payment of earnest money.

The said Explanation is retrospective in operation and is applicable to documents executed before the enactment of Act II of 1927. AIR (Vol 18) 1931 Cal 171: 34 CWN 881: 52 CLJ 158: 58 Cal 449: 129 Ind Cas 839 (DB).

——S. 17 (2) Expl. (as amended by Act II of 1927)—Effect of.

The effect of the amendment is to restore the law relating to the admissibility of documents, effecting a contract for sale of immovable property and reciting payment of the purchase-money, as it was understood prior to the decision of the Privy Council (1930) 124 Ind Cas 606 (1) (Mad).

——S. 17—The words of the Explanation "or ever to have required registration" make it quite clear that Act II of 1927 does apply even to a document dated prior to 8th February 1927. AIR (Vol 15) 1928 Nag 216: 109 Ind Cas 421.

SUB-S. (3).

61. Authority to adopt.

——S. 17—Deed of adoption.

Adoption deeds are not compulsorily registrable as it is the adoption and not the deed that confers the status of an adopted son or any interest in the property of the adoptive father. AIR (Vol 18) 1931 Bom 105: 32 Bom LR 1385: 128 Ind Cas 901 (DB).

——S. 17 (3)—Unregistered partition deed—May be used to prove consent to adopt contained therein.

Where the Bahi entries with signatures of the members related to a family partition of immovable property worth more than Rs. 100 and also related to a consent by a member for adoption of a son by the other.

Held, that the entries would no doubt be inadmissible in evidence for the purpose of proving partition, but there was no objection to their being received in evidence for a collateral purpose, viz., for showing the consent to adoption and that the consent was merely an assent to the proposed adoption and "not any authority to adopt" within the meaning of S. 17 (3). AIR (Vol 16) 1929 Lah 16: 114 Ind Cas 711.

——S. 17—If contained in a will, need not be registered.

Where a deed described a certain person as the heir of all the executants' moveable and immovable property, and empowered the wife of the executant to adopt that person in the event of the executant not recovering from the illness from which he was then suffering.

Held, the deed was both a will and a document containing an authority to adopt and was not compulsorily registrable. AIR (Vol 14) 1927 Nag 369: 105 Ind Cas 112.

——S. 17—Construction of document—Not a will but authority to adopt, (1877 Act).

A Hindu executed an unregistered document calling it a Will in favour of his wife to the effect:— "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner.

Held, the document is not a Will, but only a power to adopt, and as such ought to have been registered under S. 17 of the Indian Registration Act, 1877. AIR (Vol 9) 1922 PC 162: 41 MLJ 648: 26 CWN 374: 24 Bom LR 600: 30 MLT 124: 48 IA 482: 44 Mad 733: 14 MLW 398: 1921 MWN 713: 64 Ind Cas 458.

——S. 17—Execution outside British India—Registration.

Section 17 (3) of the Registration Act does not apply to an authority to adopt, executed in a Native State, by a person domiciled in that State. S. 49 of the Registration Act does not render the documents inadmissible in evidence, for want of registration. AIR (Vol 7) 1920 Mad 763: 43 Mad 288: 38 MLJ 149: 59 Ind Cas 978 (DB).

——S. 17—An authority to adopt contained in a will need not be registered, though the executant be minor and the bequests invalid. AIR (Vol 7) 1920 Mad 237: 1920 MWN 684: 12 MLW 596: 60 Ind Cas 146 (DB).

——S. 17 (3)—Authority to adopt — Registration—Compulsory.

A deed authorising a Hindu widow to make an adoption is compulsorily registrable. AIR (Vol 7) 1920 Nag 123: 55 Ind Cas 38 (DB).

——S. 17 (3)—Will—Authority to adopt— Destruction.

A mere authority to adopt though revokable and taking effect on the death of the person conferring the authority, cannot be considered a will and requires to be registered under S. 17 (3). To make it a will the mere description of the document as a will is not sufficient and it is necessary that it should be a disposition of property in addition to the authority to adopt. The mere appointment of a manager or guardian to manage the estate during the minority of the boy adopted, is not a disposition of the property sufficient to satisfy the definition of a will. AIR (Vol 6) 1919 Mad 447: 25 MLT 204: (1919) MWN 52: 9 LW 385: 49 Ind Cas 929 (DB).

——S. 17 (3)—Adoption-deed reserving life-interest to mother—Registration, if compulsory.

A deed executed shortly after an adoption by a widow by which a life-interest in immovable property, worth more than Rs. 100 was created in favour of the widow, requires registration. AIR (Vol 1) 1914 Bom 47: 38 Bom 227: 16 Bom LR 111: 24 Ind Cas 716 (DB).

——S. 17 (3)—Will—Authority to adopt—Registration.

A document is not a will simply because it is called a will. Where a document gives a widow a power to adopt, and provides that in case of dispute between her and the adopted son, the widow should take a life interest in the property, it is an authority to adopt requiring registration for its validity and not a testamentary disposition. (1913) MWN 199: 18 Ind Cas 1006 (DB).

——S. 17—Documents compulsorily registrable —See (1903) 13 MLJ 283: 27 M 30 (32).

——S. 17—Necessity for registration—Will—Invalid provisions—Power to adopt.

Where a document purports to be a will giving power to adopt, the validity or invalidity of its provisions or the fact that such a will could not validly have been executed does not alter its nature and make its registration necessary. (1902) 4 Bom LR 883 (885, 886).

PARTICULAR TRANSACTIONS

62. Mortgage.
(a) Test.
(b) Documents requiring registration.
(c) Documents not requiring registration.
(d) Variation of.
(e) Assignment of
(f) By deposit of title deeds.

(a) Test

——S. 17—The test is whether the document constituted the bargain between the parties or was it merely the record of an already completed transaction? In the former case, the document would come within the purview of S. 17, but if it was merely the record of an already completed transaction, it would not be a document which would create, etc., right in the immovable property and would not require registration. For the purpose of considering whether a mortgage is to be taken as embodying a bargain between the mortgagor and the mortgagee or as merely evidencing a transaction which had already been completed before the memorandum was executed or delivered, not only the terms of the document must be looked to but also the attending circumstances. AIR (Vol 25) 1938 Cal 823: 180 Ind Cas 813.

——S. 17—Interest of mortgagee in immovable property—Transfer of.

A mortgage is a transfer of an interest in immovable property, and the interest of a mortgagee in immovable property. Consequently, such an interest can only be transferred by registered deed. It makes no difference that the mortgage is one by deposit of title deeds. AIR (Vol 23) 1936 Rang 152: 14 Rang 494: 163 Ind Cas 645 (DB).

——S. 17—Covenant in mortgage.

Mortgages as defined include the covenant to pay the money secured on the property where such covenant exists. Where a document is required to be registered, any 'portion of the document cannot be said to be not registered, for any purpose. AIR (Vol 15) 1928 Mad 1124: 55 MLJ 506: 1928 MWN 873 : 28 M L W 624 : 114 Ind Cas 340 (DB).

——S. 17—No registration necessary—Mortgage.

A document of mortgage which is not signed by either of the parties to it, is clearly not an instrument creating any right and S. 17 has no application. AIR (Vol 11) 1924 Lah 249: 73 Ind Cas 642 (DB).

——Ss. 17 (1) (b) and 49—Mortgage—Redemption—Proof of—Unregistered receipt inadmissible.

No particular form of document is required to redeem a mortgage. An unregistered receipt cannot in itself be used as evidence of redemption of a mortgage. AIR (Vol 6) 1919 All 94 : 54 Ind Cas 117.

(b) Documents requiring registration.

——Ss. 17, 49—Document constituting bargain between parties.

Where, upon a mortgage by deposit of title-deeds, a document is drawn up constituting a bargain between the parties, the document is not admissible in evidence to prove the mortgage, unless it is registered under the Regis. Act and oral proof of the mortgage is inadmissible. (1936) 163 Ind Cas 709 (DB).

——S. 17 (1) (b) and S. 49 — Letter relinquishing mortgage debt.

If the mortgagee states in writing that he foregoes the entire amount due in respect of the mortgage deed, the legal effect of such relinquishment is the extinguishment of his interest in the mortgage security, and the writing will be in admissible in evidence if it is not registered. AIR (Vol 20) 1933 Mad 432 : 1933 MWN 141 (2) : 37 LW 677 : 147 Ind Cas 464.

——S. 17 — Document remitting part of mortgage amount and agreeing to receive balance.

A document which was described as a receipt mentioned that a certain sum was remitted by the mortgagee the executant, and that he agreed to receive Rs. 425 in satisfaction of all claims. It then said that towards that amount he had received Rs. 100 and that after receiving the balance of Rs. 325, he would credit the same on the said documents and hand them over to the mortgagor along with the title-deeds :

Held, that the document, though it was described as receipt, came within the scope of cl. (b), S. 17 and required registration. A I R (Vol 18) 1931 Mad 601 : 1931 MWN 261 : 135 Ind Cas 572.

——S. 17—Registered sale-deed—Second deed showing first deed to be a mortgage— Registration of the second deed is necessary.

Where a subsequent unregistered deed provided for redemption of property purported to have been sold under a former registered sale-deed of the same date and used the words "creditor," "principal" "redemption", the second deed was held to require registration, inasmuch as it showed that the intention of the parties was that the transaction evidenced by the first deed was not what it purported to be, but a mortgage. AIR (Vol 10) 1923 Rang 52 : 11 LBR 456: 1 Bur L J 223 : 72 Ind Cas 34.

——Ss. 17 (1) (b) and 49—Sale—Registered sale-deed, contemporaneous unregistered agreement to re-convey —Admissibility of evidence.

Where properties are sold under registered sale-deed and on the same day the vendee executes an unregistered document to reconvey the properties in favour of their vendors, the unregistered agreement is a document affecting immovable property requiring registration under S. 17 (1), Cl. (b) of the Registration Act, and consequently is inadmissible under S. 49 for the purpose of showing that the agreement along with the absolute conveyance constitutes a mortgage by conditional sale. A I R (Vol 6) 1919 Mad 711 : 26 M L T 291 : 10 L W 1 : (1919) M W N 87 : 49 Ind Cas 699 (DB).

——S. 17 (1) (b)— Mortgage — Conversion of simple into usufructuary mortgage—Mortgagee put in possession—Registration necessary.

A subsequent unregistered but compulsorily registrable mortgage in lieu of the previous mortgage, being invalid the mortgagee is entitled to sue upon the original mortgage. A I R (Vol 1) 1914 All 559 : 12 ALJ 1133 : 27 Ind Cas 430.

——S. 17 — Usufructuary mortgage below Rs. 100—No registration—Admissibility in evidence.

I executed a usufructuary mortgage-deed in favour of B, the value of which was below Rs. 100. The deed was not registered. I did not put B, in possession. On a suit for possession, and in the alternative for recovery of money, being brought by B :

Held, that the document could be taken in evidence in order to show that money was borrowed and that the court could pass a simple money-decree although it could not pass a decree for possession. (1910) 7 ALJ 71 : 5 Ind Cas 519 (DB).

——Ss. 17 (b) and 49—Mortgage— Oral compromise —Evidence Act (I of.1872), S. 92.

In the course of mutation proceedings on the basis of a registered mortgage when some of the parties to a mortgage deed objected and afterwards the objection was withdrawn on account of an oral compromise, and mutation was ordered without reference to the oral compromise, it was held that the oral compromise could not be admitted in evidence without registration as it altered the term of registered mortgage. 31 All 13 : (1908) AWN 264 : 5 ALJ 717 : 1 Ind Cas 558 (FB).

——S. 17 — Mortgage entitling a person to redeem, compulsorily registrable:—See (1904) 27 M 348 (350).

(c) Documents, not requiring registration.

——S. 17 (1) (b) — Document, held did not require registration.

Where what a document contains is a mere list of documents deposited with the mortgagee when creating an equitable mortgage regarding certain property, the mere fact that it is stated in the heading of the list that the property was unencumbered will obviously not be sufficient to turn it into a document embodying the agreement between the parties. Such a document does not require registration.

A document containing a contract of guarantee on behalf of certain persons that they would be liable to the mortgagee in case the mortgagor failed to pay his debt and which is not the main transaction of the mortgage but merely recites that the transaction of mortgage took place between the mortgagor and the mortgagee, is not registrable. AIR (Vol 27) 1940 Lah 166 : 42 PLR 29 : 188 Ind Cas 833.

——S. 17—Mortgage of whole property—Subsequent recognition of absence of any interest created by original deed in particular portion of property — Document effecting change in rate of interest payable on mortgage.

The disputes as to the amount of the morgage and the interest—Arbitration—Award—The amount fixed by the award was to be paid within six months; in case of default, the mortgagee was to realize the amount by the sale of 11/16th of the mortgaged property, i.e., mortgagor's rights in the encumbered property. Award put into Court—Objection that the award had limited the mortgage to 11/16th of the property instead of the whole property originally mortgaged and that further the rate of interest had been awarded not at the rate fixed in the deed but at annas 12 per cent. per mensem with annual rests and for both these reasons, the award needed registration :

Held, that the award only recognised the fact that the mortgagee never had any interest in that 5-16ths of the property for the simple reason that the mortgagor had also no interest in that property. There was no creation or extinction or limitation of any right by the award and the award did not require registration.

Held, also that a document effecting a change in the rate of interest payable on a mortgage was not a change in the mortgagee's interest in land and did not need registration. A I R (Vol 25) 1938 Lah 481 : 40 PLR 291 : 180 Ind Cas 917.

—— S. 17—Sale of equity of redemption.

Where the sale of the equity of redemption is far less than Rs. 100, prima facie, the document does not pass an interest in immovable property of the value of Rs. 100 or upwards, and does not, therefore, require registration under S. 17 (1) (b). A I R (Vol 23) 1936 Bom 175 : 38 Bom L R 205 : 60 B 220 : 162 Ind Cas 269 (DB).

——S. 17 — Where the material part of a letter contained the words, particulars of security, freehold land and two houses known as 'Rose Lodge' and 'Dovecot' on Budd Road" :

Held, that the letter did not come within the definition of "a document requiring registration" and evidence could be led as to the scope of the security outside the letter. A I R (Vol 21) 1934 Rang 51 : 148 Ind Cas 721.

——S. 17 — Document containing promise to release part of mortgage-debt—Requires no registration.

Where the document merely amounted to a promise to release part of the mortgage debt in the event of the promisee performing his obligation and there was no provision that the mortgage deed should be returned for endorsement of any kind and the mortgage interest was not referred to :

Held, that it was not a receipt within cl. (xi) of sub-s. (2) of S. 17, nor would it fall within either cl. (b) or (c) of sub-s. (1) of the section and that it was admissible in evidence without registration. AIR (Vol 17) 1930 Rang 217 : 8 Rang 257 (DB).

——Ss. 17, 49—T. P. Act, S. 59—List of documents delivered—Written evidence to prove mortgage, admissibility of.

The manager of the defendant firm executed a promissory note to the plaintiff and on the same day, gave him a list of the title deeds of the properties which the manager had agreed to give as security for the loan. The list contained the following introductory words : 'As agreed upon in person, I have delivered to you the undermentioned documents as security.' In a suit to recover the amount, it was contended that the mortgage was not capable of legal proof as the memoranda was not registered :

Held, (i) that the memorandum did not require registration as it was a mere list of the documents which had been delivered in pursuance of an agreement reached in person, and was not a document embodying the terms of any agreement :

(ii) that even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document ;

(iii) that the transaction could be proved by written as well as by oral evidence. AIR (Vol 18) 1931 P C 36 : 1931 A L J 245 : 1931 M W N 349 : 8 O W N 666 : 60 M L J 506 : 33 L W 501 : 54 Mad 257 : 35 C W N 494 : 53 C L J 396 : 33 Bom L R 878 : 58 I A 68 : 131 Ind Cas 328.

——S. 17—Solenama evidencing discharge of mortgage-debt—Registration.

There is nothing in law to exclude oral evidence of the discharge or release of a mortgage-deed when the plea is that the payment was made partly by payment of money and partly by release of the debt. AIR (Vol 18) 1931 Cal 667 : 58 Cal 532 : 133 Ind Cas 701 (DB).

——S. 17—Mortgage of crops need not be registered.

Under S. 3 of the T. P. Act growing crops are not immovable property and therefore a mortgage of such crops needs no registration. A mortgage of crops not in existence amounts to a mere agreement to hypothecate the further crops when they come into

existence. Such an agreement is valid. As soon as the crops grow the hypothecation became complete and attaches to the crops and creates an equitable interest in the mortgagee. Such a charge could be enforced against all subsequent transferees with notice but would be of no avail against a transferee without notice. 89 Ind Cas 410 : 6 L R A Civ 564 : AIR (Vol 13) 1926 All 164.

——S. 17—Mortgaged property sold to pay off mortgage—Vendee paying the amount to mortgagee and endorsement made on mortgage deed about payment and release of property but no signature affixed—Further receipt of payment with one anna stamp and stating the property to be released from the mortgagee.

Held, that the language of the receipt showed that the item must have been released from the mortgage before the date of the receipt, that it did not purport to extinguish or release an interest in immovable property and that therefore it did not require registration and was admissible in evidence to prove the factum of payment by the vendee. 112 Ind Cas 559 : 1928 M W N 537 : AIR (Vol 15) 1928 Mad 1050 (DB).

——S. 17—Occupancy rights—Mortgage of—Cannot be registered—Effect of registration.

There is no power in a Registration Officer to register a deed purporting to transfer by mortgage occupancy rights which cannot be mortgaged, but if as a fact the document is registered, in law it is to be regarded as not registered at all. In such a case even if the deed include some transferable property besides the occupancy rights, its registration is illegal and must be ignored wholesale. 81 Ind Cas 126 : 20 N L R 162 : AIR (Vol 12) 1925 Nag 125.

——S. 17—Agreement to transfer equity of redemption—Registration not necessary.

Survey Nos. 76 and 394 were mortgaged with A in 1906 and in 1908 it was agreed that No. 394 should be taken back by mortgagor free from mortgage and No. 76 to be given to mortgagee in lieu of mortgage money. The deed in respect of that ran thus :—

"You (the mortgagee) have agreed to effect the resale of that at my convenience by a regular registered deed. Survey No. 76 from out of the properties involved in that mortgage by way of sale has been given this day to you in lieu of the debt of your shop and has been given into your possession this day."

Held, Marten, J. (Fawcett, J., dissenting) that the document did not amount to an actual transfer of the equity of redemption, but only amounted to an agreement to transfer ; and therefore was admissible in evidence without registration. 75 Ind Cas 118 : 47 Bom 621 : 25 Bom L R 381 : AIR (Vol 10) 1923 Bom 473 (DB).

——S. 17—Mortgage deed or memo in an account book—Document not signed is not registrable.

A document was found not in the account book of the mortgagees but in the account book of the mortgagors. It recited the names of the parties, the amount of the charge, the period of the mortgage and the names of certain witnesses. It was not signed by anybody.

Held, that it was merely a memorandum and not a deed of mortgage and therefore not compulsorily registrable.

Before a document can be treated as such for purpose of registration, or in fact, for almost any purpose, it must be executed, and, as defined in section 2 (12) of the Stamp Act. "Executed" means "signed". 71 Ind Cas 739 : 5 L L J 75 : AIR (Vol 10) 1923 Lah 242.

——S. 17—Sale-deed and agreement to reconvey not constituting mortgage — Agreement need not be registered.

The terms of the agreement under which plaintiff claimed a re-conveyance were as follows :—"I, Kyaw Zan, have this day, the 14th of August 1919, bought for Rs. 200 from Maung Paung and Ma E Bya by registered deed in the names of myself and my wife, their house and site, and I hereby agree that if the said Maung Paung and Ma E Bya shall within two years pay to me the said principal with interest at the rate of Rs. 2 per cent per mensem. I will reconvey to them by registered deed the said house and site, and if I fail to do so, I will pay them whatever damages they suffer and the costs of any litigation which may result."

Held, that the agreement on which plaintiff relied did not constitute, along with the sale-deed, a mortgage, and therefore did not require registration. 82 Ind Cas 606 : 2 Bur L J 89 : AIR (Vol 10) 1923 Rang 242.

——S. 17 (1) (b)—Recital of mortgage—Chaupatta—Registration.

An entry in a Chaupatta account book as to the detail of money due on a mortgage effected orally does not create the mortgage and is not compulsorily registrable. 57 Ind Cas 58 : AIR (Vol 7) 1920 Lah 121.

(d) Variation of

——Ss. 17 and 49—Registered mortgage—Agreement to reduce interest — Registration — Necessity—Interest under the document reduced by the U. P. Agriculturists' Relief Act.

Though the interest payable on a loan under a registered mortgage is reduced by virtue of the provisions of the U. P. Agri. Rel. Act, an agreement to further reduce the interest under the mortgage requires registration and can be received in evidence only if it is registered. 22 Luck 503 : 1947 O W N 416 : AIR (Vol 35) 1948 Oudh 152 : 1947 O A (C C) 297 : 1947 A W R (C C) 297 (DB).

——S. 17—An agreement simply to withdraw from a suit to have mortgage, already in existence, set aside does not require registration under S. 17. 112 Ind Cas 695 : AIR (Vol 15) 1928 Lah 792.

——S. 17—To pay for improvements.

An agreement to pay "at the time of redemption" all sums expended by the mortgagee on the repair or improvement of the mortgaged property neither creates nor declares any right to and those sums to the price of redemption. That right is created and declared by S. 63 of the Transfer of Property Act. The assent of which that section speaks may be oral or even tacit. 68 Ind Cas 382 : AIR (Vol 9) 1922 Nag 262.

——S. 17 — Agreement between first and second mortgagee.

Where first and second mortgagee agree that they would share equally the money realised, the bond is admissible to prove the agreement though it is not registered. 43 Mad 660 : (1920) M W N 368 : 18 A L J 726 : 39 M L J 37 : 12 L W 143 : 24 C W N 1053 : 56 Ind Cas 642 : AIR (Vol 7) 1920 P C 33.

——Ss. 17 (1) (b) and 49 — Registered usufructuary mortgage—Subsequent writing providing for variation of term—Not admissible.

An unregistered document purporting to affect or vary the mode in which the rents and profits of the property usufructuarily mortgaged are to be appropriated under the terms of a registered mortgage, is inadmissible in evidence. (1913) 35 All 48 : 40 I A 31 : 17 C W N 233 : 13 M L T 182 : (1913) M W N 131 : 17 C L J 312 : 15 Bom L R 432 : 25 M L J 91 : 17 Ind Cas 737 (PC).

(e) Assignment of

——S. 17—Mortgage of immovable property can only be assigned by a registered deed of assignment and not by the document which merely purports to recite

a previous partition. AIR (Vol 28) 1941 Rang 122 : 195 Ind Cas 221 (DB).

——S. 17 (1) (b) Enhancement of interest.

A deed altering the terms of interest payable on mortgage does not fall within S. 17 (1) (b) of the Registration Act, and is admissible in evidence without registration. 50 Ind Cas 647 : AIR (Vol 6) 1919 Lah 212.

——S. 17 - Mortgage decree for Rs. 100 or upwards —Sale by unregistered deed—Validity.

A mortgage decree for Rs. 100 or more is assignable without registration. (1907) 12 CWN 625 (627) (DB).

(f) By deposit of title deeds.

(i) Transaction constituting the mortgage—Test for registration.

(ii) Record of an already completed transaction.

(iii) Mere bargain not creating mortgage.

(iv) Contemporaneous agreement.

(i) Transaction constituting the mortgage — Test for registration

——S. 17—Equitable mortgage—Memorandum delivered along with deposit of title deeds as security for loan—Admissibility in evidence without registration. See 1950 S C J 361.

——S. 17—It is in each case a question of fact, as to whether the writing itself constitutes the bargain between the parties or whether the mortgage had been completed by the deposit of title-deeds and the advance of money on such deposit and the writing is merely evidence of an already completed transaction. In the former case, the writing falls under S. 17, Registration Act, and if unregistered is inadmissible. In the latter case, there is no bar to its being received in evidence. AIR (Vol 27) 1940 Lah 285 : 42 P L R 307 : 190 Ind Cas 463 (DB).

——S. 17—Letter signed and delivered to mortgagee at time of depositing title deeds, by way of security for loan.

S borrowing money on deposit of title deeds—Deposit accompanied with a letter stating that S could take back the letter alone under the title deeds, on payment of money. In a subsequent mortgage, the said letter was described not only as collateral security letter but as security for the loan :

Held, that the letter constituted the bargain between the parties and operated to declare the rights of the mortgagee in the property. Consequently, the memorandum fell within S. 17 and ought to have been registered and that the equitable mortgage could not be proved. AIR (Vol 25) 1938 Mad 547 : 181 Ind Cas 922 Reversed. AIR (Vol 27) 1940 Mad 671 : 51 L W 213 : 1940 M W N 122 : 1940-1 M L J 561 : 193 Ind Cas 152 (DB).

——Ss. 17, 49 — Document evidencing equitable mortgage—Registration.

For the purpose of creating an equitable mortgage, all that is necessary is a loan coupled with a deposit of title-deeds relating to the property to be mortgaged with the intention of creating a charge on the property. No writing is needed for the creation of such a mortgage; but if the parties choose to put their agreement with respect to the transaction in writing, that document will exclude all other evidence of the transaction. AIR (Vol 24) 1937 Lah 135: 39 P L R 253 : 164 Ind Cas 63 (DB).

——S. 17 — Memorandum signed by mortgagor in relation to equitable mortgage.

A memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which the Registration Act requires to be registered, even though it does not embody all the particulars of the transaction but registration is not so required unless the memorandum, on its face, embodies such terms, and is signed and delivered at such time and place and in such circumstances, as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties :

Held, on facts that the document did not constitute the bargain between the parties but was evidence of past transactions and did not require registration. AIR (Vol 24) 1937 Lah 135 : 39 P L R 253 : 164 Ind Cas 63 (DB).

——S. 17—Memorandum relating to deposit of title deeds—Registration.

It cannot be said that no memorandum relating to a deposit of title deeds can be within S. 17 unless it embodies all the particulars of the transaction of which the deposit forms part, but no such memorandum can be within the section unless, on its face, it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties. Consequently, where in the application to renew a promissory note, the applicant states the loan required, the security he is prepared to offer and expresses his willingness to accept the conditions printed in the form and the actual loan is made many days afterwards, the latter cannot be said to effect any charge on the property, and as such, does not require registration. AIR (Vol 22) 1935 Lah 821 : 160 Ind Cas 773 (DB).

——S. 17—T. P. Act, S. 59—Memorandum of deposit of title-deeds—When requires registration—Tests.

An equitable mortgage can be created by the deposit of title-deeds without any writing whatsoever but where the title-deeds are handed over accompanied by a bargain, the terms of the bargain must prevail, and where the bargain is reduced to writing, it alone must determine the scope and extent of the security.

The real test is not the exact moment at which the documents are handed over, but the purpose for which they are handed over, and if they are handed over merely for purposes of inspection and not for the completion of the contract, then the terms of any subsequent document recording the terms of the contract must be regarded as the contract itself. AIR (Vol 20) 1933 Pesh 35 : 141 Ind Cas 541 (DB).

——S. 17—Memorandum relating to deposit of title-deeds.

A memorandum relating to deposit of title-deeds comes within the orbit of S. 17 if it embodies all the particulars of the transaction of which the deposit forms part and, on its face, embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties.

A deed assigning rents which are to accrue in future is compulsorily registrable. AIR (Vol 19) 1932 Cal 356 : 54 C L J 328 : 36 C W N 193 : 59 C 586 : 137 Ind Cas 500 (DB).

——S. 17—Memorandum — Necessity of registration —Construction of deed.

Where a memorandum given to a Bank relating to an equitable mortgage ran as follows:

"Having placed in your hands the securities as per list mentioned on the reverse as security for such sum or sums of money as now are or hereafter may be advanced to me by the said Bank on bills, promissory note or by way of overdrafts or in any other way whatsoever, I hereby agree that in default of payment on demand of all or any such sum or sums of money, you shall be at liberty to sell etc." :

Held, that it constituted the agreement and needed registration. (1932) 138 Ind Cas 247 (Lah) (DB).

——S. 17—Equitable mortgage—Letter referring to memorandum of agreement — Necessity for registration.

A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows: "I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me" and then referred to the schedules annexed to the letter.

Held, the two documents must be read together and so read, they embodied the terms of the transaction, and not having been registered, the mortgage was not valid. AIR (Vol 18) 1931 Mad 124 : 32 M L W 666 (DB).

——S. 17—Agreement to deposit and memorandum of deposit of title deeds together require registration.

The defendant having executed a promissory note for a sum of money entered into a written agreement by which it was agreed that he should deposit title deeds relating to immovable properties by way of equitable mortgage to secure the repayment of the amount under the promissory note. On the next day after the agreement the defendant deposited with the plaintiff title deeds in pursuance of the agreement and a letter was passed evidencing the same

Held, that the memorandum of agreement and the subsequent letter must be read together and that they must be registered because they constituted the bargain between the parties. AIR (Vol 18) 1931 Mad 124 : 1930 M W N 865 (DB).

—— S. 17—Equitable mortgage.

A mortgage by deposit of title deeds can be inferred from the mere fact of such a deposit accompanying a loan, and no agreement whether in writing or by word of mouth is necessary for the purpose. But, if the parties choose to reduce their bargain to writing the question will arise : "Does the writing constitute the bargain between the parties or was it merely the record of an already completed transaction ? The answer to this question must necessarily depend upon the facts of each case.

The fact that a memorandum evidencing an "equitable" mortgage is contemporaneous with the deposit of title deeds does not per se render the memorandum inadmissible in evidence for want of registration. To be inadmissible in evidence the memorandum must in itself purport to create a mortgage of immovable property and not be a mere record of an already completed transaction.

A mere list of documents showing that the documents included therein had been deposited by way of security or an entry on a voucher (prepared in ordinary course of business), though written on the same day when the deposit is made, cannot be considered to embody the terms of the mortgage transaction and hence inadmissible in evidence for want of registration. AIR (Vol 17) 1930 Lah 920 (DB).

——S. 17—Letter depositing title-deeds, if not registered, is inoperative as an equitable mortgage.

If title-deeds remain with mortgagee a later oral agreement between mortgagor and mortgagee to treat them as security is sufficient to create a valid equitable mortgage. AIR (Vol 15) 1928 Mad 919: 109 Ind Cas 170 (DB).

—— S. 17 — Agreement to deposit, and letter of deposit of title deeds—Both must be registered.

Where the first agreement was an agreement to deposit the title-deeds and the second, a letter sent the next day, was the actual deposit in accordance with the terms of the agreement.

Held, that both the agreements have to be taken together and that taken together the contract purports to create a charge upon immovable property under S. 17 (1) (b) and requires registration: 31 M L J 347, Not foll. AIR (Vol 13) 1926 Mad 1188: 24 MLW 659 : 1926 M W N 804 : 98 Ind Cas 872.

——S. 17 — Deposit of title deeds by way of mortgage — Memo embodying the contract — Registration is necessary to create a valid charge.

If the memorandum is of such a nature that it could be treated as the contract for the mortgage which the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17.

Although it is a well established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that must be raised supposing that there was no document is put out of the case and reduced to silence by the documents by which alone you must be governed. AIR (Vol 10) 1923 P C 50 : 44 M L J 602 : 50 I A 77 : 32 M L T 184 : 2 Bur L J 25 : 25 Bom L R 582 : 1 Rang 66 : 50 Cal 338 : 38 C L J 41 : 18 M L W 446 : 28 C W N 1: 1923 M W N 762 : 71 Ind Cas 650.

——S. 17 — Complete without the subsequent letter.

Defendants owed certain debt to the plaintiff-bank and the bank wanted security in addition to a promissory note. The defendants executed a pro-note for a sum of Rs. 8,000 and at the same time handed over a number of title-deeds. Subsequently, they delivered a letter to the plaintiff as follows:

"We, under this writing, deposit with you as security 12 deeds relating to property of the value of Rs. 8,537 mentioned in the list in lieu of a pronote for Rs. 8,000 in respect of which a separate pro-note has been executed to-day."

Held, that the equitable mortgage was complete without the letter and hence it did not require registration. AIR (Vol 8) 1921 Lah 253 : 3 L L J 373 : 67 Ind Cas 421 (DB).

——S. 17 (1) (b) — Equitable mortgage, deposit of title deeds by letter not registered.

Deposit of title deeds by unregistered letter followed by advance of money does not create a valid equitable mortgage. AIR (Vol 7) 1920 Cal 312 : 24 C W N 599 : 31 C L J 375 : 57 Ind Cas 686 (DB).

——S. 17 (1) (b)—Equitable mortgage—Transfer of—Registration if necessary.

A transfer of a mortgage by deposit of title deeds does not require registration. AIR (Vol 1) 1914 Mad 353 : 15 M L T 198: 23 Ind Cas 129.

(ii) Record of an already completed transaction.

——Ss. 17 and 49 — Equitable mortgage—Deposit of title deeds—Letter recording transaction and setting out list of documents—Admissibility—Oral evidence —Admissibility—Evidence Act Ss. 91 and 92.

Where an equitable mortgage by deposit of title deeds is created and the title deeds are set out in a letter passed by the mortgagor the same day at the same time, if the letter on the face of it merely records the transaction which has taken place between the parties and creates evidence of the circumstances in which the title deeds were deposited, and contains no provision which can be described as an operative provision, it is merely a memorandum regarding the fact of the deposit of the documents and it cannot exclude oral evidence of the mortgage agreement. Nor is the letter bad for want of registration. A I R (Vol 35) 1948 Pat 251 : 26 Pat 260 (DB).

——S. 17—Memorandum not operative instrument.

Where a memorandum signed by the mortgagor is not the operative instrument and does not contain the conditions of the transaction, but is merely a record of the title deeds that have been deposited a

collateral security for the amount verbally agreed to be advanced, the memorandum does not require registration. AIR (Vol 28) 1941 Lah 224:43 P L R 177: 195 Ind Cas 343 (DB).

——Ss. 17, 49—Equitable mortgage—Money advanced on deposit of title deeds—Mortgagor subsequently executed memorandum in favour of mortgagee evidencing equitable mortgage and containing terms of bargain between parties—Mortgagee, held could not establish his claim in default of registration. A I R (Vol 25) 1938 Cal 303 : I L R (1937) 2 Cal 586 : 175 Ind Cas 578 (DB).

——S. 17 — Memorandum evidencing equitable mortgage — Registration.

A memorandum which is a part of the transaction evidencing an equitable mortgage by deposit of title deeds is only the record of a completed transaction and does not constitute a bargain as to the deposit of title deeds and the memorandum as such does not require registration. A I R (Vol 23) 1936 Cal 125 : 61 C L J 473 : 161 Ind Cas 512 (DB).

——S. 17 — Mortgage by deposit of title-deeds — Letter restating terms of verbal agreement and fact of deposit.

Where the defendant borrows, in pursuance of a verbal agreement to create charge on certain immovable property, some money on a promissory note and deposits the title-deeds of such property, the letter in which the terms of the agreement are re-stated and the fact of the deposit of title deeds is recorded, does not constitute the bargain and does not require registration under S. 17. (1936) 164 Ind Cas 197 : 62 Cal 998 (DB).

——S. 17—If it was the intention of the parties that the memorandum of the transaction should constitute the contract of equitable mortgage between them, then the memorandum must be registered, but if it was merely the record of an already completed transaction the contract of mortgage can be established independently of the memorandum and it is not rendered invalid by non-registration of the memorandum. AIR (Vol 22) 1935 Rang 333 : 158 Ind Cas 845 (DB).

——Ss. 17, 49 — Memorandum of deposit of title deeds, registration.

A memorandum relating to a mortgage by deposit of title-deeds ran as follows : "This is to place on record that I have borrowed the sum of Rs. 15,000 (fifteen thousand) only from you to day at an interest of 12 per cent. per annum and executed a pro-note in your favour and I have kept the under-mentioned documents of title as security for the said debt. I further assure you that the properties of which the title-deeds are kept herewith are free from encumbrances". The memorandum and the pro-note were written on the same sheet of paper. The title deeds were handed over some days beforehand and the memorandum was written after the money had been advanced :

Held, that the memorandum was only a record of a completed transaction and did not require registration. A I R (Vol 19) 1932 Cal 589 : 36 C W N 420 : 59 Cal 781 : 140 Ind Cas 662 (DB).

——S. 17—Equitable mortgage.

A letter regarding a mortgage in effect confirming an equitable mortgage already created does not require to be stamped and registered and is admissible in evidence though not registered. AIR (Vol 19) 1932 Sind 73 : 26 Sind L R 29 : 139 Ind Cas 95.

——S. 17 (1) (b)—Equitable mortgage—Registration is necessary when the document purports to create the mortgage.

A mortgage by deposit of title deeds can be inferred from the mere fact of such a deposit accompanying a loan, and no agreement whether in writing or by word of mouth is necessary for the purpose. But, if the parties choose to reduce their bargain to writing, the question will arise: "Does the writing constitute the bargain between the parties or was it merely the record of an already completed transaction?" The answer to this question must necessarily depend upon the facts of each case. The fact that a memorandum evidencing an "equitable" mortgage is contemporaneous with the deposit of title deeds does not per se render the memorandum inadmissible in evidence for want of registration. To be admissible in evidence the memorandum must in itself purport to create a mortgage of immovable property and not be a mere record of an already completed transaction. A mere list of documents showing that the documents included therein had been deposited by way of security or an entry on a voucher (prepared in ordinary course of business) though written on the same day when the deposit is made, cannot be considered to embody the terms of the mortgage transaction and hence inadmissible in evidence for want of registration. A I R (Vol 17) 1930 Lah 920 (DB).

——S. 17 — A memo written subsequent to the creation of an equitable mortgage need not be registered.

Where the equitable mortgage was completed by handing over of documents with intent to create thereby an equitable mortgage to secure repayment of the sum of money lent on a previous promissory-note, subsequent taking of a memorandum does not create a mortgage which was already in existence and so does not require registration. AIR (Vol 13) 1926 Rang 10 : 91 Ind Cas 663 : 3 Rang 443 (DB).

——S. 17 — A letter which records a previously completed transaction of mortgage by deposit of title deeds does not require registration. A I R (Vol 12) 1925 Cal 973 : 29 C W N 784 : 88 Ind Cas 866 (DB).

——S. 17 — In a mortgage by deposit of title-deeds, where the intention of the depositor is clear apart from the letter recording the deposit and the purpose for which it is made, the letter need not be registered. A I R (Vol 8) 1921 Lah 274 : 3 L L J 44 : 59 Ind Cas 578.

——S. 17 (1) (b)—Equitable mortgage—Memorandum —Registration.

A document merely reciting that certain documents are handed over to an equitable mortgagee, is a memorandum and is not a mortgage and is not compulsorily registrable. A I R (Vol 5) 1918 L B 52 : 45 Ind Cas 918 (DB).

——S. 17—A document purporting to contain an admission merely of a mortgage transaction between the parties as distinguished from the mortgage itself, which in this case had already been created by the deposit of title deeds, did not require registration under S. 17. (1905) 10 C W N 276 : 4 C L J 102 : 33 C 410 (420) (DB).

(iii) Mere bargain not creating mortgage.

——S. 17—A letter written by the defendant to the plaintiff Bank asking for a loan offering a title-deed as security but not sending the title-deed along with it does not constitute a mortgage by deposit of title deeds and is not compulsorily registrable. A I R (Vol 23) 1936 Lah 65 : 162 Ind Cas 523 (DB).

——S. 17 (1) (b)—Equitable mortgage of right to get lease — Letter intimating deposit — Lease executed subsequent to letter — Registration of letter, necessity for.

The plaintiffs carried on banking business in Calcutta. S and Sons who were carrying on business in Calcutta owed money to the plaintiffs and as sureties for S and Sons, the defendants created an equitable mortgage on their own immovable property in favour of the plaintiffs by means of a letter, dated May, 1922, addressed to them stating that they had instructed their solicitors to hand over the title-deeds "to be held by you as a security against advances you

may make to S and Sons, Calcutta." At the date of this letter, the only interest the defendants had in the property was a right to get a lease of that property executed in their favour and that lease was, in fact, executed in February, 1923. The question was if the letter of May 1922 needed registration :

Held, (Per Beaumont C. J., Mirza J. dissenting.) that the letter could only operate as a contract imposing upon the defendants an obligation to create a mortgage when they acquired the property to be mortgaged, and was not, therefore, compulsorily registrable. AIR (Vol 18) 1931 Bom 337 : 33 Bom L R 709 : 55 Bom 677 : 134 Ind Cas 545 (DB).

(iv) Contemporaneous agreement.

——S. 17—Contemporaneous agreement in writing—Tests.

Where the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement in writing which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, the document must be registered. In such a case there will not be two separate and distinct and valid mortgages, the equitable mortgage first and the legal mortgage afterwards. The transaction is one, and in competition between an equitable and legal mortgage, the legal mortgage will prevail and will require registration. It does not much matter whether the document was made before or after the equitable mortgage. A few minutes, a few hours, a few days either way cannot be conclusive, though the circumstances under which the memorandum was made are to be considered and may assist in the final decision as to whether the document did, and was intended to, constitute the bargain between the parties. Each case must be decided on its particular facts. AIR (Vol 30) 1943 Sind 36: ILR (1942) Kar 479: 208 Ind Cas 184 (DB).

——S. 17—Equitable mortgage—Memorandum executed by mortgagor on same day on which title deeds were deposited.

A mortgagor obtained from a bank a loan by way of over-draft and as security, executed a promissory note on the same date and further deposited with them title deeds of certain immovable property as security by way of equitable mortgage. On the same day, mortgagor executed a memorandum.

Held, that the memorandum must be taken as executed contemporaneously with the deposit of title deeds. It was not a contractual agreement in writing, an integral part of the transaction, and an operative instrument. It was, therefore, not a document compulsorily registrable. It was a mere memorandum relating to the deposit of title deeds and there was a valid equitable mortgage on the property in question. AIR (Vol 27) 1940 Sind 204: 191 Ind Cas 861.

——S. 17—Where the parties professing to create a mortgage by deposit of title-deeds contemporaneously enter into a contractual agreement in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must be registered under S. 17, Regis. Act. AIR (Vol 26) 1939 P C 167: 5 BR 747; 43 CWN 806: 50 LW 33: 1939 OWN 570: 20 PLT 574: 70 CLJ 163: (1939) 2 MLJ 522: ILR (1939) 2 Cal 243: 66 IA 184: 1939 ALJ 869: 41 Bom LR 1144: 1939 MWN 1166: ILR (1939) Kar (PC) 287 Sup: 1939 AWR 181: 181 Ind Cas 935.

——S. 17 (1) (b)—Reconveyance.

Mortgage deed in form of sale-deed and contemporaneous agreement to reconvey — Transaction amounts to mortgage and agreement to reconvey and is compulsorily registrable—If not registered, it is inadmissible in evidence. AIR (Vol 17) 1930 Bom 79: 31 Bom LR 1266: 54 Bom 30.

——S. 17—Memorandum of document though contemporaneous with deposit of title deeds is not compulsorily registrable if it does not itself create the mortgage, but evidences a transaction already completed. AIR (Vol 15) 1928 Sind 17: 22 SLR 222: 105 Ind Cas 765.

63. Sale.

——S. 17—Unregistered letter — Whether can be given in evidence to prove the sale to be fictitious.

An unregistered letter can be given in evidence to show that a sale deed is purely fictitious transaction. Such a letter does not purport or operate to extinguish the sale. In order that a sale may be extinguished, it must first exist. AIR (Vol 32) 1945 Nag 102: 1945 NLJ 89: ILR (1945) Nag 510.

——Ss. 17, 49—Where a document creates an interest in immovable property worth more than Rs. 100, it is compulsorily registrable under S. 17, otherwise it cannot affect the property under S. 49. AIR (Vol 25) 1938 PC 20: 1938 AWR 19: 65 IA 45: 32 SLR 276: 18 PLT 1001: 4 BR 198 (2): 1938 ALJ 72: 47 LW 3: 1938 OWN 158: 1938 RD 214: 17 Pat 69: 1938 MWN 145: (1938) 1 MLJ 209: 40 Bom LR 292: 66 CLJ 485: 42 CWN 593: 172 Ind Cas 443.

——S. 17 (2)—Compromise, if a family settlement.

N adopting plaintiff's father—Deed of gift by N—Life estate in favour of widow—On her death, absolute estate in favour of plaintiff's father—Title suit after death of N between plaintiff's father and defendant's father — Compromise — Property not subject matter of suit mentioned to be given to present defendants—Widow surrendering in favour of plaintiff's father—Defendants getting their names mutated— Plaintiff's suit for declaration of title and possession.

Held that the agreement was admissible in evidence as merely an agreement to convey and it could have been a basis for a suit for specific performance, had the defendants taken the appropriate remedy in time.

Held, also that the agreement was not a family arrangement declaring existing rights and that the defendants could get no relief on the basis of that agreement unless they chose to enforce the agreement according to law and that the widow's death during the action was immaterial. AIR (Vol 23) 1936 Pat 300: 17 PLT 164: 2 BR 481: 162 Ind Cas 787 (DB).

——S. 17 — A sale deed and a contemporaneous agreement to reconvey constitute single transaction which amounts to a mortgage and such documents are compulsorily registrable. AIR (Vol 21) 1934 Lah 453: 35 PLR 337: 147 Ind Cas 1191.

——S. 17 (1) (b)—Sale.

Sale of mortgagee's interest must be registered, 13 All. 89, 15 All 134 and A. I. R. 1924 All. 796 Expl. and not Foll. AIR (Vol 16) 1929 All 161: 51 All 494: 1929 ALJ 279: 119 Ind Cas 241 (DB).

——S. 17—Several un-registered sale-deeds each for less than Rs. 100 conveying land worth more than Rs. 100—Sale-deeds are valid. AIR (Vol 16) 1929 Pat 620: 10 PLT 449 (DB).

——S. 17—Sale-deed of property worth less than Rs. 100, if in writing, must be registered. AIR (Vol 15) 1928 Mad 546: 28 MLW 234: 111 Ind Cas 677 (DB).

——S. 17—A contract of sale of immovable property though it contains a recital of payment of a part of purchase money of more than Rs. 100 to the proposed vendee, does not require registration. AIR (Vol 14) 1927 All 287: 49 All 806: 25 ALJ 513: 103 Ind Cas 417 (FB).

——S. 17—No registration necessary—Sale— Right to turn of worship—Sale of.

A turn of worship is not an interest in immovable property and therefore a sale thereof does not require registration. AIR (Vol 14) 1927 Pat 7: 6 Pat 245: 1926 PHCC 349: 97 Ind Cas 332 (DB).

——S. 17—Agreement to re-convey which purports to limit the purchaser's interest in the immovable property conveyed under the sale deed requires registration and if unregistered it cannot be made the foundation of a suit for specific performance. AIR (Vol 13) 1926 Bom 131: 27 Bom LR 1465: 92 Ind Cas 527 (DB).

——S. 17—An oral sale along with a receipt for a part of the consideration money of the sale along with the old sale-deed with an endorsement on the back of it does not together form a sale-deed, and consequently registration is not necessary. AIR (Vol 12) 1925 Lah 123: 6 LLJ 408: 85 Ind Cas 293 (DB).

——S. 17—The sale of a final decree for sale of mortgaged property passed under O. 34, R. 5 is not compulsorily registrable. AIR (Vol 12) 1925 Oudh 399 : 12 O L J 109 : 2 O W N 70 : 28 O C 382 : 86 Ind Cas 591.

——S. 17—Contract of sale of immovable property requires registration. AIR (Vol 11) 1924 Mad 271: 46 MLJ 528: 46 Mad 919: 18 MLW 953: 33 MLT 53: 1924 MWN 14: 76 Ind Cas 886 (FB).

——S. 17—Sale-deed—Deed giving rights to vendor contrary to sale, executed simultaneously—Must be registered.

If a document of sale is executed, and then at the same time or almost at the same time another document is taken from the purchaser, which gives rights to the vendor, contrary to the rights parted with in the sale-deed, then the second is a document which requires registration, because its effect is really to change the sale-deed into a mortgage, and such a transaction must be effected in the case of property of over Rs. 99 by a registered document. AIR (Vol 8) 1921 Bom 442: 23 Bom LR 1066: 64 Ind Cas 294 (DB).

——Ss. 17 (1) (b) and 49(c)—Sale-deed— Property less than Rs. 100.

An unregistered deed of sale of lands for less than Rs. 100 though not operative under S. 54 of T. P. Act, where delivery has not been made to the vendee, is admissible to prove the contract of sale. The rule is unaffected by the provision in S. 49 (c), Regn. Act, which relates only to documents compulsorily registrable under S. 17 of the Act. AIR (Vol 4) 1917 Mad 951: (1916) 2 MWN 136: 34 Ind Cas 921 (DB).

——S. 17 (1) (b)— Sale — Unregistered sale-deed — Admission of sale by vendor—Evidence—Mutation proceedings admissible to prove but not the sale-deed.

T, one of four brothers sold to one of them B his whole holding by an unregistered deed. The Revenue authorities found that the sale was in favour of all the three brothers of T, and accordingly effected mutation of that holding in the name of his three brothers in equal shares. B took possession of nearly the whole of the land, R, a third brother, got a decree for his third share on the strength of the mutation and unregistered sale deed admitted in evidence. Held, that an unregistered deed of sale of immovable property worth Rs. 100 or more cannot be admitted in evidence to affect the interest of a third person who was no party of the deed though the seller himself admits the sale. AIR (Vol 3) 1916 Lah 88: 78 PLR 1917: 110 PWR 1916: 36 Ind Cas 374.

——S. 17 (1) (b)—Sale—Sale for less than Rs. 100.

A sale-deed of immovable property which is subject to a mortgage is not compulsorily registrable if the consideration excluding the mortgage money is less than Rs. 100. 9 PWR 1912: 135 PLR 1912: 13 Ind Cas 852.

64. Lease

——S. 17—Immovable property.

Government's right to levy toll under Bombay Tolls on Roads and Bridges Act is not a benefit arising out of or incident of ownership of road under Bombay Land Revenue Code and is, therefore, not immovable property. Consequently, the writing which purports on the face of it to be an assignment or extinguishment of the right of the lessee of the tolls would not be compulsorily registrable under S. 17 (1) (b). AIR (Vol 27) 1940 Bom 369 : 42 Bom L R 750 : ILR (1941) Bom 71 : 191 Ind Cas 806 (DB).

—— S. 17—A deed of lease of an occupancy holding is not a document required by S. 17 of the Registration Act to be registered, and is not affected by the provisions of S. 49 of that Act because of C. P. Tenancy Act (1920) S 12 (4). 93 Ind Cas 633 : AIR (Vol 13) 1926 Nag 335.

——S. 17 — Lease deed — Lease granting mokarari interest for indefinite period at fixed rent must be registered if effected in the form of a sanad.

A lease of immovable property granting mokarari interest for an indefinite period at a fixed rent need not be in writing. It may be effected by oral agreement in which case no question of registration arises, and the lease may be proved in the same way, as any other verbal agreement, and even documentary evidence may be admissible in support of the oral agreement, but if the lease or grant is in the form of a document (as in this case by a Sanad) then the only evidence admissible in proof of the terms of the document is the document itself and unless it is registered even the document itself cannot be admitted in evidence as proof of any transaction affecting the property. 79 Ind Cas 26 : 3 Pat 349 : 1924 P H C C 185 : 5 P L T 541 : AIR (Vol 11) 1924 Pat 641 (DB).

——S. 17 — Lease for less than a year under S. 107, T. P. Act—Section 17 does not apply.

The provisions of S. 107, Transfer of Property Act which say that a written instrument, in order to have the effect of a lease for less than a year, must be registered cannot be taken to have been inserted in S. 17 of the Registration Act. So such a lease is not a document required by S. 17 to be registered and Ss. 49, 59 can have no application to the case. 59 Ind Cas 350 : 44 Mad 55 : AIR (Vol 8) 1921 Mad 337 (FB).

——S. 17—Document collateral to a permanent lease of immoveable property—Necessity for registration —Evidence Act, S. 92.

An agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zemindari, which agreement was come to before, but reduced to writing after, the execution of the lease was held to be not affected by S. 92 of the Evidence Act, and not to require registration either under the Registration Act, S. 17, or the Transfer of Property Act, S. 107, where it was not inconsistent with the lease. Its provisions formed no part of the holding under the lease, and it was not rent or recoverable as rent but a mere personal obligation collateral to the lease. (1902) 6 C W N 865 : 12 M L J 479 : 4 Bom L R 839 : 25 M 603 (611) : 29 I A 138 (P C).

——S. 17 (1) (b)—Trusts—Lease by trustee.

In a suit for specific performance of a contract its terms can be proved even from the unregistered Amalnamah and by oral evidence. The registration of an Amalnamah is optional when from its condition the parties' intention of executing a properly registered document to perfect lessee's title, is clear. A Court in decreeing specific performance must ascertain beforehand whether the contract is enforceable specifically and does not involve any breach of trust.

The equity Courts would refuse specific performance of a lease entered into by a trustee lessor of a trust property beyond his authority. (1912) 16 Ind Cas 390 (DB) (Cal).

65. Gifts

——S. 17—Part performance — Possession given before execution of deed –Deed unregistered—If gift complete.

The donor, for services rendered to him during his illness by the donee, transferred possession of certain property to the donee as a gift. Subsequently he executed a deed of gift which however remained unregistered as the donor died in the meantime.

Held, that the single fact that actual transfer of possession had taken place before the document would not make the gift complete in law, or the document the less a deed of gift. The services during the illness were not the consideration of the deed, but merely the motive. The deed, therefore, fell not under S. 9 but under S. 122 and a registered document was necessary. 109 Ind Cas 149 : 30 Bom L R 451 : AIR (Vol 15) 1928 Bom 250 (DB).

——Ss. 17 (1) (a) and 49—Recital of gift in petition for mutation — Gift unregistered Admissibility to prove character of donee's possession as owner.

A petition by the donors reciting a gift of a mittah village and praying for the mutation of names in favour of the donee, though inadmissible in evidence to prove title by gift, may be yet admissible to prove the character of the donee's possession of the mittah as absolute owner. 46 I A 285 : (1919) M W N 724 : 10 L W 679 : 24 C W N 346 : 33 M L J 313 : 18 ALJ 274 : 53 Ind Cas 901 : AIR (Vol 6) 1919 P C 44.

——S. 17—Sale—Gift—Transfer of Property—Consideration in of services rendered or to be rendered : See 12 Bom L R 9 (12) : 34 Bom 287.

66. Exchange

——S. 17—Oral exchange of immovable property—Entry in patwari's register—Need for registration.

As between the parties an exchange of immovable property was oral. No document of exchange was written. The oral exchange was reported to the patwari who embodied it in an entry of the Rozanamcha-i-Waqaati, and then entered the mutations on the strength of that entry.

Held, that the entries made by the patwari in the Roznamcha-i-Waqaati and the register of mutations were his acts in the discharge of his duties, and the documents which were prepared by him in the ordinary course of his duties did not require registration. AIR (Vol 34) 1947 Pesh 27.

——S. 17 (2) (vi)—Compromise for exchange—Registration necessary.

Compromise to exchange bonds filed in Court is merely an agreement to exchange which is to be effectuated by the decree of the Court and therefore it is admissible in evidence in other proceedings without registration. (1916) 1 M W N 276 : 34 Ind Cas 446 : AIR (Vol 4) 1917 Mad 624 (DB).

——S. 17 (1) (b)—Family arrangement—Hindu Law Reversioner – Unregistered deed of exchange of immovable property worth more than Rs 100 by sonless father—Decree on admission of his widow—Right of reversioners.

Where there is an unregistered deed of exchange of immovable property worth more than Rs. 100, it is inadmissible in evidence for want of registration and a decree obtained thereon on the admission of the widow can be challenged by the reversioners. 176 P L R 1914 : 74 P W R 1914 : 24 Ind Cas 894 : AIR (Vol 1) 1914 Lah 108.

——S. 17 (1) (b)—Exchange.

A deed of exchange relating to immovable property of the value of Rs. 100 or more is compulsorily registrable. 145 P W R 1909 : 4 Ind Cas 1004.

67. Charge.

——S. 17 — In the Punjab, a report made to a subordinate land revenue officer under the statutory provision relating to changes in the land revenue records does not operate to create a title for the purposes of S. 17, Registration Act, 1908. AIR (Vol 25) 1938 Lah 760 : 49 PLR 682 : 180 Ind Cas 138.

——S. 17 — Letter of request to Bank to advance money to bearer on security sent along with it—Bank advancing much less than requested :

Held, letter did not require registration as it did not create any charge. AIR (Vol 24) 1937 Lah 135 : 39 PLR 253 : 164 Ind Cas 63 (DB).

——S. 17—Decree, whether to be registered.

Under S. 17 (2) (vi), Registration Act, the document which created charge namely, the decree was not require to be registered. 1937 ALJ 1090.

——S. 17—A deed of further charge, when the money secured is less than Rs. 100, is not compulsorily registrable. (1936) 159 Ind Cas 612 : 1935 OWN 1199.

——S. 17—Where the charge amounts to a mortgage and is not registered, the mortgage is of no effect under Ss. 17 (b) and 49. The holder of a decree on such a charge is not a secured creditor. AIR (Vol 21) 1934 All 444 : 148 Ind Cas 417 (DB).

——S. 17—Document transferring vendor's lien.

A document which creates a charge which is given to the seller in S. 55 (4) (b), T. P. Act, requires registration and any other instrument which assigns the rights under that document also requires registration under S. 17 (1) (b) of the Registration Act. AIR (Vol 21) 1934 Mad 615 : 40 L W 481 : 1934 M WN 1194 152 Ind Cas 375 (DB).

——S. 17—Assignment of vendor's lien over property worth over Rs. 100, whether compulsorily registrable.

The unpaid vendor's lien under the Transfer of Property Act is an interest in immovable property and when document assigns such an interest in immovable property of the value of over Rs. 100, it is compulsorily registrable under the Registration Act and when unregistered, it is invalid and unenforceable against the property. AIR (Vol 20) 1933 Mad 181 : 142 Ind Cas 739.

——S. 17 — Registrability — Bond creating further charge or mortgage on mortgaged property.

Per Full Bench.—Where property mortgaged is transferable, non-registration of a bond creating a valid pledge of same security by way of charge or mortgage is not material to the mortgagor's liability under the bond. AIR (Vol 17) 1930 All 136 : 1930 ALJ 156 : 124 Ind Cas 733 (FB).

——S. 17 (1) (b) — Loan on security of such unregistered debenture — Enforceability of charge.

A mere charge on immoveable property is within S. 17, cl. (b) of the Ragistration Act. Where a Bank advanced money to another bank on the security of a debenture which created a charge on its entire assets but it appeared that the debenture was unregistered, held, that the leading bank was not entitled to a charge on the borrowing bank's assets because the debenture did not contain a description of the borrowing bank's properties and was not registered. Effect of floating charge discussed with reference to Ss. 17 and 49 of the Registration Act. AIR (Vol 17) 1930 Cal 536 : 57 Cal 328 : 34 C W N 605 (DB).

——S. 17—Floating charge.

Quære, whether a floating charge created by a company is compulsorily registrable. AIR (Vol 17) 1930 Cal 536 : 57 Cal 328 : 34 CWN 605 (DB).

——S. 17 – Security furnished for granting stay of decree – Creates only a charge and need not be registered.

A, a firm filed a suit against B, another firm but the Court, in November 1918, ordered stay of the suit, pending an appeal to Privy Council in a connected suit subject to a security. B deposited the sale deeds of his properties and the following document was executed "I . . . proprietor of B—stand security to the extent of . . . (mortgaging the properties specified below) and covenant that B duly act—and it B fails herein then any amount so payable shall be realized from the properties hereby mortgaged, title deeds whereof are deposited by way of equitable mortgage. . . ." On 24th May 1920, B borrowed certain amount from C by depositing the sanad of the properties which were subject of above security. On 28th January 1922, A, by virtue of the decree obtained in 1920, sold the properties of B. In 1926 C filed the present suit and contended that the executed document was a mortgage and being unregistered was inadmissible in evidence.

Held, that the document was not a mortgage within the meaning of Registration Act, S. 17 (b), and did not require registration, but it created a valid charge which subsisted over the properties on 24th May 1920 when B borrowed money from C. AIR (Vol 17) 1930 Sind 159 : 121 Ind Cas 878.

——S. 17 — Unregistered document to pay a certain commission in perpetuity to lender — Property of the factory also liable for loan — Charge is created as well as interest in land requiring registration within S. 17.

Defendants borrowed a loan from the plaintiff for starting a factory and an unregistered agreement was entered into which gave the right to the plaintiff to obtain a commission of two and a half per cent on the gross income of the factory in perpetuity. There were also provisions binding the defendants not to remove the factory but to get any future partners to enter into a similar agreement and that in certain events the properties of the factory would be liable for certain moneys and that in certain other contingencies the lender would be at liberty to recover a certain amount from the machinery of the factory or from the borrowers. A promissory-note also was passed in favour of the plaintiff which formed a part of the same transaction.

Held, that the agreement amounted to an equitable charge on the property within the meaning of S. 100 of the T. P. Act. Also it purported to create an interest in land within the meaning of S. 17 of the Indian Registration Act, and as such it would prima facie require registration and as it was never registered it could not be relied on. The same result follows if it amounted to an equitable charge within the meaning of S. 100 of the T. P. Act. AIR (Vol 13) 1926 Bom 495 : 28 Bom L R 939 : 98 Ind Cas 696 (DB).

——S. 17—Of charge.

The assignment of the charge not being a transfer of property need not be made by a registered instrument. AIR (Vol 13) 1926 Mad 903 : 51 MLJ 95 : 1926 MWN 569 : 95 Ind Cas 447.

——S. 17—Charge may be created orally, although, if it is in writing, the document must be registered. AIR (Vol 13) 1926 Nag 262 : 9 NLJ 130 : 92 Ind Cas 25.

——S. 17—No registration necessary—Charge—Promise to pay money but no charge.

A deed which contains a promise for the payment of money and in which different avenues as to the sources of money are indicated in the agreement, but which creates no charge on any immovable property does not require registration. AIR (Vol 12) 1925 Oudh 536 : 12 OLJ 510 : 2 OWN 503 : 89 Ind Cas 573

——S. 17 — At the foot of a hundi a note was added in the following words—"Hamari Delhi wa Ludhiana ki jaidad is qarze ki zinmewor hogi;" held these words do not create a charge, and that even if they do, the document is not admissible in evidence for want of registration. AIR (Vol 10) 1923 Lah 652 : 75 Ind Cas 441.

68. Partition.

(a) What is partition deed — Construction — Test for registration — Effect.
(b) Documents containing agreement to.
(c) Documents effecting.
(d) Documents maintaining a partition already effected.
(e) Partition lists.

(a) What is partition deed—Construction—Tests for registration—Effect.

——Ss. 17 and 49 — Partition effected before panchayatdar after passing of preliminary decree for partition—Document not registered — Objection by some of the parties relying on that document to passing of final decree — Admissibility of document in evidence — Application for recording compromise—It can be treated as suit for specific performance contemplated by the proviso to S. 49, Registration Act— Court holding the document inadmissible and appointing commissioner to divide the properties — Order if appealable.

In a suit for partition and possession of her share filed by the widow of a Mahomedan against the other heirs a preliminary decree was passed on 25th September, 1944 On 22nd April, 1946, the first defendant filed an application for the passing of the final decree. That application was opposed by the plaintiff and the other defendants mainly on the ground that subsequent to the preliminary decree the parties to the suit divided all the properties in the presence of panchayatdars and took possession of the properties that fell to their shares. Though no separate petitions were filed for recording the arrangement, the counter-affidavits of the plaintiff and second defendant requested the Court to pass suitable orders. As the document relied on was not registered the Subordinate Judge held that it was not admissible in evidence and therefore the adjustment pleaded could not be considered. He appointed a commissioner to divide the properties. In an appeal against that order:

Held, (i) Though no appeal lay against an order appointing a commissioner to divide the properties, the appeal can be sustained on the basis that the order of the lower Court was one refusing to record a compromise. Though there was no separate petition under O. 23, R. 3 of the C. P. Code, in the circumstances of the case the relief claimed by the plaintiff and the second defendant in their counter-affidavits may reasonably be treated as one made under O. 23, R. 3 and the order of the Subordinate Judge must be deemed to be one passed under O. 43, R. 1 (m) of the C. P. Code. If so, an appeal will certainly lie against the said order.

(ii) As the document in question created an interest in immovable property, the mere fact that a provision was inserted enabling the parties to get a proper partition deed written up on stamp paper and get the same registered does not take away the document from the mischief of Ss. 17 and 49 of the Registration Act.

The document in question (partition koor-chit) should have been registered under S. 17 of the Registration Act and not having been registered it cannot affect immovable property nor can it be used in evidence.

(iii) Whether the parties who effected a partition by executing an unregistered partition deed do not file a compromise petition or do not agree in regard to the factum or the terms of the compromise the Court necessarily cannot pass a compromise decree unless the factum of compromise and the terms therefor are proved to the satisfaction of the Court.

Where such terms could only be proved by producing a document affecting rights in immoveable property, the provisions of Ss. 17 and 49 of the Registration Act should be complied with.

(iv) Unless the document in question comes under one or other of the categories of cases mentioned in the proviso to S. 49 of the Registration Act, the main section must apply. An application for recording a compromise cannot conceivably be treated as a suit for specific performance under Chapter II of the Specific Relief Act and therefore the document cannot be used as evidence of the contract.

(v) Where a party seeks to rely upon the partition deed to prove that the parties agreed to divide the properties between themselves, there is no independent transaction collateral to the main purpose of the document, viz., dividing the property and it cannot be said that the document will be admissible for a collateral purpose. A I R (Vol 37) 1950 Mad 433 : 63 LW 304 : (1950) 1 MLJ 151 (DB).

——Ss. 17 and 49—Partition quora — Registration—Necessity.

Where a document is nothing but a partition quora and merely purports to describe the lots assigned to the different parties, it cannot be said to be an instrument whose registration is compulsory under S. 17 of the Registration Act. It is not a partition deed but only a memo. of the lots that might fall to the share of the different parties. It is not necessary to stamp or register such a document. Further, it would be admissible under the proviso to S. 49 of the Act. 1948 AWR (Rev) 269 : 1948 RD 450.

——Ss. 17 and 49 and Evidence Act (I of 1872), S. 91 — Partition "Koorchit" unregistered — Admissibility — Oral evidence to prove its terms — If admissble.

An unregistered document of September, 1928, described as a "partition Koorchit" provided that the parties having divided "all our family properties movables, lands, etc." according to the advice of certain panchayatdars, the 1st defendant-plaintiff, second defendant and third defendant should respectively take the properties mentioned in A, B, C and D schedules and hold and enjoy them absolutely. The document then referred to the division on that day of the family debts and outstandings due to the family and concluded by declaring that "since, we have thus agreed and got the properties divided among us in the presence of panchayatdars we have no properties, debts or cash hereafter to be divided. From this day onwards we have excepting blood relationship, no other relationship in respect of assets and liabilities." In a suit by one of the parties to the above "Koorchit," against the others for a partition and account and for his share of properties and outstandings which still remained undivided, the above "Koorchit" was sought to be put in evidence by the defendants to prove a complete partition in September, 1928, but was rejected as being inadmissible "for any purpose."

On appeal, held, (1) it cannot be said that the unregistered "Koorchit" was inadmissible "for any purpose." Unlike the Indian Stamp Act which renders an instrument not duly stamped inadmissible "for any purpose," the Indian Registration Act prohibits its admission only for certain purposes. (2) It cannot be said that the 'Koorchit" evidenced a valid partition of all the outstandings due to the family. As most of the debts consisted of mortgages of lands and as such stood on the same footing as the immovable properties comprised in the document, the division of the outstandings cannot be regarded as a severable part of the transactions valid and operative so far as they were concerned. In a family partition, no part of the transaction can be separated from the rest unless it appears that the parties intended that that part should stand even though the other part should prove ineffectual. (3) The concluding declaration in the "Koorchit" that all the family properties had been divided and that there were no more properties, debts or cash left to be thereafter divided would not be admissible to prove that there was a complete partition on the date of the "Koorchit." Section 49 (c) of the Registration Act prohibits the admission of such a document as evidence of the partition. (4) The "Koorchit" was admissible to prove the adverse character of the 1st defendant's possession of the lands which were allotted to him under it though such allotment was ineffectual for want of registration. But as in the circumstances, the allotments were not real, but merely fictitious and colourable, no question of adverse possession could arise. (5) As the "Koorchit" was not receivable as evidence of the partition for want of registration, oral evidence as to the details of the complete nature of the partition would be equally inadmissible. Though a valid partition arrangement can be effected orally, where the terms of the arrangement have been reduced to the form of a document, S. 91 of the Evidence Act prohibits the admission of any evidence of the terms except the document itself or secondary evidence of its contents where such evidence is admissible. As the "Koorchit" was unregistered and inadmissible as evidence of the partition, oral evidence to prove its terms, to show that there was a complete partition on the date of the document was barred. AIR (Vol 35) 1948 Mad 26:I L R (1947) Mad 694 : 60 L W 135 : 1947 M W N 66 : (1947) 1 M L J 90 (DB).

——S. 17 — "Brit jajmani" — If moveable or immoveable property — Registration f deed partitioning it, whether necessary.

"Brit jajmani" books are moveable property. The amount payable by a "jajman" as "brit jajmani" to the panda when he visits Muttra is not a fixed allowance which even under the Hindu law would be deemed to be a "nibhandha." Nor is it a hereditary allowance of the kind mentioned in the Act. A deed partitioning such 'jajmani' is not, therefore, compulsorily registrable, and it can be admitted into evidence without registration. AIR (Vol 33) 1946 All 476 : 1946 All W R H C 607 : 1946 A L W 226 : 224 Ind Cas 391 (DB).

——S. 17 — Partition deed — Document held to be partition deed not mere memorandum.

A document between two brothers provided as follows : "To day .... we both .... of our own accord made partition between ourselves of our jajmani, buildings, money-lending, all things, in the presence of some friends. Its details are given below. If we both the brothers or our heirs take any objection to it, it shall be considered false on the face of this writing." The document specified the shares of the two brothers and the compensation payable by one to the other. It was signed by the two brothers and attested by two witnesses :

Held that there could be no doubt that the parties intended the document to be the document which was binding on them as a deed of partition and which was to be the sole evidence of the terms of partition. The document was, therefore, compulsorily registrable under S. 17 and not being registered was inadmissible in evidence. AIR (Vol 33) 1946 All 476 : 1946 All W R H C 607 : 224 Ind Cas 291 (DB).

——S. 17 — Partition deed — Construction — Document, held partition deed and required registration.

A deed executed by the parties as a result of partition between them recited: "You and I are real brothers and were all joint up to this day. But to day

you and I have separated. And the undermentioned movable and immovabe property is allotted to your share." It then set out the property allotted to the share of the brother in whose favour the document was executed and continued: "The aforesaid movable and immovable property has been allotted to your share and is delivered into your share. Therefore, neither I nor my heirs have left any right and interest therein." Then followed certain items of property which were kept joint and the document stated in respect of them: "This property is joint. However, we will have the same partitioned on the decision of the appeal . . . . . On getting the possession though Court, we will get it partitioned half and half. I have written and signed this receipt list at Sakhara with my free will and pleasure and while in full possession of senses." Then the date, the name and address of the scribe were set out, and the signature of the executant which was followed by the signature of three attesting witnesses :

Held, that the use of the present tense and the form of the deed, particularly the concluding portion which spoke of the document having been executed "with my free will and pleasure and while in full possession of senses," and also the fact that as many as three attesting witnesses were called, suggested that the document was meant to embody the expression of will necessary to effect the change in the legal relation contemplated and the document, therefore, required registration. AIR (Vol 28) 1941 Nag 209 : 1941 N L J 266 : I L R (1942) Nag 73 : 196 Ind Cas 278 (DB).

——S. 17 — Partition deed — "share list" signed by parties—Is an instrument of partition — If unregistered is admissible to evidence division of status. (Case under old Act).

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on perusal of the actual document. A partition was headed as "particulars of the immovable properties which fall" to the share of a member in the divisions of family properties. The item then enumerated the several properties falling to the share of the member. It was signed by both the members between whom the properties were divided and was duly attested but was not registered.

Held, that the document could not be said to be merely the minutes of a previous oral agreement to divide. It was a document such as described in S. 17 (b), Registration Act, and so, being unregistered, was to be excluded in so far as it was evidence of a transaction affecting immovable property.

Held further, that although inadmissible to prove partition it could be used in evidence as evidence of of a division in status, for a partition deed otherwise inadmissible, may be received in evidence of a division of status. AIR (Vol 17) 1930 Mad 883 (DB).

——S. 17 (1) (b)—Partition — Memorandum of prior partition.

A memorandum in an account book of a partition which has already taken place need not be registered in order to be admissible in evidence. A I R (Vol 7) 1920 Lah 173 : 2 U P L R 93 : 56 Ind Cas 182.

——S. 17 (1) (b) and 49—Partition — Map and chitta —Allotment on partition.

A map and a chitta put in to prove that land in dispute was allotted in a partition to a certain person, cannot be said to be instruments falling within S. 17 of the Registration Act and requiring registration. AIR (Vol 6) 1919 Cal 902 : 47 Ind Cas 159 (DB).

——S. 17 (1) (b)—Partition deed.

A partition, evidenced by oral testimony and two lists, which in no sense amounts to a partition deed need not be registered. AIR (Vol 4) 1917 Lah 122 : 11 P W R 1917 : 33 P R 1917 : 38 Ind Cas 387 (DB).

——S. 17 (1) (b)—Partition — Award effecting partition.

Neither an agreement to effect partition nor an award of arbitrators, though creating or declaring title to immovable property, is compulsorily registrable. (1910) 13 C L J 158 : 6 Ind Cas 361 (DB).

——S. 17(b) and (h)—Deed of partition if to be registered—Registration Act (3 of 1877) ss. 17 (b) (h), 49 —Evidence Act (1 of 1872), S. 92 — Document, admissibility in evidence — Specific performance of agreement to effect partial partition — Suit, maintainability of — Part performance — Joint owner making valuable improvements right of — Commissioner, if can enquire into a joint character of property.

A deed of partition, either declaring certain rights over immoveable property, or reciting the allotment of land and containing an agreement to act accordingly is compulsorily registrable. A document though not admissible as creating an interest in land is receivable in evidence for a collateral purpose namely, for the purpose of obtaining specific performance of the agreement. When men agree to preserve by writing the remembrance of past events of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written acts must be established by the acts themselves, that is, by the inspection of the originals. A suit for specific performance of an agreement to effect a partial partition of joint property is not maintainable. If there is part performance by the party seeking relief, and to the knowledge of the other party, proof will be admitted of the verbal contract in cases where an action for specific performance would lie. But part performance is only an exception to the plea of the statute of frauds in an action for specific performance. An act done by a party in pursuance of the parol agreement, in order to be a part performance of it, must not only be one which could not be done with any other view or design than to perform it, but must also be such as could not be undone without causing the party unliquidated damages. Hence if it is possible to restore the parties to precisely the same position as they entered into the parol agreement, the doctrine of part performance will not ordinarily be allowed. If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take that fact into a consideration upon a partition and in some way will make an allowance to him therefore in addition to his rateable share of the property. The question whether a particular property, alleged to be joint really possesses that character must be determined before the preliminary decree for partition is made. (1910) 15 C W N 375: 12 C L J 25 (34, 35) : 6 Ind Cas 346 (DB).

(b) Documents containing agreement to partition.

——S. 17 — Documents containing agreement to divide property.

Where the father and son in a joint Hindu family with a view to separate executed certain documents agreeing that the son, on the one hand, on receiving certain property should give up his claim to the rest and that the father should get the same property transferred to the son's name and should execute in writing any legal documents that may be necessary, but possession was not given under the documents;

Held, that the documents were not compulsorily registrable. AIR (Vol 18) 1931 Bom 419 : 33 Bom L R 802 : 133 Ind Cas 861 (DB).

——S. 17—No registration necessary—Partition deed.

Where a memorandum of agreement specified the shares and provided for a further deed effectuating the partition.

Held that it did not require to be registered. AIR (Vol 9) 1922 P C 266 : 44 M L J 745 : 37 C L J 435 : 21 A L J 460: 27 C W N 561: 46 Mad 373 : 50 I A 134 : 31 M L T 136 : 13 M L W 615 : 69 Ind Cas 123.

(c) Documents effecting partition.

——Ss. 17 and 47 — Scope—Partition document embodying all terms — Creates interest in immovable property—Provision for execution of formal document later on — Does not take away the document from mischief of Ss. 17 and 47. See AIR (Vol 38) 1951 Mad 213 : (1950) 2 M L J 338.

——Ss. 17 and 49—Partition of immovable property between co-parceners—Need for registration.

A partition of immoveable property between co-parceners may be made orally and is not required by any law to be in writing. But if there is an instrument effecting a partition of immovable property it falls under S. 17 (1) (b) of the Registration Act and is compulsorily registrable under that clause and if it is not registered it does not affect any immovable property comprised therein and is not admissible as evidence of any transaction affecting such property under S. 49 of the Act except for certain limited purposes stated in the proviso to the section. AIR (Vol 35) 1948 Nag 110 : ILR (1947) Nag 510 (DB).

——S. 17 (1) (b) — Document, if intended to be part of transaction of partition requires registration.

The word "declare" being ejusdem generis with "create", etc., implies a definite change of legal relation to the property by an expression of will embodied in the document.

If a document relating to partition is intended by the parties to be embodied in the transaction of partition, it is compulsorily registrable; but if it is intended to be used merely as a record of an already effected partition, it need not be registered.

Where a document executed by the parties within one hour of an alleged completed oral partition, started with the recital of details in the past tense but concluded in the present tense and described itself as a deed of partition :

Held, that the document was a part of the partition transaction and not a mere record or acknowledgment of a completed transaction. Hence, it was compulsorily registrable under S. 17 (1) (b). AIR (Vol 33) 1946 Bom 126 : I L R (1945) Bom 121 : 47 Bom L R 970.

——S. 17—Partition deed allotting properties to each member and each member to have full rights of enjoyment, alienation, etc., and pay the Government taxes himself :

Held, that the allotment was final. The mere fact that the parties contemplated the execution of a more comprehensive partition deed later on did not make the one any the less operative to create interests in the immovable properties. Hence, it required registration under S. 17. A I R (Vol 29) 1942 Mad 125 : 54 L W 499 : 1941 M W N 944 : (1941) 2 M L J 707 : 201 Ind Cas 367.

——S. 17—Subsequent execution of documents evidencing agreement and being formal record of its terms.

Where an agreement of partition is followed by the documents being prepared with the express object of making them the only formal record of the transaction evidenced by the same the documents are not mere records of part transactions but they create or declare rights and are, therefore, compulsorily registrable under S. 17. AIR (Vol 25) 1938 Bom 257: 40 Bom L R 202 : 175 Ind Cas 361 (DB).

——S. 17 — Suit for possession of plots — Document formally signed by parties and declaring their respective rights in plots in suit, referred to as evidence of agreement—Document, held required registration and hence inadmissible. A I R (Vol 24) 1937 All 16 : 1936 A L J 1165: 1936 A W R 1110: 166 Ind Cas 766.

——Ss. 17 and 47 — Partition deed—Documents evidencing shares to be allotted on partition or partition lists—Registration.

A partition of immovable property can be effected without any document. But if it is effected by means of a document, the document must be registered where partition lists, however, need not be registered, nor is the registration compulsory in case of a document intended to evidence the shares that are to be allotted to the parties in a partition to be effected later on. 1937 M W N 393.

——S. 17 — Deed to the effect that brothers had partitioned their land — Details of allotment and provision for compensation for inequalities — Registration.

Where the terms of a document were briefly to the effect that three brothers agreed that they had partitioned their land, details of the land allotted to each brother were given and provisions were made whereby the brothers were to compensate each other in various ways on account of inequalities in the quality of the land :

Held, that the document was a partition deed and required registration. A I R (Vol 21) 1934 Pesh 100 : 151 Ind Cas 787 (DB).

——S. 17—Instrument of partition requires registration.

A partition was effected between the parties and a deed drawn up under which plaintiff was to get a certain share in a house. Plaintiff not having got possession of the house sued to recover possession and relied upon the partition deed. The deed was not registered.

Held, that the deed was an instrument of partition and not record of already completed partition and thus required registration. A I R (Vol 13) 1926 Lah 540 : 95 Ind Cas 256 : 8 L L J 347 : 27 P L R 745.

——S. 17—Document evidencing partition — Registration necessary.

Where a document is intended to be the evidence of a partition effected between the parties thereto it requires registration under S. 17 and if unregistered is inadmissible in evidence according to the provisions of S. 49. A I R (Vol 11) 1924 Lah 286 : 69 Ind Cas 859.

——S. 17—Deed not merely acknowledgment of partition but part of partition transaction is inadmissible without registration.

Where a deed was described on the face of it as a partition-deed and it was implied therein that the partition took place on the day of the execution of the deed where it stated that it would be registered and where there was no agreement to execute another document.

Held, that it was not admissible in evidence without registration. AIR (Vol 11) 1924 Nag 395 : 76 Ind Cas 158.

——S. 17—Deed evidencing intention to enjoy shares separately must be registered.

Crump, J. — Where the whole tenor of a deed shows that the intention was that the parties should be the owners of their separate shares as from the date of the document, it is impossible to escape from the bar created by S. 17, cl. (b) of the Registration Act, 1908. The mere fact that parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section. AIR (Vol 10) 1923 Bom 464 : 77 Ind Cas 914 (DB).

— S. 17—Partition, sole repository of.

The document was an entry in Bahi reciting that a settlement had been arrived been uncle of the one

part and nephews of the other part, by which the house in suit was given to uncle and another house to the four nephews in a partition. The entry stated that two of the nephews made themselves responsible for their brothers, and, therefore, had executed the document. The entry was signed by them and by three witnesses. One of the nephews below his signature declared that the settlement had been made at the instance of the brotherhood and that "the above writing is accepted."

Held, that the purport of the document was plainly to serve as a title deed; it was clearly a declaration of will creating a definite change of legal relation to the property, and the intention of the executants undoubtedly was to constitute the document and its counterpart with the nephews the sole repository and the appropriate evidence of the partition and, therefore, the document required registration. A I R (Vol 10) 1923 Lah 392 : 76 Ind Cas 852.

——S. 17—A memorandum of what was agreed or a share list, if the same was intended by the parties to be the final partition-deed between them, will be clearly inadmissible in evidence for want of registration. A I R (Vol 10) 1923 Mad 160 (1) : 69 Ind Cas 562: 16 M L W 784 : 1922 M W N 833 (DB).

——S. 17—Shares to be enjoyed separately as owners —Document requires registration.

Where the document after describing the property given to the two brothers and reciting that the parties had received the shares allotted to them and that in future neither party was concerned with the other, stated that Deorao had no concern with the field at Pardhi (the field in suit) but that Maroti was the owner thereof.

Held, it is none-the-less a partition deed and that the statement therein amounts to a declaration of right as to property and is not admissible in evidence without registration. A I R (Vol 10) 1923 Nag 75 : 69 Ind Cas 612.

——Ss. 17 (1) (b) and 49—Partition.

In a suit to recover property four duly signed receipts acknowledging the acceptance of certain portions of the property at partition were filed. Held, they were (i) inadmissible as they collectively constituted an instrument of partition but were unregistered. (ii) They were mere lists which when read separately did not prove the partition. (iii) In either case, partition is not established. A I R (Vol 7) 1920 Bom 46: 22 Bom L R 992: 58 Ind Cas 415 (DB).

——S. 17 (1) (b)—Partition document of Admissibility for collateral purpose.

For the purpose of proving a partition, and to indicate that plaintiff has lost his right in the suit properties, a non-testamentary document extinguishing the right of plaintiff in certain immovable property exceeding Rs. 100 in value and acknowledging receipt of other property in lieu of his relinquishment are not receivable in evidence for want of registration. A I R (Vol 3) 1916 Lah 254 : 35 P R 1916 : 52 P W R 1916: 33 Ind Cas 948 (DB).

——S. 17 (1) (b)—Partition—Memorandum of partition—Declaring divided status—Registration.

Per Spencer, J.—A document purporting merely to be a memorandum of partition and is imperfect as a deed does not require registration and is admissible in evidence to prove a divided status. (Per Sadashiva Iyer J. contra.) It requires registration and is not receivable in evidence even for proving a divided status. 3 I C 321, Diss. A I R (Vol 1) 1914 Mad 121 : 1 L W 31 : 15 M L T 163 : 24 Ind Cas 771 (DB).

——S. 17—Partition deed—Hindu Law—Partition—Decree of admission.

Per Sankaran Nair J. — If there be a division of right, though not of all properties, a co-parcener's widow will be entitled to a division of all the properties. A partition deed not registered is inadmissible in evidence to prove the status of the members, but is admissible in evidence to prove the transaction so far as it affects immoveable properties.

Per Pinhey J.: — The partition deed can neither affect any immoveable property comprised therein, nor be received in evidence of any transaction affecting such property, but it is admissible to prove the fact of a partition having been effected as well as to prove the arrangements come to regarding the moveables. Though a document evidencing a partition is inadmissible in evidence for want of registration a decree may be given on the admission of parties. (1908) 19 M L J 228 (232, 233) : 4 M L T 354 : 3 Ind Cas 321 (DB).

(d) Documents maintaining a partition already effected.

——S. 17—Agreement not to demand partition.

A joint Hindu family consisting of A, B and C—B and C demanding accounts from A—Agreement that A should not demand partition of family and B and C should refrain from demanding accounts from A—Subsequent suit for partition by A—Question was whether agreement required registration :

Held, that the agreement did not require registration. AIR (Vol 30) 1943 Pat 433 : 11 B R 149 : 217 Ind Cas 49 (DB).

——S. 17 (i) (b)—Partition—Document reciting fact of partition.

A document reciting the fact that certain immovable property has already been partitioned and that each party has since been in possession of the share allotted to him at partition, does not require registration. 53 Ind Cas 123 : AIR (Vol 6) 1919 Lah 19 (DB).

—— S. 17 (1) (b) — Partition — Acknowledgment of partition, whether compulsorily registrable.

A document purporting to be nothing more than an acknowledgment that a partition was effected at a certain time does not create any right in any property and is not compulsorily registrable. 122 P W R 1917 : 13 P R 1918 : 41 Ind Cas 479 : AIR (Vol 5) 1918 Lah 250 (DB).

——S. 17 (i), (b) and (c) — Partition — Completed—Partition—Receipt.

Law does not require writing to complete a partition which has already been effected by Panchayats. A receipt for possession of some land allotted to one of the parties in a partition already effected by Panchayats is not compulsorily registrable. (1918) 45 Ind Cas 854 (Nag).

——S. 17 (b)—Partition — Deed declaring effected partition.

A partition deed of immovable property or a deed declaring a partition previously effected by the parties, must be registered but one merely reciting incidentally such a partition needs no registration. (1910) 12 C L J 25 : 15 C W N 375 : 6 Ind Cas 346 (DB).

(e) Partition lists.

——S. 17—Whether partition chittha requires registration—Test.

The question whether partition chittas require registration under S. 17 (1) (b, must be decided with reference to the contents and nature of the document and the surrounding circumstances in each particular case. Where the partition chitthas do not amount to anything more than mere memoranda containing the list of the shares which each of the parties got at the time of partition and were signed by the parties in order to authenticate the lists and do not in themselves constitute a deed of partition, they do not come within the purview of S. 17 (1) (b) and do not require registration. AIR (Vol 33) 1946 All 200 : ILR (1945) All 921 : 1945 A L J 452 (DB).

——Ss. 17, 49—Partition—Lists prepared by arbitrators to be in force till document of title was executed—No registration is necessary.

Partition lists prepared at the conclusion of the arbitration by which the partition was effected bearing the endorsement of the parties that the lists shall be in force till the document of partition was executed and completed are merely memoranda of decisions arrived at by the arbitrators and the parties and not documents of title and do not, therefore, require registration for being admitted in evidence. AIR (Vol 32) 1945 Mad 262 : 58 L W 46 : 1945-1 M L J 222 (DB).

——S. 17—Partition lists recording results of already completed partition.

To see whether a document relating to partition requires registration, the test to apply is whether the document forms an essential part of the process of dividing the property, or, whether there is ground to suppose that the partition had already taken place and became complete when the document was executed. The question really is, is there sufficient dissociation of the transaction from the document? The matter does not turn upon the interval of time, although where the interval is long the dissociation may be more readily inferred.

Where certain partition lists were prepared with a view to fix the parties to the division so far made and prevent them from going back on it and the parties had already divided the property in shares, the lists did not therefore, require registration. AIR (Vol 25) 1938 Mad 568 : 47 L W 477 : 1939-1 M L J 582 : 1938 M W N 354 : 179 Ind Cas 265 (DB).

——S. 17—Butwara chitta.

A Butwara chitta being a mere list of the shares which each of the parties has in the property concerned signed by the parties and not in itself a regular deed of partition but merely a note upon which the parties have to proceed at the partition does not require registration for being admissible in evidence. AIR (Vol 23) 1936 Cal 700 : 62 C L J 513 : 168 Ind Cas 637.

——S. 17 — List of bonds allotted to parties and signed by them.

A list of bonds, allotted to each of the parties between whom a partition of certain bonds is effected, signed by the parties is not an instrument of partition requiring registration. AIR (Vol 20) 1933 Cal 474 : 37 C W N 112 : 144 Ind Cas 868 (DB).

69. Partnership.

——S. 17—Contract in respect of lease—Registration necessity of—Per Abdur Rahim J.

The onus is on the person who objects to a deed for want of registration to shew that the writing is required by law to be registered. A contract of partnership in respect of a lease-hold interest does not require registration and a person who enters into a contract of partnership with a tenant and enters into possession and enjoyment of the lease property is liable to the landlord for the rent. An endorsement by the landlord evidencing his assent to the assignment by the lessee of an interest does not create an interest in immoveable property and so requires no registration. Though it is not necessary that the tenant should assent to the act of forfeiture by the landlord, yet the question of the tenant's acquiescence or otherwise has a bearing on the landlord's rights of forfeiture and the landlord can waive his act of forfeiture if the tenant has not assented to it. (1910) 20 M L J 555 : 6 Ind Cas 766 (768): 7 M 419 (DB).

——S. 17, cl. (b)—Agreement amongst partners giving one of themselves sole right to redeem mortgaged partnership premises — Document creating right in immoveable property—Registration, necessity of — Evidence admissibility in — Necessity of further assurance if registered.

Where a partnership agreement contained a clause that one of the partners should be solely entitled to redeem the mortgaged immoveable property belonging to the partnership such document should be compulsorily registered under S. 17, cl. (b) as the right created by the clause is a right in immoveable property. If not registered, it is inadmissible in evidence. Where it is registered, declaration of the right by the Court after contest is sufficient and it is not necessary to make an order directing the execution of any further instrument. (1903) 5 Bom L R 975 : 13 M L J 329 : 7 C W N 861 : 30 C 1016 (1020) : 30 I A 230 (P C).

70. Family arrangements and compromises.

(a) Which require registration.
(b) Which do not require registration.

(a) Which require registration.

——S. 17—Family settlement—Registration—Necessity—Test.

Though a compromise or a family settlement does not require registration inasmuch as it operates as a recognition of pre-existing title, it does not follow that no deed of family settlement requires registration. It is only such settlements or deeds which do not "purport or operate to create, declare, assign, limit or extinguish . . . any right or interest" that are exempt from registration since they do not come within the purview of S. 17 (1) (b) of the Registration Act. But where the deeds do "purport or operate . . . . . interest," S. 17 (1) applies and they require registration. A I R (Vol 35) 1948 Oudh 88 : 22 Luck 407 : 1947 OA (CC) 196 : 1947 AWR (CC) 196 : 1947 OWN 306 (DB).

——S. 17 — Where a family arrangement is reduced to writing and the arrangement results in a transfer of title from one side to the other, it requires registration. AIR (Vol 27) 1940 Nag 113 : 1939 NLJ 216 : ILR (1941) Nag 386 : 189 Ind Cas 111.

——S. 17— If family arrangement giving several properties to different persons is reduced to writing, it will undoubtedly have to be registered under the provisions of S. 17. A I R (Vol 22) 1935 Rang 355 : 159 Ind Cas 798.

——S. 17—Family arrangement— Necessity of registration—Unregistered deed acted upon—Doctrine of part performance.

A family arrangement, if it is in fact reduced to the form of a document, requires registration if it affects property of the value of over Rs. 100. A I R (Vol 20) 1933 Lah 648 (2) : 34 P L R 741 : 14 L 635 : 144 Ind Cas 396 (DB).

——S. 17—Family settlement.

Documents evidencing family arrangment affecting immovable property require to be registered and if such documents are not registered, they are wholly inadmissible in evidence. AIR (Vol 17) 1930 All 341 (DB).

——S. 17 — Oral arrangement followed by a petition in Court — Whether the application was intended as information to court or as formal record of the arrangement is to be decided on particular facts — In the former case, registration is not necessary—In the latter, if property involved is Rs 100 or more registration is necessary. A I R (Vol 15) 1928 All 641 : 26 ALJ 952 : 51 All 79 : 116 Ind Cas 861 (FB).

——S. 17—Acknowledging title already in existence.

The real test to determine whether a family arrangement requires registration is to see whether the arrangement merely purported to be an admission or acknowledgment of title already in existence : if it is so, no registration is required but if the arrangement is a declaration of an agreement which was to regu-

late the respective interests of the parties not merely in the present but also in future then registration is compulsory under S. 17. A I R (Vol 12) 1925 Oudh 168 : 11 OLJ 574 : 28 OC 65 : 83 Ind Cas 193.

——S. 17 — Family settlement to show what the shares of parties will be, must be registered.

So far as a document of family settlement declares what the shares of the parties are to be hereafter, its registration is compulsory and in order to show what those shares are to be it is inadmissible in evidence but it is admissible for the purpose of showing what the original shares were. AIR (Vol 10) 1923 Lah 371: 76 Ind Cas 747 (DB).

——S. 17 (1) (b) and (2) (vi)—Family arrangement — Mutation proceedings — Petition of compromise — Doubtful claims.

In the course of mutation proceedings in a Revenue Court a petition was presented which stated a settlement out of Court fixing the share of each party, and asked for mutation accordingly :

Held, that such a petition which contained nothing more than a recital of the oral settlement effected out of Court and did not by itself purport to create, assign or declare any rights in immovable property did not require to be registered.

Per Piggott, J.— Any petition intended by the parties to serve, and so drafted as to serve as a document of title or an authoritative admission by such party as against the other, of the title of the other party to whatever share has been agreed upon amongst them, becomes a document purporting to declare the rights of the parties concerned in immovable property, and requires registration, if that property exceeds Rs. 100 in value. A I R (Vol 8) 1921 All 248 : 18 A L J 877 : 2 U P L R (All) 174 : 58 Ind Cas 732 (DB).

——Ss. 17 (1) (b) and 49—Family arrangement—Joint Hindu family — Throwing into the common stock — Registration.

Where a divided member of a joint Hindu family throws his properties into the common stock so as to make it joint family property of a reunited family, a registered instrument is necessary to validate it. AIR (Vol 6) 1919 Mad 988 : 8 LW 400 : (1918) MWN 680 : 47 Ind Cas 716 (DB).

——Ss. 17 (1) (b) and 19—Family arrangement— Recital of a prior gift in a petition for transfer of registry—Registration optional.

A petition to the Collector paying for the transfer of a registry of a certain Mitta in the name of one D recited that the village had been given to D as stridhanam and concluded as follows :—

The said Doraiswami Ammal shall hold and enjoy the villages, with the right of alienation thereof by way of gift, mortgage, sale, etc. :

Held by the Full Bench that the petition containing the above recitals was not a document declaring the rights of D's estate.

Per Coutts Trotter J.—Exclusion of evidence under statutory rules should be confined strictly to the letter of the statute. A I R (Vol 4) 1917 Mad 859 : 19 M L T 52 : (1916) 1 M W N 17 : 3 LW 1 : 32 Ind Cas 111 (FB).

——S. 17 (1) (b)—Family arrangement — Instrument declaring widow's right to maintenance.

The document made by brothers declaring the right and interest of the brothers in an estate of large value and also stating in one clause that their widows should not inherit a life estate but receive maintenance only, must be registered. A I R (Vol 3) 1916 Lah 48 : 8 PR 1916 : 203 PWR 1915 : 32 Ind Cas 522 (DB).

——Ss. 17 (1) (b) and 49 — Family arrangement — Document admitting relationship and right to a share in property—Registration.

A document whereby K acknowledges S to be the son of R and hence entitled to a share in certain immovable property requires to be registered and will not, if unregistered, be admissible in evidence to prove sonship in a suit for the share, as it would affect the immovable property in suit. 1914 P L R 19 (DB).

——S. 17 (1) (b)—Family arrangement—Registration.

An instrument which is not testamentary but is final, irrevocable and immediately operative against immovable property is void if unregistered. (1911) 33 All 344 : 14 OC 133 : 38 IA 104 : 15 C W N 497 : 8 ALJ 465 : 13 CLJ 519 : 9 M L T 507 : 13 Bom L R 404 : 21 MLJ 637 : (1911) 2 M W N 242 : 10 Ind Cas 285 (PC).

(b) Which do not require registration.

——S. 17—Compromise petition incorporating family arrangement—Petition informing Court the terms of settlement—Petition does not require registration.

A family arrangement not involving a transfer may be a settlement in which each party takes a share of, or interest in, family property by virtue of an independent title which is to that exent admitted, by the other parties. Such an arrangement may, however, involve a declaration of right under S. 17 (1) (b), Registration Act. Whether the family arrangement involves a declaration of right or not will depend on the facts of each particular case. If it involves a declaration of right, it will require registration.

Where in mutation proceedings a bona fide dispute between the parties is composed, each party recognising an antecedent title in the other, and the parties make a petition to the Court informing the terms of the agreement, there is no necessity to have such a petition registered as it does not purport to create, assign, etc., any right in immovable property within the meaning of S. 17 (1) (b), Registration Act; it is merely a recital of fact by which the Court is informed that the parties have come to an arrangement. AIR (Vol 33) 1946 Pat 55 : 11 CLT 48 : 12 BR 688 : 226 Ind Cas 129.

——Ss. 17, 49—Permitting party to remain in possession of property for life — Document, if creates title —Compulsory.

Where a family settlement does nothing but permits a female to remain in possession of property during her life time, the family settlement is not a document whose registration is compulsory, although it may have been founded on a will which may or may not have been valid. Such a document is not one operating to confer title or effect any transfer of immovable property. AIR (Vol 28) 1941 Oudh 150 : 1940 OWN 1092 : 1940 AWR 461 : 16 Luck 266 : 191 Ind Cas 402 (DB).

——S. 17—Documents containing oral agreement.

Where, reading together all the documents which were executed on one and the same date, it is clear that they are not records of the family arrangement reached at by the various claimants but only intimations to the Revenue Court as to the manner in which, according to a previous oral agreement, mutation of names was to be effected by that Court, the family arrangement having been made orally, no question of registration arises. AIR (Vol 21) 1934 Oudh 462 : 10 Luck 203 : 11 OWN 1071 : 151 Ind Cas 452 (DB).

——S. 17 — Family arrangement based on family custom.

A family arrangement is not liable to compulsory registration if it is based on a recognition of pre-existing right and cannot be regarded as creating any title. Where it is clear from the evidence that the family arrangement was based upon a family custom, it must be held to be an arrangement in recognition of pre-existing rights. The fact that the custom is not established to the satisfaction of the

trial Court is immaterial. It is enough that there were disputes between the parties which were settled on the basis of a bona fide belief in the existence of the custom. AIR (Vol 21 1934 Oudh 462 : 11 OWN 1071 : 10 Luck 203 : 151 Ind Cas 452 (DB).

——S. 17—And not a release—Need not be in writing and registered.

There is no provision of law requiring that a partition of family settlement must be reduced to writing and the writing registered, though of course, when they are reduced to writing the point of registration may arise.

Where by family arrangement it was settled that A, father of B was to pay the family debts and B was to pay nothing and Rs. 1,000 from the joint property were to be paid to B as his share and a house was to fall to the share of A.

Held, that the alleged arrangement amounted to family settlement and not to a release of his share by B. It was not therefore necessary to get the settlement reduced into writing and get the writing registered. Oral evidence on the point of the alleged settlement was therefore admissible. AIR (Vol 17) 1930 Bom 438: 32 Bom LR 948.

——S. 17—Agreement of the nature of a family settlement does not require either writing or registration. AIR (Vol 16) 1929 Oudh 373: 4 Luck 57: 5 OWN 1022: 116 Ind Cas 59 (DB).

—— S. 17 — It is not necessary that a family settlement should be embodied in a formal registered document. It is sufficient that members of the family should agree among themselves to make a settlement and give effect to such agreement. AIR (Vol 16) 1929 Oudh 305 : 6 OWN 109 : 115 Ind Cas 197 (DB).

——S. 17 (1) (b)—Partition deed — Memorandum of family arrangement not amounting to a deed of partition need not be registered.

When a document was neither a deed of partition nor a deed of gift, but was merely a memorandum in which one of the sharers purported to acknowledge the fact that he was taking away his share of the property while the remaining shares belonged to others and the arrangement recorded therein was also given effect to for a period over 60 years each party enjoying the usufruct of the land getting a share of paddy and possession of the homestead :

Held, that the document was only a record of the family arrangement and did not require to be either stamped or registered. AIR (Vol 15) 1928 Cal 705 : 48 CLJ 279 : 112 Ind Cas 326 (DB).

——S. 17 (1) (b) — Family settlement — Application by parties to Court informing the terms of their agreement need not be registered — Registration of family settlements when necessary.

Where a bona fide dispute between the parties is eventually composed each party recognizing an antecedent title in the other and parties make a petition to the Court informing the terms of the agreement there is no necessity to have such a petition registered as it does not purport to create, assign, etc., any right in immovable property within the meaning of S. 17 (1) (b). It is merely a recital of fact by which the Court is informed that the parties have come to an arrangement :

Per Sulaiman J.—Division of property by way of family settlement does not amount to a transfer by one party to the other, nor does any party to such settlement derive title through the other. The settlement merely recognizes the right of the other party and accepts it in part. Not being a transfer, gift or exchange from one party to the other the transaction does not fall under any of the sections of the Transfer of Property Act which require registration. Even in the absence of a registered document it is open to either party to the family settlement to prove that there had been a family settlement which was acted upon. If the compromise is reduced to writing then if that document is used as a document of title purporting to create or declare rights in immovable property worth more than Rs. 100 the deed would require registration, but if the document does not purport to be a document of title creating or declaring such right, but contains a mere recital of a previous settlement arrived at between the parties, the document may be used in evidence in proof of that previous settlement, even though not registered. AIR (Vol 13) 1926 All 173 : 48 All 213 : 24 ALJ 116 : 6 L R A Civ 625 : 90 Ind Cas 992 (DB).

—— S. 17—No registration necessary—Deed.

There is no authority for the proposition that when a co-parcener throws self-acquired property into the common stock of the co-parcenary consisting of himself and others a registered deed is necessary to effect the transaction. AIR (Vol 13) 1926 Mad 963 : 51 MLJ 167 : 1926 MWN 635 : 96 Ind Cas 1051.

——S. 17 — Document evidencing prior agreement.

Any document, whether a family settlement or not, which purports to create title to property and is put forward in Court, as the basis of title requires registration, but where the document itself is not a document of title but merely evidences an oral agreement between the parties, no registration is necessary.

Where a party is already in possession and his title to property is considered by both parties to be sound at the time, no conveyance of immovable property is at all necessary in maintaining that party in possession of a portion of that property, an oral agreement is sufficient for the purpose. AIR (Vol 13) 1926 Oudh 22 : 2 OWN 849 : 90 Ind Cas 766.

—— S. 17 — A compromise of disputed claim among members of a family operates only as a family arrangement acknowledging or defining an antecedent but disputed title and its registration is not necessary. Such a family settlement does not fall within the purview of any of the provisions of the Transfer of Property Act so as to require an instrument in writing or registration. AIR (Vol 12) 1925 All 176: 5 LRA Civ 736 : 85 Ind Cas 633.

——S. 17—Petition to Revenue Court.

A family arrangement as such does not require to be embodied in a written instrument; but if a document is tendered in evidence as proving the terms of a settlement, the mere fact that the document in question is a petition addressed to a Court of revenue does not exempt it from the provisions of S. 17, but all cases of this nature must be decided with reference to the terms and circumstances of the particular document.

A petition was presented to the revenue Court by M and R. It purported to be a compromise, in the disputed matter of mutation of names, arrived at between the two contending parties. It informed the Court that a settlement had been arrived at and asked that in accordance with the said settlement mutation of names may be made. The petition contained the following clause : "As to the remaining other assets left by Mt. G., there remains no concern in the same on the part of M." The petition purported to be signed by duly authorized pleaders on behalf of both parties and also by the parties personally. Subsequently this document which was unregistered was sought to be put in evidence in civil litigation.

Held, that it is possible to treat the document not as one which purports to declare, assign, or relinquish any rights, in immovable property, but which merely purports to inform a Court of revenue of the results of a settlement arrived at by oral agreement between the parties and hence the document did not require to be registered. AIR (Vol 13) 1926 All 103 : 89 Ind Cas 849 (DB).

——S. 17—A bona fide settlement of family disputes does not require registration although it may relate to immovable property. AIR (Vol 8) 1921 All 248: 43 All 1 (DB).

——Ss. 17 (1) (b) and 49—Family settlement—Registration.

Family settlement under Hindu Law need not be registered though it involves the giving up of disputed land to strangers. AIR (Vol 2) 1915 All 58 : 37 All 105 : 13 ALJ 21 : 27 Ind Cas 497 (DB).

——S. 17 (1) (b) — Family arrangement — Compromise unregistered – Filed in mutation proceedings.

Section 17 of the Registration Act, aims at those documents which operate by themselve to confer a fresh title, and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of certain persons by way of inheritance. A family settlement arrived at between the several claimants to the property of a deceased and allotting different parcels among them is not compulsorily registrable, as no fresh rights are created but only existing titles are acknowledged by the compromise. AIR (Vol 2) 1915 Oudh 199 : 18 OC 51 : 2 OLJ 67 : 27 Ind Cas 938.

——S. 17 (1) (b) — Family arrangement — Maintenance to Hindu widow—Writing if necessary.

Under Hindu Law no transaction need be in writing and so the grant of immovable property to a widow for maintenance is perfectly valid if proved by evidence. AIR (Vol 1) 1914 Nag 54: 10 NLR 111: 26 Ind Cas 835.

——S. 17 (1) (b)—Family arrangement.

A petition embodying a family settlement to the Revenue Court is not compulsorily registrable. (1913) 35 All 502 : 11 ALJ 765 : 21 Ind Cas 29 (DB).

——Ss. 17 (1) (b) and 49 — Family arrangement — Letter embodying agreement of transfer—Recital of possession.

Where a letter from a vendor to a vendee contained an agreement to transfer certain lands and also a clause as to possession, the document could be admitted as evidence of an agreement to convey the lands without registration. (1913) 21 Ind Cas 777 (Mad).

——S. 17 (1) (b)—Family arrangement.

A deed of division of rights between members of a Hindu family need not be registered since it only creates a division in status but does not by itself create any interest in the property. Such a deed is admissible in evidence to prove divided status but not as evidence of transaction affecting immovable property. (1909) 19 MLJ 228 : 4 MLT 354 : 3 Ind Cas 321 (DB).

71. Release, relinquishment and surrender.

——S. 17—Assignment or extinguishment of lease.

An assignment of an interest in a lease or a relinquishment of the rights thereunder falling under S. 17 (1) (d) is not excluded by S. 17 (1) (b), Regis Act. AIR (Vol 27) 1940 Bom 369: 42 Bom LR 750 I L R (1941) Bom 71: 191 Ind Cas 806 (DB).

——S. 17 (1) (b)—Document by usufructuary mortgagee admitting satisfaction and releasing property does not require registration. AIR (Vol 17) 1930 Cal 79: 56 Cal 910: 122 Ind Cas 193 (DB).

——S. 17 (1) (b)—Relinquishment.

Relinquishment of ryoti land by tenant to his landlord need not be evidenced by registered deed. AIR (Vol 17) 1930 Mad 1: 121 Ind Cas 765.

——S. 17—Not a release.

A document between two sons of a Hindu father evidencing an arrangement regarding the division of the family house between them both, while providing for payment of a sum of five rupees per month to the father does not amount to a release or a sale of the father's right in the family properties and is not compulsorily registrable.

In the case of a joint Hindu family a person may take nothing when a division take place and it cannot be said that under such circumstances he releases his right to the other family property in the sense that it is an ordinary release which requires a registered document to validate it. AIR (Vol 14) 1927 Mad 593: 52 MLJ 599: 38 MLT 383: 101 Ind Cas 118.

——S. 17—No registration necessary—Surrender — By Hindu widow.

There is nothing in the Registration Act which requires any particular transaction to be recorded in writing that Act requires only that when certain transactions are so recorded the writing shall be registered. Nor is there anything in the Transfer of Property Act or in any other law, requiring that a mere extinguishment of an interest in immovable property shall be in writing. A surrender by Hindu widow of her interest is not a transfer of any kind, but is merely an abandonment of an interest, which the next reversioner takes in his own right and not because anything is conveyed to him by the widow. Such an abandonment can be effected without a written instrument though if one is executed it would undoubtedly require registration, under S. 17 of the Registration Act. AIR (Vol 14) 1927 Nag 44: 22 NLR 169: 97 Ind Cas 995.

——S. 17—No registration necessary—Release— By partner of share in partnership property.

In a partnership business owning immovable property a partner may be a co-owner in the property, but he has no right to ask for a share in that property but only that the partnership business should be wound up, including therein the sale of the immovable property and to ask for his share in the resulting assets. Before a partner releases his right in the partnership property, that property belongs to the partnership and incidentally to him as a member of the partnership but not in his individual capacity. When therefore, he retires from the partnership by releasing his rights therein, the property still remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immovable property, for he receives his share of the assets on going out of the partnership and the immovable property still remains the property of the partnership as it was before.

A release deed by which a partner relinquishes his share of the partnership property is not compulsorily registrable under S. 17. AIR (Vol 13) 1926 Mad 1040: 51 MLJ 410: 49 Mad 738: 1926 MWN 732: 24 MLW 529: 96 Ind Cas 881 (DB).

——S. 17—A release in writing (relating to interest in immovable property, more than Rs. 100 in value) must be registered to make it operative—But release need not be in writing. AIR (Vol 13) 1926 Nag 21: 8 NLJ 157: 23 NLR 86: 95 Ind Cas 979.

——S. 17—Deed of relinquishment compulsorily registrable does not become effective by being acted upon in a partition proceeding affecting wholly separate property. AIR (Vol 12) 1925 Lah 125: 6 LLJ 391: 85 Ind Cas 285 (DB).

——S. 17 –One partner releasing his share in the partnership—Share affecting immovable property of more than Rs 100 in value—Release if in writing must be registered though dissolution of partnership need not be reduced to writing at all.

Where an agreement or any other transaction is reduced to writing and under it any right to immovable property is affected, such writing ought to be registered. AIR (Vol 12) 1925 Mad 945: 22 MLW 109: 86 Ind Cas 860.

——S. 17—Settlement of suit—Release of immovable property— Registration is necessary. AIR (Vol 8) 1921 Cal 202: 48 Cal 1059: 25 CWN 990: 66 Ind Cas 705.

——S. 17 (1) (b)—Relinquishment.

A document by which an interest in immovable property worth less than Rs. 100 is relinquished, need not be registered. AIR (Vol 7) 1920 Cal 775: 57 Ind Cas 949 (DB).

——S. 17 (1) (b)—Surrender—Landlord and tenant.

A registered instrument is not essential to validate a surrender by a tenant to his landlord. AIR (Vol 6) 1919 Cal 840: 53 Ind Cas 17 (DB).

——Ss. 17 (1) (b) and 49—Relinquishment—Compromise petition — Order of Revenue Court—Mutation proceedings — Transfer of property under compromise — Compromise unregistered, if admissible in evidence.

A dispute before Revenue Court as to the entry of names in the Revenue Register, between a reversioner and the daughter of the last holder, was compromised by which the reversion was to pay off certain incumbrances created by the parents of last holder and the daughter in her turn gave up possession of the disputed lands and also her claim to mutation. The compromise petition was filed and the order was made accordingly. The reversioner failed to carry out his part of the compromise and the daughter sued for recovery of the land she had given up. Except the petition to the Revenue Court and the order of the Revenue Officer, there was no evidence that the daughter had transferred her interest in the property.

Held, that the mutation proceedings not being judicial proceedings and the order of the Revenue Officer not a decree and both the petition and the order, being unregistered were inadmissible in evidence and consequently there was no legal evidence of any transfer of interest by the daughter to the reversioner. AIR (Vol 3) 1916 All 1 : 38 All 366 : 14 A L J 449 : 35 Ind Cas 701 (FB).

——S. 17 (1) (b) — Relinquishment — Usufructuary mortgage.

A relinquishment by a usufructuary mortgagee of his right to take possession, need not be registered. AIR (Vol 3) 1916 Mad 102 : 31 Ind Cas 565.

——S. 17 (1) (b)—Release — Compromise petition reciting release of a co-parcener's rights — If admissible without registration.

A compromise petition evidencing an effected release of or an agreement to release. a co-parcener's right in a family property, is admissible in evidence without registration. AIR (Vol 2) 1915 Mad 590 : 27 M L J 396 : 26 Ind Cas 790 (DB).

——S. 17 (b) — Release—Surrender or release; if required to be registered.

Agreements of surrender or release were not unenforceable in Oudh for want of registration, before the enforcement of the Act in Oudh in 1871. (1913) 20 Ind Cas 429 (DB) (Oudh).

——S. 17, cl. (b) — Release in writing — Release of portion of mortgaged property from debt.

A release executed in writing by a mortgagee in favour of an assignee of a portion of the properties mortgaged is inoperative, unless registered, where the interest sought to be extinguished by it is of the value of Rs. 100 or upwards. (1906) 10 C W N 551 (559) : 33 Cal 613 : 3 C L J 576 (DB).

——Ss. 17, 18, 21, 24, 77—Document evidencing relinquishment of a share by a daughter to her father in his property — Registration — Refused to register on the ground that the document did not contain sufficient description of the property — Discretion of the Registrar—Jurisdiction of civil court — Right of heir to succeed — Vested or contingent estate — Transfer of Property Act, Ss. 6, 19, 21 — Succession Act, S. 107 — Spes successionis—Mahomedan Law—Document—Alternation.

A document executed by a daughter in favour of her father (the parties being Mahomedans) provided that in consideration of her receiving Rs. 9,000, she had reliquished all her rights and claims to any property there may be on her father's death. This document was presented to the Sub-Registrar of Bombay for registration. The registration fee was taken and payment thereof was endorsed on the document. The registration was subsequently refused on the ground that the document did not contain a sufficient description of the immoveable property to which it related (S. 21.) In a suit under S. 77,

Held (1) that the document cannot be treated as relating to property, much less can it relate to immoveable property, capable of being described and identified, and S. 21 cannot apply to it; (2) that even taking the document as relating to immoveable property it contains not only a sufficient but the only description that can be given of it; (3) that the document does not fall within the category of any of the document mentioned in S. 17, but that it falls within Cl. (d) or Cl. (f) of S. 18. Where a Sub-Registrar or a Registrar has exercised his discretion under S. 24 or S. 21 of the Act and accepted a document for registration, though subsequently he refuses to register it, the court in a suit under S. 77 has power to enquire into the propriety of his finding and discretion as to such acceptance. The discretion under S. 21, arises only where a non-testamentary document 'relates to immoveable property.' Where it does not relate, the section cannot apply and the discretion cannot arise. And into this question it is open for a civil court to inquire in a suit under S. 77. The right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definition of a 'vested interest' in S. 19 or of 'a contingent interest' in S. 21 of the Transfer of Property Act ,and S. 107 of the Indian Succession Act. So far from being a vester of contingent right, a right in present or in future, it is in the language of Cl. (a) of S. 6 of the Transfer of Property Act 'the chance of an heir apparent succeeding to an estate' or a mere possibility of succession which cannot be transferred. A mere spes successionis is unknown to and not recognised by the Mahomedan law. The alteration of a document, to be material, must affect the legal effect of the contract so as to make it cease to be the same instrument. (1905) 7 Bom L R 742 : 30 B 304 (316, 317, 318).

——S. 17 — Agreement not to prosecute claim and not to excute decree—Release.

Where the plaintiff agreed by a document not to prosecute his claim to property for more than Rs. 100 against one of the defendant as the plaintiff was satisfied that the defendant had the title and even if he obtained a decree not to execute it against defendant, and on his death his representative applied for execution.

Held (1) that the document was not a release and did not require registration, (2) that even if it was release the portion containing the covenant not to prosecute the claim and not to execute the decree was independent of the release and was admissible in evidence. (1905) 15 M L J 370 (372) (DB).

72. Pre-emption and option to re-purchase.

——S. 17—Document waiving right to pre-empt—Need for registration.

A document evidencing the waiver of a right to pre-emption does not require registration under S. 17 of the Registration Act, as there is no transfer or relinquishment of any subsisting interest in immoveable property. AIR (Vol 36) 1949 Nag 387 : I L R (1949) Nag 771 : 1949 N L J 468.

——S. 17—Agreement to transfer land—When must be registered.

A, the plaintiff in a pre-emption suit executed in favour of B, the plaintiff in a rival pre-emption suit, in consideration of B's having withdrawn the suit, an agreement to transfer without charging any thing, to B certain land if A succeeded in obtaining a decree in his suit.

Held, that the document was clearly a document of title and made B an owner of the land from the date of which A obtained a decree in the suit. The document clearly fell within the purview of clause (b) and required registration before it could be admitted into evidence. AIR (Vol 12) 1925 Lah 78 : 78 Ind Cas 444.

——S. 17—Agreement creating right of pre-emption does not require registration.

The agreement as to pre-emption was in these terms :—"If the plaintiff and defendant 1 wish to sell the houses situate at Singlaw, they should first sell them to trustees Nos. 2 to 6 at the market value; that is to say, first right in respect of 'safil' is to be reserved for them; and accordingly they have been given by this document a right in respect of 'safil' ".

Held, that this agreement is an agreement between the parties which could be enforced by the plaintiffs, and that it does not create any right in immovable property and that it is admissible without registration. 32 All 206 Diss. AIR (Vol 10) 1923 Bom 226: 47 Bom 283 : 25 Bom L R 79 : 73 Ind Cas 666 (DB).

——S. 17 (2) (vi) — Compromise conferring right of pre-emption—Filed before a Revenue Court.

An agreement giving a right of pre-emption, the registration of which is made compulsory, is not exempted from the Registration law, simply because it is embodied in a compromise filed in a mutation proceeding before a Revenue Court. (1910) 13 O C 241 : 7 Ind Cas 1010.

——Ss. 17, 49 — Compromise regarding contract of pre-emption—Not embodied in decree—Not admissible without registration.

A sulahnama filed in a suit in so far as it purports to create a right of pre-emption is a transaction affecting immoveable property and as such requires registration. Where such a document was not registered no evidence of its contents could be given to establish a claim of pre-emption. (1910) 7 A L J 206 : 32 A 206 (209) : 5 Ind Cas 234 (DB).

73. Power of attorney.

——S. 17—Presentation by servant — Invalidity — Subsequent proper presentation.

W executed a power of attorney in favour of D and being unable, due to illness, to attend the Registry Office personally, sent his servant, W. B., with the document there for registration. Two days later the Sub Registrar went to W's house and was satisfied as to W's inability to attend the Office. The Sub-Registrar read out the document to W who admitted the execution by him and desired its registration, and also that after registration the document should be given to D.

Held, that although probably the Sub-Registrar acted irregularly in accepting the document as presented by W. B. and in entering the registration as made on the date on which W. B. took the document to him and not 2 days later, yet the presentation by W. B. was inoperative but not injurious to the validity of any subsequent presentation. It was W who was the real presenter, and was so treated by the Sub-Registrar, and hence the registration was valid. AIR (Vol 8) 1921 P C 93 : 42 All 487 : 47 I A 177 : 18 A L J 717 : 22 Bom L R 136 : 28 M L T 98 : 1920 M W N 413 : 2 U P L R 179 : 25 C W N 73 : 13 M L W 4 : 39 M L J 41 : 58 Ind Cas 386.

——S. 17 (1) (b)—Agency — Transfer of immoveable property of more than Rs. 100 in value — Agency — Registration.

There is nothing in the T. P. Act or in the Registration Act to show that an agent, to transfer an interest in immovable property worth more than Rs. 100 in value, must be empowered by a registered document. AIR (Vol 5) 1918 L B 6 : 43 Ind Cas 536 (DB).

——Ss. 17, 21, 49—Attorney, power of, if creates a charge on immoveable property.

Where a power of attorney was executed by A in favour of B to enable B to recover the rents and profit of the property of which A was the administrator in order to pay off an amount advanced by B to A as such administrator.

Held :—That inasmuch as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immoveable property. (1907) 7 C L J 149 : 12 C W N 316 : 35 C 845 (849) (FB).

74. Appointment of trustees.

——S. 17—A deed, by which a debtor assigns has entire property to the trustees for the benefit of his creditors is exempted from registration under S. 17 only to the extent that it purports to create or assign a right in immovable property and not when it amounts to a trust which contemplates something more than mere creation or assigning of a right in immovable property. AIR (Vol 23) 1936 All 239 : 1935 A W R 1432 : 1936 A L J 350: 58 All 505 :1936 A L R 346 : 161 Ind Cas 903 (DB).

——S 17 (1) (b)—Trusts.

A deed appointing trustees but not vesting property does not require registration. Trustees in this sense are mere superint ndents of property. AIR (Vol 8) 1921 P C 105 : 57 Ind Cas 329.

[Affirming 14 A L J 554 : 35 Ind Cas 718.]

——S. 17 (v)—Power of appointment—Appointment of new trustee in place of a dying trustee under power reserved by the deed - Registration—Indian Trusts Act, Ss. 1, 75—Property dedicated to charitable uses—Construction of document—Originating summons—Certifying counsel — Taxation of costs—Practice.

An indenture of trust contained the following clause by which the settlors reserved to themselves and the survivor of them the right to nominate and appoint trustee or trustees in the place of retiring or dying trustee or trustees :—"It shall be lawful for ..... to appoint any other person or persons to be a trustee or trustees in place of the trustee or trustees so dying or going to reside abroad or desiring to retire or refusing or becoming incapable to act as aforesaid with liberty upon such appointment to increase or diminish the original number of trustees and upon every such appointment the trust premises hereby settled shall be so transferred as to become vested in the new trustee or trustees." On the death of one of the trustees, the surviving settlor, in exercise of this power, appointed a new trustee : this deed of appointment was not registered. Subsequently the surviving settlor in exercise of the power reserved appointed three additional trustees by deeds of appointment bearing different dates. The surviving settlor died : and at her death without leaving progeny the whole of the trust property was to be utilized for charitable uses and purposes as provided by the deed of settlement. The two questions that

were submitted to the Court for opinion were (1) whether the deed appointing the new trustee required registration; and (2) whether the additional trustees were validly appointed.

Held (1) that the deed of appointment did not require registration. The provisions of the Trust Act not applying to the settlement which became one in favour of charity, on the death of the settlor the trust property did not vest in the new trustee by mere operation of law. The deed of appointment by itself created no interest in the property, but merely gave him the right to obtain another document, (2) That the words 'upon any such appointment" in the clause were not words that absolutely governed the surviving settlor's right to increase the number of trustees : they merely indicated the occasion when she may exercise her right, but the right to increase the number of trustees existed she was therefore entitled to increase the number of trustees whenever she chose to do so. (1907) 9 Bom L R 1071 (1079, 1080).

75. Waqf deeds.

——S. 17 — Agreement between N and S that after S bought certain land he would make it wakf — If requires registration.

N agreed to advance the sale price of a certain land which S proposed to buy from a Municipal Committee on condition that S executed in his favour an agreement whereby he bound himself to create a wakf of that land. An agreement was then executed between N and S to the effect that after S bought the land from the Municipal Committee he would make it wakf and S or his successors would have no right or power to transfer it in any way. After the execution of this agreement, the sale price was deposited by N and a sale-deed was executed by the committee in favour of S.

Held, that as the rights under the agreement were to come into existence after the land had been bought and the sale had yet to take place on the date of the agreement, the agreement read as a whole did not purport or operate to create or declare any right, title or interest in the land whether in the present or in the future, and it did not, therefore, require registration. AIR (Vol 36) 1949 E P 233 (DB).

——S. 17—Where the wafq is made by a deed, Ss. 17 (1) (a) and 49 come into play. A I R (Vol 26) 1939 Rang 365: 1940 Rang L R 136: 186 Ind Cas 210 (DB).

——S. 17—No registration necessary—Wakfnama.

Where the owner of certain immovable property executed a wakfnama purporting to divest himself of ownership in favour of God and appointed himself the Mutwalli of the property during his life-time with power to appoint successor.

Held, that he did not purport to transfer the ownership of the property, and that the wakfnama was therefore outside the provisions of the statute and that registration was unnecessary. AIR (Vol 8) 1921 P C 105 : 39 M L J 263 : 42 All 609 : 47 I A 224 : 18 A L J 1089 : 32 C L J 471 : 1 P W R 1921 : 28 M L T 220 : 12 M L W 539 : 1920 M W N 565 : 25 C W N 122 : 57 Ind Cas 329.

——S. 17 (1) (b) — Waqf — Subsequent trustee-namah appointing a Co mutwalli

A Mahomedan under a registered waqf constituted himself mutwalli of certain trust created thereunder. Subsequently by a trustee-namah he appointed another person to help him as a co-mutwalli but did not transfer property to any person or modify the terms of the waqf-namah in any way. Held, that the trustee-namah was not compulsorily registrable. AIR (Vol 3) 1916 All 68 : 14 A L J 551 : 35 Ind Cas 718 (DB).

[Affirmed on appeal 57 Ind Cas 329 : A I R (Vol 8) 1921 P C 105.]

——Ss. 17, 32, 34, 87 — Evidence — Admissibility — Attorney for registration — Death of principal — Authority of attorney—Irregularity in registration — Mahomedan Law—Wakf—Illusory trust.

Where a document requires registration to be admissible as evidence or to affect immoveable property, it is not enough that the deed is in fact registered, but it must be registered in accordance with law. The registration of a document at the instance of one who is not by law empowered to present it for registration is not in law recognized as such and does not make the document admissible in evidence. An attorney authorised to present a document for registration and admit execution of it before the Registrar loses his authority on the death of the executant; and registration after that date on the presentation or the admission of execution by such attorney is invalid. The test of the validity of a wakf which confers benefit on the family of the settlor is to see whether the document is in substance an endowment of the property for a charitable purpose or is merely intended to create a perpetuity for the benefit of the family under colour of a charitable trust. (1900) 11 M L J 58 : 3 Bom L R 114 : 5 C W N 177 : 23 All 233 (241, 242) : 28 I A 15 (PC).

76. Splitting up of transactions to avoid registration.

——S. 17 (1) (b) — Splitting up mortgage in various transactions—Registration.

There is nothing illegal in the parties splitting what is apparently one mortgage transaction of more than Rs. 100 into several mortgages of even date, each for a sum of less than Rs. 100. In such a case, the charge on the particular plot dealt with in each instrument is below Rs. 100 and, therefore, none of them requires registration under S. 17, Registration Act.

The defendant executed fourteen different mortgage-deeds relating to fourteen separate plots of land. None was registered. The amount secured on it was stated to be less than Rs. 100. The concluding clause of each deed contained a clause that mortgagor would redeem the plot on payment of entire money due on rest of the mortgages :

Held, that under the terms of the clause, no additional charge was created on the plot mentioned in a particular deed, and each plot was, and continued to be, liable to be redeemed on payment of the amount secured on it, which was below Rs. 100 in every case. The clause merely contained a collateral agreement as to the date when the right of redemption in each case was to be exercised. This by no means amounted to a "consolidation" of the fourteen transactions into one transaction Hence the deeds, though unregistered, were admissible in evidence. AIR (Vol 27) 1940 Lah 98 : 188 Ind Cas 75 (DB).

——S. 17 —Splitting up mortgage into various transactions—Registration.

It is perfectly legitimate to split up a transaction into a number of similar transactions in order to make registration not compulsory.

There were 14 different mortgage-deeds between the parties, each mortgage-deed relating to separate land and being of a value of less than Rs. 100. Each of these deeds, however, except one contained a concluding clause that mortgagor would redeem his land when he would pay up entire money on other mortgage deeds.

Held, that the addition of the clause did not make each deed by itself an instrument creating a right of the value of more than Rs. 100 to or in immovable property. The clause merely laid down a collateral agreement as to the date when the right of redemption in each mortgage shall be exercised. That being so, the statute must be strictly construed and the benefit given to the person who claimed that he was not bound by it. The deeds, therefore, did not need

registration. AIR (Vol 26) 1939 Lah 173 : 41 P L R 585 : 184 Ind Cas 85.

——S. 17 – Splitting up of a transaction – Validity of.

Where a person borrowed Rs. 198 and executed two unregistered mortgage bonds for Rs. 99 each on the same date — Held, that as there was nothing in the Registration Act which forbade the splitting up of a transaction in this manner, the bonds were valid. 1906 A W N 281 : 3 A L J 681 : 29 All 50 (52).

——S. 18.

——S. 18 — Fraud — What amounts to — Fictitious inclusion of an item of property not intended to be conveyed, is fraud.

That a fictitious inclusion of an item never intended to be sold, can amount to fraud on registration admits of no doubt. If the parties never intended that a certain item should be sold at all and transferred under the deed, the deed does not relate to it, and by concealing the fact, from the Sub-Registrar, they commit a fraud on the Registration Law. AIR (Vol 17) 1930 All 786 (DB).

——S. 20.

——Ss. 20 and 35 — Interlineation — Denial of execution.

Where there was an interlineation at the end of the deed and the parties were not prepared to admit it, the Sub-Registrar is justified in refusing to register the deed. The executant must be taken to have denied the execution within S. 35 of the Registration Act. AIR (Vol 3) 1916 Mad 673 : (1915) M W N 543 : 30 Ind Cas 507 (DB).

——Ss. 20 and 72—Refusal to receive document.

Semble—If a Sub-Registrar merely refuses to take up a document for registration, no appeal will lie to the Registrar against the order. (1912) M W N 412 : 15 Ind Cas 370 (DB).

——S. 20—Interpolation — Admission by parties.

When all the additions and interpolations are admitted by all executants before the Registrar, they cannot be used to avoid the document. (1910) 12 C L J 137 : 5 Ind Cas 654 (DB).

——S. 21.

——S. 21 — Scope of.

Section 21 of the Registration Act does not appear to lay down any obligation on the part of executants of sale deeds to give as true, proper descriptions of the properties. What appears to be stressed in the section is that the property should be described in sufficient details so as to make the identity thereof easier. AIR (Vol 37) 1950 Ajmer 19 (2):51 Cr L J 883.

——S. 21 — Properties sufficiently identifiable — Document registered — Document, if operative.

Section 21 merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable, the document, if registered, would be operative in respect of such properties as would be found to answer the description contained in the document. AIR (Vol 22) 1935 Cal 203 : 60 C L J 243 : 39 C W N 120:155 Ind Cas 926 (DB).

——S. 21 — Duty of Registering Officers to insist on sufficient description of property.

It is the duty of Registration Officers to refuse to accept a document for registration unless it contains a description of the property referred to therein sufficient to identify the same and to verify the survey numbers and the extent given in the document before registering it. AIR (Vol 22) 1935 Mad 268 : 40 L W 810 : 154 Ind Cas 753.

——S. 21—Document affecting immovable property — Entry in Book No. 4 — Whether validates document.

The mere entry by the Registrar in Book No. 4 of a document which, on the face of it, is clearly of the kind to be entered in Book No. 1 is not by itself sufficient to invalidate the registration in such a way as to render the document inoperative or to render the document incapable of being used as evidence of the transaction. Where the language of the document clearly expresses the nature of the transaction as one affecting immovable property and where it contains a description of such property sufficient to identify the same within the meaning of S. 21, the mere fact that the document has been wrongly entered in Book No. 4 should not be regarded as invalidating the document. AIR (Vol 20) 1933 Rang 418 (2) : 149 Ind Cas 1113 (DB)

——S. 21 — Effect of inaccurate description.

Mortgagee not giving proper description of properties situate in Rangoon in accordance with provisions of Ss. 21 and 22 — Properties not properly indexed in Registration Office — Subsequent purchaser making ordinary search but not discovering mortgage — As failure to make proper entry in index was due to negligence of mortgagee, subsequent purchaser would be preferred to him. AIR (Vol 16) 1929 Rang 117 : 7 Rang 118 : 117 Ind Cas 580 (DB).

——S. 21—Property not properly identified—Document is not valid.

A house and certain land were mortgaged by the same deed. In respect of the land what was sought to be mortgaged was merely the tenants, permanent interest but the mortgagor had no tenants' interest in that land and, moreover, the description given of the said land was inaccurate in every particular.

Held, that the subject-matter of the mortgage had not been identified at all for the purposes of registration within the meaning of S. 21 and the document even if registered would not be valid. AIR (Vol 15) 1928 Cal 385 : 47 C L J 124 : 32 C W N 241:113 Ind Cas 855 (DB).

——S. 21—Sufficiency of description.

The description of property as required by S. 21 (1) is to be sufficient to identify the property, but as S. 22 of the Registration Act shows it need not be description of local character. It need not mention the street in which the house is or give the name of the superficial area. AIR (Vol 14) 1927 Mad 586 : 38 M L T 226 : 25 M L W 563 : 52 M L J 482 : 102 Ind Cas 360 (DB).

——S. 21 — Enquiry about description.

Registering officer is bound to accept in a normal case the description of property given by the party. AIR (Vol 13) 1926 Nag 93 : 91 Ind Cas 1018.

—S. 21 — Description of property as "godown bearing No. 3 Port Trust No. of which is . . . . . in the New Rice Market at Carnac Bunder Port Trust" Bombay was held sufficient, though cadastral survey number of property was omitted. AIR (Vol 12) 1925 Bom 34 : 49 Bom 40 : 26 Bom L R 934 : 84 Ind Cas 416.

——S. 21—Document presented without map.

The registration of a document without the map referred to therein is ineffective. AIR (Vol 5) 1918 Low Bur 31 : 43 Ind Cas 455.

——S. 21 — Description of property — Immaterial error.

Section 21 merely provides that the registrable document should contain a sufficient description to identify the same and the registration will not be vitiated by an immaterial error in such description. (1913) 35 All 250 : 11 A L J 241:18 Ind Cas 923 (DB).

——S. 21—Mortgage — Description of property — Sub-mortgage.

When the property mortgaged consists of deeds, they are sufficiently described if the sums of money with which they are charged, the dates of execution

and persons bound by them are sufficiently clear. (1910) 12 C L J 137 : 5 Ind Cas 654.

—— S. 21 — Construction—Description of property, insufficient.

Section 21 of the Registration Act is positive and imperative and not merely directory. The contents of a letter were "I am disgusted with all that I got from my father and mother and whatever property you have transferred in my name. All these properties are yours, you are their owner." Held, that the description of the property given in the letter was not sufficient to identify the same and the Sub-Registrar and the Registrar were right in refusing to register it. (1909) 31 All 523 : 6 A L J 627 : 6 M L T 5 : 3 Ind Cas 506 (DB).

——Ss. 21, 22, 76 — Refusal to register—Suit to enforce registration—"Sufficient to identify the same" —Jaidad Scope of S. 21 — Letter relating to immovable property.

The provisions of S. 21 are positive and imperative and not merely directory. The object of registering a document is to give notice to the world that a document has been executed and is in force. The object of the statute would be to a great extent nullified and innocent persons would be exposed to great hardship and loss if the words could be treated as purely directory. Hence, where a letter purported to transfer immovable property and was presented as a non-testamentary document for registration which was refused on the ground that it contained no description of the property "sufficient to indentify the same" — Held, that the refusal was under the circumstances proper. (1909) 6 A L J 627 (630) : 31 All 523 : 3 Ind Cas 506 : 6 M L T 5 (DB).

—— S. 21 — Description of property — Power of attorney — Document being of two descriptions — Gift and appointment of guardian — Document operative as to the appointment of guardian — Death of executant before registration — Gift inoperative — Registration of document so far as regards appointment of guardians—Description of property to be managed.

A document which is in part an appointment of the guardian of the person and property of certain minors is not a document relating to immovable property within the meaning of S. 21 any more than a power of attorney authorizing an agent to collect rents of immovable property is. Such a document can be compulsorily registered although it contained no description of the properties referred to in it.

Where a person executes a deed of gift but dies before it is registered the gift is incomplete and the legal representatives of the donor cannot be compelled to complete such incomplete gift.

Where a document is in part operative but is inoperative as to the rest, the document may be registered as to the part that is operative, but the Registrar must add a declaration that is only as regards the part that is operative that registration will take effect. (1903) 13 M L J 303 (305) (DB).

— S 21 (1) — Description, unsatisfactory.

Once a sale deed is registered, it cannot be deemed to be a nullity merely because there was no specification of property within S. 21 of the Registration Act. (1912) 10 A L J 33 : 16 Ind Cas 337 (DB).

——S. 21 (2)—Description of house in town.

The proper description of houses in towns for purposes of registration is by the street in which they are situated and the number which they bear in the street. AIR (Vol 1) 1914 P C 67 : 41 Cal 972 : 1 L W 1050 : 41 I A 910 : 27 M L J 80 : (1914) M W N 462: 16 M L T 6 : 18 C W N 817 : 19 C L J 484 : 16 Bom L R 400 : 12 A L J 774 : 23 Ind Cas 637.

——S. 22

—— S. 22—Misdescription.

Where there is a misstatement or misdescription of the sub-registry in which the property is situate, the description is not co ipso insufficient and of such character as to make the registration of the document invalid. 33 C W N 1211 : AIR (Vol 17) 1930 Cal 235 (DB).

——S. 22 - Meagre description.

Description of property given in mortgage-deed not in compliance with terms of Ss. 21 and 22 but from careful study of document property could be identified and the description is not misleading—Document is not disentitled for registration. 117 Ind Cas 580 : 7 Rang 118 : AIR (Vol 16) 1929 Rang 117 (DB).

——S. 22 —Rules under.

Rules of Local Government under S. 22 (1)—Rule prescribing a particular description of property, not saying that document shall not be registered if such description is not given—Document should be registered if the description given is otherwise sufficient.

Where a reference to other registered document is given, not only the description is sufficient to identify the property but it is a compliance with rules in force making a certain kind of description necessary. 99 Ind Cas 846 : 25 M L W 429 : 38 M L T 10 : AIR (Vol 14) 1927 Mad 369 : 52 M L J 140

——S. 22—Sufficiency of description — Description of property — Identification sufficient — Document must be registered.

Cl. (2) of S. 22 provides that a document shall not be refused registration merely because there has been a notification under S. 22, Cl. (1) unless that notification so provides. If notification merely provides that in certain districts the description should be in a certain manner and does not give any further direction, the proviso under cl. (2) would have the effect of entitling a document to be registered provided the description is sufficient to identify the property.

The document sought to be registered was substantially a compromise agreement and one of the conditions of that compromise was that "all the immovable properties pertaining to the family of the executants and mentioned in Sch. A described therein below shall be divided into four equal shares" and also "a deed of partition shall be executed separately on a proper stamp paper and that the same shall be got registered."

Held, the description is sufficient for the identification of the property. It could have been registered at least so far as it purports to be an agreement for partition. 31 All 523, Not Foll. 88 Ind Cas 901 : 16 M L W 287 : AIR (Vol 10) 1923 Mad 81 (DB).

——S. 23

—— Ss. 23 to 26, 28 and 68 and Registration Rules, R 72—Document registered in wrong sub-registry office — Re-registration — Time limit — Powers of District Registrar.

Where a document has, by inadvertence, been registered in a wrong sub-registry office in contravention of S. 28 of the Registration Act. R. 72 of the Registration Rules can be invoked for registration of that document afresh. But under that rule, the District Registrar cannot issue an order under S. 68 of the Registration Act to a Sub-Registrar within whose jurisdiction the property lies directing him to register the document afresh if the period prescribed in Ss. 23 to 26 of the Act has elapsed since the execution of the document. Under S. 68 the Registrar could only issue orders consistent with the Registration Act. Further before a Registrar can issue orders under this section it must be shown that the act or the omission complained of was the act or omission of one of his subordinates. ILR (1948) 2 Cal 252 : 53 C W N 92 : AIR (Vol 36) 1949) Cal 220 (DB).

——S. 23—Original award re-written.

Where an original award is merely re-written by the arbitrators, then the award comes within the mischief of S. 23, Registration Act, and must be presented for registration within four months from the date of execution. AIR (Vol 28) 1941 Pat 215 : 7 B R 864 : 195 Ind Cas 87 (DB).

——S. 23—Time for registration under S. 23, Registration Act has been extended by the Bengal Ten. Ordinance of 1938. AIR (Vol 27) 1940 Cal 86 : I L R (1939) 2 Cal 346 : 43 C W N 948 : 186 Ind Cas 349.

——Ss. 23, 25, 73, 75 — Registration of document more than four months after execution—Legality.

A document was presented for registration five months after its execution. The executant then denied the execution. On an application under S. 73, the Registrar found that it had been executed and the requirements of the law had been complied with and registered it under S. 75 even within there being an application under S. 25 to extent the original period of four month :

Held, that the registration was illegal and the mere fact that the Registrar found that the document was actually executed did not validate it for the original delay of more than four months after its execution was never excused under S. 25. AIR (Vol 26) 1939 Lah 292 : 42 P L R 267 : 184 Ind Cas 556 (DB).

——S. 23—Priority.

Where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage. AIR (Vol 20) 1933 Cal 398 : 60 Cal 225 : 144 Ind Cas 196.

——Ss 23, 25, 49 (1)—Registration more than four months after execution.

Where a document is presented for registration more than four months after its execution and no attempt is made, pursuant to S. 25, to account for the delay in presentation on the ground of urgent necessity or unavoidable accident, the Registrar before whom it is presented has no jurisdiction to register it. The mere fact that he has registered the document will not take the document out of the ambit of S. 49. There is no difference in principle between presentation by a person who is not entitled to present the document for registration, and presentation after the period within which the presentation has to be made, the Registrar having no jurisdiction to register it in either event. AIR (Vol 20) 1933 Rang 194 : 147 Ind Cas 287 : 11 R. 207 (DB).

——Ss. 23, 87 Document presented for registration four months after execution — Defect, if can be cured—Presumption.

Where a document is presented to the Sub-Registrar for registration after the expiry of four months from the date of execution, the Sub-Registrar has, under S. 23, no jurisdiction to entertain the application or to register the document.

Section 87 does not apply when the presentation is out of time.

When a document is presented for registration after the expiry of four months from date of execution, but it is all the same registered, it is for the person presenting the document to show that the days prior to the registration were holidays or that the office of the Sub-Registrar was closed. In such cases, the presumption is against the person presenting the document for registration. AIR (Vol 20) 1933 Rang 5 : 11 R 15 : 141 Ind Cas 705.

——S. 23—Execution at intervals.

Several executants signing a document at intervals —Document must be registered within four months of the last execution in respect of all previous executions whether they are within the four months or not.

S. 24 merely provides a safeguard for the case of a document never executed at all by one or more of the people by whom it was to have been executed, when each execution is good to the extent of the executant's interest in the subject-matter.

Where out of five expected executants of a document, four signed at intervals of four months, and the fifth refused to sign and could not be compelled to do so.

Held, the last execution would be the fourth and registration would be time-barred four months after it, but within those four months it would be within time against the first three executants also. 110 Ind Cas 498 : 24 N L R 106 : 11 N L J 96 : AIR (Vol 15) 1928 Nag 239 (DB).

——S. 23—Presentation beyond time — Document presented beyond time—Registration is invalid

Obiter.—Per Sadasiva Aiyar J. The registration of a document presented beyond the period prescribed by Ss. 23 to 26 of the Registration Act is invalid. It is not a mere irregularity under S. 87 of the Act. 59 Ind Cas 978 : 43 Mad 288 : 38 MLJ 149 : AIR (Vol 7) 1920 Mad 763 (DB).

——Ss. 23, 24, 25, 26 — Date on instrument — Optional registration—S. 17, Part VII of the Act—Operation of S. 77—Description, sufficiency of.

Held. (1) It is not essential for the registration of a document that it should be dated. When a document tendered for registration is, as a matter of fact executed, parol evidence is admissible to prove when the execution took place.

(2) Where a deed gives the names of the Dihis and Chuks of the properties comprised therein, but not the names of the Districts wherein they are situated, the description is sufficient for the purposes of registration.

(3) The provisions of Part VII for enforcing the appearance of executant and witnesses are applicable to the case of an executant of a document, the registration of which is optional and the refusal of such an executant gives rise to a cause of action under S. 77. (1904) 1 C L J 126 (132) (DB).

——S. 23-A.

——S. 23-A — Limitation for suit — Starting point.

A disappointed applicant under S. 23-A has a right to bring a suit under S. 77, and the limitation runs from the date of the finding of the Court and not from the date when plaintiff came to know about the plea of invalidity of the document. A I R (Vol 29) 1942 Pesh 37 : 200 Ind Cas 632 (D B).

——S. 23-A — Period of limitation, when starts.

Where the defendants had disputed the validity of registration of a document long before in their written statements and the plaintiffs alleged that the registration was valid and the plaintiffs' contention was upheld by the trial Court and it was only on appeal that it was held to be invalid :

Held, that for the purposes of re-registration, the four months' period as required by S. 23-A, must be computed from the date of the appellate judgment. A I R (Vol 22) 1935 Lah 32 : 152 Ind Cas 611.

——S. 23-A — Re-registration — Effect if retrospective.

Section 23-A was enacted specially to enable parties to get technical defects in the previous registration of the documents removed and when a document is registered under that section, it takes effect from the date of original registration and in special circumstances an Appellate Court can take notice of facts material to the decision of a case, which have arisen subsequent to the decision of the suit by the lower Court. Consequently, the evidence regarding re-registration of the document can be produced in

second appeal. A I R (Vol 22) 1935 Lah 32 : 152 Ind Cas 611.

——S. 23-A — Adopted son.

Under S. 23-A, the adopted son is a person claiming under the document and is a proper person to represent the document. (1933) 1933 M W N 1148 (D B).

——S. 23-A — Scope.

All cases where the person presenting the document was not entitled to present it are covered by S. 23-A. (1933) 1933 M W N 1148 (D B).

——S. 23-A — Scope.

Section 23 A requires that the document which was erroneously registered should be one requiring registration. The section does not say "a document requiring registration and presented for registration under its correct description." Whether the character of the former presentation was of the correct character or incorrect character is immaterial. (1933) 1933 M W N 1148 (D B).

——S. 25.

——S. 25 — Order extending time — If should be passed within time contemplated by S. 25.

There is nothing in S. 25 of the Registration Act which requires that the order allowing an extension of time should also be passed by District Registrar within the period of eight months contemplated by S. 25 of the Registration Act. To read such a provision into the Act would mean that there would be a curtailment of the period allowed to the applicant to present the document because the order of the District Registrar would naturally be passed after some inquiries. There is no justification in S. 25 for this view. 1950 A W R 669.

——Ss. 25 and 77 — Discretion of Registrar extending time — Interference by Civil Court.

A District Registrar acting under S. 25 of the Registration Act has been invested with the discretion to decide whether there was an urgent necessity or unavoidable accident which led to the delay in presentation for registration and it is not the function of a Civil Court in a suit under S. 77 of the Act to sit in appeal over decisions of the Registrar in such a discretionary matter. 1950 A W R 669.

——S. 25 — Refusal to condone delay — Suit, when lies.

Where, upon the refusal of the Registrar to condone the delay under S. 25, the Sub-Registrar makes an order refusing registration, suit under S. 77 does not lie if no appeal is made to the Registrar against the order of the Sub-Registrar. A I R (Vol 26) 1939 Bom 254 : 41 Bom L R 470 : 182 Ind Cas 943 (D B).

——S. 25 — Sub-Registrar registering document already four months old — Registration, if good.

The Registration Officer who is merely a Sub-Registrar, is not empowered to extend the time beyond the standard four months (a power which is only vested in the Registrar himself under S. 25) and has no jurisdiction to proceed with the registration of the document which is already four months old. Such a registration is bad. A I R (Vol 25) 1938 Rang 53 : 174 Ind Cas 490 (D B).

——S. 25 — Interference by Civil Court.

Presentation after time — Refusal to register — Civil Courts are debarred from questioning the decision. A I R (Vol 17) 1930 Lah 710 : 11 Lah 218 : 31 P L R 508 : 120 Ind Cas 488 (D B).

——S. 25 — Suit is competent under S. 77 even where Sub-Registrar refuses to accept document for registration under S. 25, because there is no difference of meaning between "refusing to register" and "refusing to accept for registration" as used in Registration Act. 21 Bom 699, Diss. from. A I R (Vol 16) 1929 Bom 365 : 53 Bom 644 : 31 Bom L R 676 : 119 Ind Cas 651 (D B).

—— Ss. 25 and 77 — Document presented after four months — Discretion — Civil Courts

A Civil Court will decline to direct registration of a document not presented for registration within four months as required by S. 23 and there is no order of the Registrar extending the time. A I R (Vol 4) 1917 Lah 39 : 39 P R 1917 : 64 P L R 1917 : 123 P L R 1917 : 112 P W R 1917 : 41 Ind Cas 64 (D B).

——S. 25 (1) — Refusal to excuse delay in presentation.

Whether the order refusing to excuse delay in the presentation of a document for registration is one passed by the Sub-Registrar after his communicating about it to the Registrar or one passed by the Registrar on application directed to him, it is a refusal to excuse delay under S. 25 (1) which furnishes a ground for a civil suit under S. 77.

Per Seshagiri Iyer J. — An order refusing to excuse delay in the presentation of a document for registration under S. 25 (1) of the Registration Act is an order refusing to register the document, which furnishes ground for a civil suit under S. 77.

(Per Bakewell J.) Refusal to excuse delay in presentation of document is not a refusal to register it. A I R (Vol 4) 1917 Mad 277 : 19 M L T 397 : (1916) 2 M W N 38 : 34 Ind Cas 769 (D B).

——S. 26.

——S. 26 — Document affecting immovable property situated in British India executed outside British India — Need for registration.

A document effecting immovable property situated in British India of which registration is compulsory under S. 17 of the Registration Act is not valid, even if executed outside British India, unless it is registered in British India under S. 26 of the Act. A I R (Vol 35) 1948 Nag 110 : ILR (1947) Nag 510 (DB).

——S. 27.

— S. 27 — Notice of prior contract — Vendee not having paid a substantial portion of sale consideration before notice — Whether entitled to protection of S. 27 — Good faith.

Where, before the Registrar has made the endorsement of the presentation of a document for registration of a sale deed, a third party files an application to the effect that he had a prior contract in his favour of which notice is required to be given to the vendor and the vendee, if the vendee has not paid at least a substantial portion of the sale consideration before notice, he cannot be said to have paid his money in good faith so as to be entitled to the protection given by S. 27. A I R (Vol 21) 1934 All 1045 : 1934 A L J 871 : 4 A W R 375 : 57 All 346 : 152 Ind Cas 39 (D B).

——S. 28.

1. Burden of proof.
2. Estoppel.
3. Procedure.
4. Validity of registration.

1. Burden of proof.

——S. 28 — Fraudulent registration — Burden of proof.

In a deed of trust executed by a person in 1893 for the benefit of his children, a small piece of land was included along with other large areas and the deed was registered in the place where the small piece of land was situated. In 1924, the son and grandson of the person who created the trust filed a suit in which they contended that the deed was illegal on the ground that registration was invalid owing to the fact that the small piece of land did not belong to the owner but was included only to effect registration in that particular place :

Held, (1) that the onus was on the plaintiffs to prove that the trustees were aware of the want of

title of the author of the trust and that they colluded with him in committing the fraud on the Registration Office and that they had not proved it ;

(2) that the registration of the deed was, therefore, valid under S. 28. A I R (Vol 22) 1935 Bom 54 : 36 Bom L R 738 : 152 Ind Cas 715 (DB).

——S. 28 — Inclusion of small item in registered deed, when amounts to fraud—Onus of proof.

As in the case of every other kind of fraud, a party who sets up fraud on the registration law is bound to make it out by clear and cogent evidence and there should be strong evidence of collusion between the parties to the document before a party can be deprived of the benefits accruing to him under a registered deed on the ground that there was a fraud on the registration law.

A mere failure to make a good title to the property dealt with by the instrument is something totally different from fraud. The crucial question in such cases is, was it intended or not that the document should take effect in regard to the particular item of property in dispute. The fact that it is a fictitious item may often furnish clear evidence of fraud, but when the item does exist, to invalidate a transaction on the ground that the party has not adduced satisfactory evidence as to his title, is to misunderstand and misapply the law on the subject. A I R (Vol 22) 1935 Mad 26 : 1934 M W N 1082 : 40 L W 749 : 154 Ind Cas 572.

——S. 28—Fraud on Registration law—Onus.

The burden of proving that there has been a fraud on the law of registration is on the party setting it up. A I R (Vol 18) 1931 Mad 45 : 32 L W 680 : 1930 M W N 1067 (DB).

——S. 28—Intention of parties material — Property intended to pass—Motive immaterial.

The burden of proving fraud on registration lies on the party setting up the plea. Where the evidence showed that the small item included in the deed was intended to be conveyed in order to give the Sub-Registrar of the place jurisdiction, held, that the document was not rendered invalid. Rule regarding fraud on registration law discussed. A I R (Vol 17) 1930 All 797 : 1930 A L J 724 (DB).

——S. 28—When a party attacking a deed has shown that the plot in virtue of which registration was effected was one which either did not exist or to which the mortgagor never had any title this is sufficient to raise a presumption that a fraud had been intended and the burden of showing that no fraud had been committed thrown on the other side. A I R (Vol 11) 1924 Oudh 136 : 26 O C 336 : 73 Ind Cas 13.

——S. 28 — Non-existent property — Registration officer having no jurisdiction.

At the time the sale was executed in favour of the plff. the vendor had no title whatever in a plot which was entered in the sale deed merely to enable its registration to be made in a certain place. Held, that the burden of proving that the entry regarding that plot was not a fictitious entry was cast on the plff. The plaintiff having failed to discharge that burden it must be held that the sale-deed was invalid, as the registration was collusive and fraudulent. A I R (Vol 7) 1920 Oudh 34 : 23 O C 38 : 7 O L J 36 : 2 U P L R (J C) 37 : 55 Ind Cas 511.

——Ss. 28, 32 and 5—Registration at proper office—Burden of proof.

The burden of proving that the registration of a document is invalid, because it has not been registered at the proper registration office is on the party alleging it. According to S. 5 of the Act transfers of jurisdiction for purposes of registration should be declared only by notifications under that Act. Per Roe, J.—Where a person alleges that the description of the property given in a registered deed is incorrect, the burden of proving the incorrectness would lie on him under S. 114 of the Indian Evidence Act. A I R (Vol 4) 1917 Pat 387 : 3 Pat L W 325 : 39 Ind Cas 143 (DB).

2. Estoppel.

—— S. 28—Inclusion of item to procure registration at particular office—Absence of intention to convey the item Executant of deed, if can plead invalidity of deed—Estoppel.

Where, in a sale-deed an item of land, which did not belong to the vendors and which was not intended by any of the parties to pass to the vendee, was included solely for the purpose of getting the document registered in a particular Sub-Registrar's Office where documents relating to the other items could not be registered, and one of the executants of the sale deed sued for possession contending that the sale was void as the deed was not duly registered :

Held, that the plaintiff could not be allowed to plead or take advantage of any invalidity in the registration of the deed. AIR (Vol 19) 1932 Mad 311 : 1932 M W N 226 : 35 L W 294 : 55 M 507 : 63 MLJ 77 : 139 Ind Cas 404 (DB).

——S. 28—Misrepresentation by mortgagor—Registration is valid if mortgagee is innocent.

Where the mortgagor represented to the mortgagee that he (the mortgagor) was the owner and proprietor of the land mortgaged and it is not proved that the mortgagee knew at the time of taking the mortgage that the land in question did not belong to the mortgagor, held, the mortgagor cannot take advantage of his own fraud by pleading that the mortgage-deed was not registered at the proper place. AIR (Vol 9) 1922 All 231 : 66 Ind Cas 681 (DB).

(3) Procedure.

——Ss. 28 and 30—Scope of—Sections do not provide for two different modes of registration— Officer empowered under S. 30 (2)—No part of property comprised in deed situate within his district — Registration is not invalid on ground that it is under S. 28 — Requirement as to payment of additional fee provided by Registration Manual has nothing to do with his jurisdiction.

Per Chakravartti J. — Sections 28 and 30 do not provide for two different modes of registration and do not warrant the view that if an officer, specially empowered under S. 30 (2), registers a deed comprising property no part of which is situated within his own registration district, such registration shall be valid only if the registration is impliedly or in substance under S. 30 (2), and shall be invalid if the registration is under S. 28. There is no such thing as registration under one section rather than under another. It is true that the Registration Manual provides for additional fees to be levied in cases where a District Registrar or a Registrar of a Presidency Town registers a document comprising property, no part of which is situated within his registration district. But that requirement has nothing whatever to do with his jurisdiction to register a deed and it cannot be supposed that when such an officer registers a deed on receipt of the lower fee, he somehow contracts into a Sub-Registrar and exceeds his authority if he exercises the larger powers. The authority conferred by S. 30 (2) is absolute, and it is in no way affected by the Registrar charging the lower fee chargeable in cases where some part of the property is situate within his jurisdiction. The levying of a lower fee may be an irregularity and if it is an irregularity, it may be curable under S. 87 of the Act. But it is a complete mistake to suppose that the matter has any bearing whatever on the jurisdiction of the Registrar to make the registration in such circumstances. A I R (Vol 33) 1946 Cal 465 : 50 C W N 569 : 81 CLJ 123 : 227 Ind Cas 449 (DB).

——Ss. 28, 29 — Document must be considered as a whole — Mortgage bond coming under S. 28 but registered in wrong office.

In considering what class a document falls within, one has to regard it as a whole. The Court cannot reform it by notionally cutting out most of the clauses which the parties let in and then say : Thus altered, this has ceased to be a mortgage and become a bond, has ceased to fall within S. 17 and falls within S. 18, has ceased to be subject to S. 28 and become subject to S. 29.

Where a mortgage bond begins and ends as a mortgage, it is compulsorily registrable under S. 28. It cannot be treated only as a registered bond, and as such, optionally registrable under S. 29 simply because it was registered in a wrong office. AIR (Vol 26) 1939 Nag 57 : 1939 NLJ 44 : ILR (1939) Nag 64: 179 Ind Cas 933 (FB).

——S. 28—Mortgage of two properties situate in two districts—One forming small portion in value—Deed registered in place where such property is situate.

Where a mortgagor mortgages two properties one consisting of a house and the other of some shares in a certain village and both the properties are situate in different districts, and the house is included in the deed mainly with the intention of getting the registration done in the place where it was situated, the mere fact that the house is of small value compared with the village shares is not sufficient to invalidate the registration. If the parties to the mortgage intended that this house should not form part of the mortgaged property and inserted it in the mortgage deed without intending that any interest in it should be transferred, then, no doubt, the insertion of the house in the mortgage-deed would have been fraudulent and the registration invalid. 18 NLJ 291 : (1936) 163 Ind Cas 961 (DB).

——Ss. 28 and 29 — Registration in district where transferor had no property.

In the absence of fraud on the part of the transferee, or collusion between the transferor and the transferee, the mere fact that the transferor had no title only to the property which would give jurisdiction to the office where the document was registered would not be a bar to the Registrar's jurisdiction. A I R (Vol 5) 1918 Pat 595 : 4 Pat L W 237 : 44 Ind Cas 399 (DB).

—— S. 28 — Place of registration — No property in—Effect of.

A person who has no property in a particular district cannot validly register a bond in that district. The Registrar of the district has no jurisdiction to register that bond and such a bond does not create any liability against any person. A I R (Vol 3) 1916 Cal 551 : 29 Ind Cas 413 (DB).

——S. 28—Registration at wrong office.

Registration in a sub-district in which the property is not situated is "without jurisdiction" and is invalid. AIR (Vol 1) 1914 All 76 : 12 ALJ 918 : 24 Ind Cas 451 (DB).

——Ss. 28, 32, 49 and 60 — Registration in wrong office.

A document is not registered in accordance with the Act if no part of the property, is situate within the jurisdiction of the registrar who registers the deed. (1914) 12 ALJ 913 : 26 Ind Cas 52.

——S. 28—Registration at wrong office— Validity—Error of procedure.

Registration of document in a Sub-Registrar's Office within whose sub-district no portion of the property is situate does not render the registration invalid. All errors of a Registrar, antecedent to registration must be regarded merely as errors of procedure not affecting the validity of the instrument registered. (1913) MWN 525 : 24 MLJ 664 : 14 MLT 237: 20 Ind Cas 385 (DB).

——S. 28 — Registration at wrong office — False statement — Jurisdiction of registrar—Invalid deed.

A false statement concerning certain property to which the vendor had no right was made in a sale deed in order to give jurisdiction to the Sub-Registrar who otherwise had no jurisdiction to register the deed :

Held, that the registration was invalid and the deed was void for want of registration. (1912) 9 ALJ 766 : 16 Ind Cas 108.

——S. 28 — Title to property within jurisdiction — Enquiry as to—Duty of Registering officer.

It is not the duty of a registering officer to inquire into the title of a person registering the document. It is enough if property is situate within the jurisdiction of the registering officer and the document cannot be questioned on the basis that the executant had no title to the property. (1910) 13 OC 265: 7 Ind Cas 614 (DB).

——S. 28—Property— Portion of it situate in British India and another portion out of British India.

A person can have his document registered in a district in British India where a portion of the property is situate although the other portion of the same may be situated outside British India and in the territory of a Native State. (1900) 2 Bom L R 608: 25 B 50 (51) (DB).

4. Validity of registration.

(a) Essentials.
(b) Inclusion of a small item.
(c) No intention.
(d) No valid title.
(e) Property non-existent.
(f) Wrongful inclusion.
(g) Miscellaneous.

(a) Essentials.

——Ss. 28 and 30 — Evasion of registration law—Test — Intention of parties that property on basis of which document is registered should form part of transaction is crucial test—Whether property admits of physical enjoyment is no test — Law permitting registration in intended jurisdiction without inclusion of particular property in document — Inclusion of such property does not show intention to commit fraud on law of registration.

The crucial test to be applied in order to find out whether the registration law was evaded or defrauded is whether or not the parties intended that the property in question on the basis of which the document was registered should form part of the transaction. In order to find out the intention, the fact whether the property admits of physical enjoyment may no doubt be sometimes relevant, but it is not the crucial test.

Where the law permits registration of a document in the intended jurisdiction, independent of the inclusion of any item of property in it, it cannot be said that the parties intended by such inclusion to commit a fraud on the law of registration. A charge of fraud is not to be lightly laid. Where the admitted facts themselves rule out a possible foundation for fraud, a superstructure of fraud cannot be raised, merely by trying to show that the property which was included in the document was a "fictitious" property in the larger sense of the word, that is property existing but being of inconsequential character and not intended to be transferred.

A mortgage deed comprised two properties which were situated outside Calcutta. The third item of property was a Calcutta property. The Calcutta property was actually acquired by the mortgagor on the very day that the mortgage was executed and it was admittedly acquired for the purpose of including in the mortgage, because the mortgagee would not advance any money unless some Calcutta property was also included. The purchase was in fact put

through for the mortgagor by the mortgagee's attorneys and the consideration w s also deducted by the attorneys from the mortgagee fore it was made over to the mortgagor. The price paid for the property was Rs. 100. The deed was registered by the Registrar of Assurances in Calcutta. It was contended that the mortgage bond was invalid for want of proper registration on the ground that a "fictitious" property in Calcutta was deliberately included in the document with a view to get it registered in Calcutta :

Held, that under S. 30 of the Registrar of a Presidency Town could have registered the document without inclusion of the Calcutta property on payment of an extra fee which at the time the document was registered was a sum of Rs. 20. It was difficult to see, therefore, why in order to save this extra fee of Rs. 20 any of the parties to the transaction should go to the trouble and expense of acquiri g a property at a much higher value and then including it in the document only for the purpose of securing its registration in Calcutta. There could, therefore, be no doubt that the mortgagee definitely intended that a Calcutta property should be included, and the mortgagor definitely acquired a Calcutta property in order that it might be included in the mortgage. The parties certainly contemplated that the property should form part of the mortgaged premises. Whether or not the mortgagee afterwards gave up the security of the Calcutta item was of no significance. The point was whether at the time the mortgage was executed this was intended to form part of the security, and it was abundantly clear that the intention was that this Calcutta property should form part of the security which was offered by the mortgagor. A I R (Vol 33) 1946 Cal 465 : 50 C W N 569 : 81 C L J 123: 227 Ind Cas 449 (DB).

——S. 28 — Authority to register arises from existence of some property within registering officer's jurisdiction — Property capable of ownership and enjoyment and intended to pass — Registration is valid — Inconsequential character of property and object of its inclusion are immaterial (Obiter).

Per Chakravartti J. — The Registration Act makes no distinction between substantial properties and properties of small value. The authority to register arises from the existence or some property within the jurisdiction of the registering officer and if the property is a property as the term is understood in law and is capable of ownership and enjoyment and if it is intended to pass, then however inconsequential in character it may be and whatever may be the object with w ich it is included in the document, as a matter of the law the registration would be valid. AIR (Vol 33) 1946 Cal 465 : 50 C W N 569: 81 C L J 123 : 227 Ind Cas 449 (DB).

——Ss. 28 and 49 — Registration law — Compliance with—Criterion is intention of parties—Sale of share in village in district B — Sale deed also including small property in district A — Latter property purchased to acquire status of cosharer — Sale-deed registered in district A — Property held was intended to be transferred—Sale-deed held was not void.

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided.

The test for determining whether the inclusion of a small item of property situate at a place where a sale-deed is registered renders the sale invalid is whether it was actually intended to be transferred.

Where by a sale-deed registered in district A, a share in a village situate in district B was sold and the deed also included a small item of land and a tree situate in district A and the latter property was purchased by the vendee to acquire the status of a coshare :

Held, that the small item of land and the tree were intended to be transferred by the vendor to the vendee and, having been actually transferred, the registration of the sale-deed was not void and ineffective on account of its having been registered in district A. AIR (Vol 33) 1946 Oudh 92 : 1945 O W N 30 (DB).

——S. 28 — Property existing within Registering Officer's jurisdiction—Failure of transferee to prove transferor's title to such property.

Where the property included in the transfer deed actually existed within the jurisdiction of the Registering Officer, and the parties intended to transfer it, the registration would not be affected merely because the mortgagee or transferee fails to prove the title of the mortgagor or the transferor. A I R (Vol 28) 1941 All 179 : 1941 A L J 168 : 1941 O W N 295 : I L R (1941) All 320 : 1941 A W R 83 : 195 Ind Cas 25.

——S. 28—Fraud on registration—Criterion.

In determining whether the requirements of the law as to registration have been complied with the intention of the parties is the criterion by which the matter must be decided. Where the donor intended to vest the property in the donee, the inclusion of the property in a gift deed cannot be held to be a device to evade the Registration Act. AIR (Vol 28) 1941 Oudh 348 : 1941 O W N 532 : 1941 A W R 129: 194 Ind Cas 87.

——S. 28—Objection to defective registration.

In the absence of any collusion between the donor and the donee, the registration of the deed cannot be challenged as being defective in law. A I R (Vol 28) 1941 Oudh 348 : 1941 O W N 532 : 1941 A W R 129 : 194 Ind Cas 87.

——S. 28—Mere failure to make good title by mortgagor to property dealt with by the instrument, does not establish fraud.

Where registration of a mortgage is sought to be invalidated on the ground that mortgagor included in the deed, property which was not his own, for effecting registration at a certain place, it is not sufficient to show that the mortgagor contemplated a fraud. It must be further shown that the mortgagee was a party to it. The crucial question always is "Did the parties intend or not that a certain item should form part of the security." If the parties did then fraud is out of question. It is not sufficient to render a document invalid that the mortgagor is unable to establish his title to property and even if his title is not established it must be shown that the mortgagee was aware of the fact that such property was included. A I R (Vol 16) 1929 Mad 432 : 117 Ind Cas 124 (DB).

——S. 28 — Registrar having jurisdiction — Property existing — Registration is valid unless fraud or collusion exists. A I R (Vol 15) 1928 Nag 1 : 107 Ind Cas 517 : 23 N L R 143 : 11 N L J 49.

——S. 28—Property owned by the donor and intended to be transferred Registration is valid.

The Registration of a document by the Registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if in fact the property in question does exist. It is enough for the purpose of Registration that the donor had a good title to the property and intended to part with that property in favour of the donee. Whether the donee really exercised his right conferred by the deed is not at all essential. AIR (Vol 13) 1926 Pat 582 : 99 Ind Cas 782 : 5 Pat 646 : 7 L T 821 (DB).

——S. 28—Fictitious property included by mortgagor not in collusion with the mortgagee, does not affect mortgagee. A I R (Vol 12) 1925 Mad 430: 79 Ind Cas 869.

——S. 28 — Obiter. — The inclusion in sale-deed of item of property merely for the sake of registration does not amount to fraud on registration where the transferor is entitled to transfer it. A I R (Vol 11) 1924 All 897 : 82 Ind Cas 243 : 46 All 754 : 5 L R A Civ 509 (DB).

——S. 28 — The inclusion in sale-deed of property which the parties intended to be transferred but of which possession was not taken by vendee does not amount to fraud on registration and does not render it invalid simply because the deed which included other items of property was registered in the office of the Sub-Registrar having jurisdiction over the place in which the former item of property was situated. A I R (Vol 11) 1924 All 897 : 82 Ind Cas 243 : 46 All 754 : 5 L R A Civ 509 (DB).

——S. 28 — Non-existent property included to effect registration at a particular place—Registration valid, unless collusion between parties is proved. AIR (Vol 11) 1924 Mad 281 : 77 Ind Cas 464 : 33 M L T 243 : 1924 M W N 125 : 46 M L J 12 (DB).

—— S. 28 — Interpolation of fresh property for purposes of registration — Consent of mortgagors and attesting witnesses.

With the consent and knowledge of the mortgagor and in the presence of the attesting witnesses an item was put in the mortgage to avoid delay in registration and to get the document registered in an office near the place where the mortgagor was living,

Held, the inclusion of the item was not a fraud on the Registration Law and did not invalidate the document. AIR (Vol 7) 1920 Mad 596 : 43 Mad 405 : 38 M L J 251 : 11 L W 192 : (1920) M W N 205 : 55 Ind Cas 86 (DB).

——S. 28—Property included in mortgage deed within jurisdiction—Vendor having no title—Fraud.

In a mortgage deed certain immovable property was included which actually existed within the jurisdiction of the registering officer but the mortgagor had no title thereto.

Held, that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and the mortgagee. AIR (Vol 6) 1919 All 450 : 41 All 22 : 16 A L J 871 : 48 Ind Cas 200 (DB).

——S. 28 - Place of registration—Wrong inclusion of property—Collusion.

Where there is any fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register a document by including property which does not exist, this is sufficient to invalidate the registration. But registration is not invalid if the property described exists, merely because it transpires that the transferor though acting in a perfectly bona fide manner, has ceased to have an interest in the property. A I R (Vol 6) 1919 Pat 572 : 4 Pat L J 433 : 52 Ind Cas 446 (DB).

——S. 28—Mortgagor not owning property.

The registration of a mortgage deed is not invalid simply because the mortgaged property contains a part, to which the mortgagor has no title. (1910) 14 C W N 532 : 5 Ind Cas 127 (DB).

(b) Inclusion of a small item.

——S. 28 — Fraud on registration — Inclusion of small item to give jurisdiction — Title intended to pass—Validity of registration.

Obiter:—Where a small item of property is included in a deed not fraudulently but openly with the intention that it should pass for what it is worth, the registration is not invalid even though such inclusion is with the definite object of making registration possible at a particular place. The Registration Act makes no distinction between substantial properties and properties of small value. The authority to register arises from the existence of some property within the jurisdiction of the registering officer, and if the property is a property as the term is understood in law and is capable of ownership and enjoyment, and if it is intended to pass, then however inconsequential in character it may be and whatever may be the object with which it is included in the deed, as a matter of law, the registration would be valid. A I R (Vol 33) 1946 Cal 465 : 50 CWN 569 : 81 CLJ 123 : 227 Ind Cas 449 (DB).

——S. 28—The criterion by which the question must be decided is whether upon the facts established by the evidence, the parties intended this one yard of land to pass under the deed. The motive may be immaterial if the requirements of the law have been complied with but of this the intention is critical and no such intention existed in this case.

Where the bulk of property conveyed was situated in one district and a ridiculous fraction of land situated in another district was included in the deed to enable registration in that other district :

Held, that it was the inevitable conclusion from the facts that neither did the vendor intend to sell, nor did the purchaser intend to buy, this almost ridiculous fraction of land, and that the so called sale of it was a mere device to evade the Registration Act and that there was no effective registration of the conveyance. A I R 1931 Mad 45, reversed on evidence : A I R (Vol 23) 1936 P C 91 : 1936 AWR 311 : 2 BR 338 : 1936 OWN 278 : 1936 MWN 305 : 70 MLJ 378 : 43 LW 456 : 1936 ALJ 258 : 40 CWN 545 : 38 Bom LR 457 : 38 PLR 308 : 19 NLJ 89 : 63 CLJ 382: 59 Mad 539 : 63 IA 169 : 161 Ind Cas 29.

——S. 28 — Insignificant item included in order to effect registration in a certain place — Intention of parties — Registration, validity of — Tests.

A deed purported to transfer as one parcel four villages in an estate and as a separate item of property, a one-third share in a sitting room in a garden in another Mohalla. No part of the garden was included in the sale and the purchaser was given no right of way or other access to the room. As compared with the value of the four villages, this property was insignificant. It was found that this insignificant item of property was never contemplated as really forming a part of the consideration and was entered in the sale-deed presumably with the only object of getting the deed registered at a certain place :

Held, that the circumstances pointed out that the parties never intended that this undivided share of the sitting room should really be sold and that the so called sale was a mere device to evade the Registration Act.

The word 'fictitious' used in Harendra Lal Ray v. Hari Dasi Debi, [23 I. C. 637] is not confined to non-existing properties. It is satisfied if the deed does not "relate" to a specified property for any effective purpose of enjoyment or user. AIR (Vol 21) 1934 P C 157 : 11 OWN 889 : 40 LW 217 : 1934 ALJ 779 : 67 MLJ 274 : 15 PLT 531 : 60 CLJ 67: 1934 MWN 751: 36 Bom LR 867 : 38 CWN 1101 : 56 All 468 : 61 I A 286 : 4 AWR 46 : 150 Ind Cas 545.

——S. 28—Fraudulent exclusion of item—Strict proof of fraud and collusion, necessity of.

There should be the strongest possible evidence of the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors. AIR (Vol 18) 1931 Mad 335 : 60 M L J 302 : 33 L W 727 : 131 Ind Cas 840 (DB).

——S. 28 — Inclusion of item merely for purposes of registration at particular place.

Where the contention is raised that the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdic-

tion to the Registrar, the true test whether S. 28 has not been complied with will be in cases where the parties intend the document to be a deed or real transfer, did they collude in intending that that piece of property should not pass : and in cases where the parties intend the document to be nominal or benami, did they collude in intending it not to apply, so far as it has validity to that piece of property. The test for both cases is : did the parties, in including that property, intend to deceive the registration authorities, and so escape the mischief of S. 28.

The facts that the property is small, or that the primary intention was that registration should be in a particular office, will not in themselves constitute acts of fraud. AIR (Vol 18) 1931 Mad 45 : 32 L W 680 : 1930 MWN 1067 : 54 Mad 352 : 60 MLJ 701 : 129 Ind Cas 245 (DB).

[Reversed on facts in A I R 1936 P C 91]

——S. 28—If property belonging to transferor is intended to be conveyed there is no fraud however small the property may be.

The object of the parties to get registration effected at any particular place cannot per se amount to a fraud on the registration department. They are the best judges of their own convenience. The inclusion of a bit of a property howsoever small does not necessarily imply any fraud on registration. So long as the parties satisfy the requirements of S. 28, Registration Act, they are acting well within their powers.

If in order to enable themselves to present a deed for registration at a particular registration office, the parties to the deed include a small list of property situated within the jurisdiction of that office in the deed, honestly believing that that property belongs to the transferor, and intending that it should pass from the transferor to the transferee they are not guilty of committing any fraud on the Registration Department and the deed is valid. AIR (Vol 17) 1930 All 797 (DB).

——S. 28—Fraud—Burden of proof.

The fictitious inclusion of property never intended to be sold can amount to fraud on registration law. The burden of establishing fraud lies on the party who pleads it. Where the property did exist and though its value and utility to the purchaser were very little there was nothing to show that the parties did not thereby intend to confer jurisdiction on the Sub Registrar. Held, that the Court cannot in the absence of stronger evidence infer fraud. AIR (Vol 17) 1930 All 786 : 1930 ALJ 926 (DB).

——S. 28—Test for validity.

The test for determining whether the inclusion in a sale deed of a share in property at a particular place with the object of getting the deed registered at that place renders the sale invalid would appear to be whether it was actually intended to be transferred. If the parties did intend to transfer it, the sale would be valid although the motive for the inclusion of the property was merely to secure registration at that place. AIR (Vol 16) 1929 Lah 812 : 10 LLJ 375 : 10 Lah 381 : 30 PLR 546 : 116 Ind Cas 457 (DB).

——S. 28—Property included for effecting registration at particular place—Property belonging to transferor and intended to be transferred—Registration is valid. AIR (Vol 16) 1929 Nag 318 : 119 Ind Cas 701.

——S. 28 — The inclusion of a small plot of land belonging to the lessor in a different locality from bulk of the property leased for the purpose of obtaining the registration of the deed at a particular place will not of itself render the registration of the deed at that place invalid. AIR (Vol 15) 1928 Pat 89 : 8 P LT 829 : 105 Ind Cas 172 (DB).

——S. 28—Sale of property by one to another for the sole purpose of giving that other right to registered mortgage deed in a particular place is not invalid. AIR (Vol 14) 1927 All 422 : 49 All 680 : 25 ALJ 349 : 100 Ind Cas 1029 (DB).

——S. 28—Unless both the parties to a document had the intention to evade the registration law by including property in the document simply for giving jurisdiction to the Sub Registrar, the document is not necessarily invalid. AIR (Vol 14) 1927 Mad 92 : 25 MLW 327 : 98 Ind Cas 195.

——S. 28 — Property purchased and included in gift deed with a view to give particular Sub-Registrar jurisdiction to register—Gift deed is valid AIR (Vol 13) 1926 Oudh 136 : 2 OWN 947 : 91 Ind Cas 512.

——S. 28—Property included in a deed only to give jurisdiction to Sub-Registrar—Intention of parties to reconvey the property after registration does not invalidate Registration.

The Registrar had jurisdiction to Register that document, because a portion of the property mentioned in the deed was within his jurisdiction, and evidence cannot be led with regard to the intention of the parties at the time the document was registered to deal again with the portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid. AIR (Vol 12) 1925 Bom 514 : 49 Bom 821 : 27 Bom L R 1103 : 92 Ind Cas 628 (DB).

——S. 28—Small property purchased and included by vendor in the sale-deed to confer jurisdiction on the particular Sub-Registrar — No dishonest motive proved — Registration is valid — Defect in title of vendor's vendor does not affect validity. In a proceeding for Registration of a document, title to property cannot be gone into. Section 28 does not require anything more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to Register the same, AIR (Vol 12) 1925 Pat 787 : 4 Pat 394 : 7 PLT 507 : 92 Ind Cas 1034 (DB).

——S. 28—A small item of property included only for Registration will not invalidate Registration if the property is intended to be transferred. AIR (Vol 12) 1925 Pat 194 : 78 Ind Cas 492.

——S. 28 — Where a small grove which was the only part of the mortgaged property within the jurisdiction of the Sub-Registrar did in fact exist and was believed by both parties to belong to the mortgagor and where both parties intended to deal with it.

Held, that there was no fraud on the Registration Act and that the actual existence of the mortgagor's title did not affect the question. AIR (Vol 11) 1924 All 473 : 5 LRA Civ 419 : 82 Ind Cas 736 (DB).

——S. 28 — Inclusion of property for purposes of registering document in wrong place.

If an inclusion of a property of small value in comparison to others, is made a security for the purpose of getting the document registered by a particular Sub-Registrar that motive of inclusion cannot be said to be in fraud or violation of the Registration Act so as to affect the validity of the document. AIR (Vol 7) 1920 Mad 974 : 12 LW 754 : (1920) MWN 487 : 58 Ind Cas 849 (DB).

——S. 28—Registration — Validity — Jurisdiction of registering officer — Property actually within jurisdiction included in conveyance — Vendor found not to have title in it—Fraud not found.

Where the title to the only item of property sold by a kobala which would give the Sub-Registrar jurisdiction to register it was disputed and ultimately found not to have been in the vendor :

Held, that this alone, in the absence of fraud on the part of the vendor or the vendee or collusion between them would not render the registration of the kobala by the Sub-Registrar invalid, when the property did in fact exist within his jurisdiction. (1910) 14 CWN 532 (534) : 5 Ind Cas 127 (DB).

(c) No intention.

——S. 28 — Fraud on registration—Property mentioned in sale-deed not existing or of no effective use or enjoyment -Evidence as to vendee's intention not to take possession of the vended property, whether admissible.

Where certain of the property mentioned in a sale-deed either does not exist at all or is property of which no effective use or enjoyment can be made, the sale-deed cannot be said to relate to that property within the meaning of these words as they occur in S. 28. However the case is otherwise where, the land belongs to the vendors and is described with such particularity that there is no difficulty at all in identifying it; and is such as can be effectively used.

Where the validity of a sale-deed is impeached on the ground that it could not legally be registered in a particular sub-registry district oral evidence may be adduced to show that the property in that sub-registry district which it purported to convey either did not exist or could not be ascertained with certainty, or, if it did exist and could be ascertained, was of such a nature that no effective use or enjoyment could be made of it. But where the property exists and the title to it has undoubtedly passed to the vendee, oral evidence that the vendee intended not to take possession of it and ultimately to allow his title to it to be extinguished is irrelevant. AIR (Vol 30) 1943 Pat 48 : 21 Pat 710 : 9 B R 85 : 203 Ind Cas 422 (DB).

——S. 28 — Fraud on registration — Property not intended to pass included in mortgage deed to get document registered in sub-division, where it was situated—Proof of intention—Evidence Act, S. 92. Proviso (1)—Insufficient description of such property, rendering it unidentifiable—Effect.

There is no effective registration unless the deed of mortgage relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale-deed, be transferred or in a mortgage deed form part of the security.

Where the land certainly existed in a sub-division where the deed was registered but the insertion of it in the mortgage deed gave the mortgagee no security whatsoever and the land being undefined, could not effectually form part of the security, and on the evidence it was clear that it was never intended to form part of such security :

Held, that the registration of this mortgage deed must be held to be invalid.

Held, also that the mortgagor could raise this question of want of valid registration though he was a party to the fraud on the registration laws.

Held, further that it could not be held that the Registrar had no jurisdiction to register this sale-deed by reason of the insufficiency of the description of the land situate. The Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in S. 87 so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. AIR (Vol 27) 1940 Pat 504 : 6 B R 485 : 19 Pat 578 : 187 Ind Cas 522 (DB).

——Ss. 28, 29—Fraud on registration law—Portion of land not intended to be transferred included in mortgage to give jurisdiction to Registrar—Portion found not existing :

Held, that registration was invalid. AIR (Vol 26) 1939 Nag 57 : 1939 N L J 44 : I L R (1939) Nag 64 : 179 Ind Cas 933 (FB).

——S. 28—Portion included with object of getting deed registered in one particular place—No intention to make that portion part of security—Registration, validity of.

In judging whether the registration of a document is valid, it should be seen whether or not it was really intended that property which purports to have been dealt with by the instrument should actually be so dealt with. In other words, whether the instrument actually "relates" to that property within the meaning of S. 28. The criterion by which the question must be decided is whether, upon the facts established by the evidence, the parties intended this plot of land to pass under the deed. Where a portion of the mortgaged property was entered in the mortgage-deed merely with the object of getting the deed registered in the office of a certain Sub-Registrar and it was never intended to make that property form part of the security, the registration of the deed is invalid. AIR (Vol 24) 1937 Oudh 493 : 1937 O W N 944 : 13 Luck 484 : 171 Ind Cas 233 (DB).

—— S. 28—Property not intended to be mortgaged included for jurisdiction purposes — Registration is wholly invalid. AIR 1923 Mad 447, Diss. 107 Ind Cas 517 : 23 N L R 143 : 11 N L J 49 : AIR (Vol 15) 1928 Nag 1 (FB).

——S. 28 — The inclusion of an item of property belonging to the vendor in a sale-deed without any intention of passing any title in it and purely for the purpose of making the deed available for registration in a particular place is a fraud upon the registration law and as such the sale deed must be deemed to be invalid. 100 Ind Cas 25 : AIR (Vol 14) 1927 All 797.

——S. 28—Property included merely for obtaining registration—No interest intended to be transferred —Registration is invalid. 48 Ind Cas 127 : 48 Cal 509 : 19 A L J 385 : 23 Bom L R 629 : 33 C L J 440 : 25 C W N 985 : 14 M L W 1 : 1921 M W N 370 : 2 P L T 397 : 60 I C 833 : 63 I C 770 : AIR (Vol 8) 1921 P C 8 : 40 M L J 489.

——S. 28 — Property entered, not intended to be sold—Sale, validity of

A sale deed comprising also a property in a district not intended to be sold but to have registration in that district is a frand on registration and being void conveys no title. A suit to recover possession from the vendee falls under Art. 144 and not under Art. 44 of Sch. I of Limitation Act. 43 Mad 436 : 11 L W 394 : 38 M L J 327 : 56 Ind Cas 519 : AIR (Vol 7) 1920 Mad 598 (DB).

——S. 28—Place of registration—Inclusion of property with a view to give jurisdiction.

Where property not intended to be conveyed is included in a sale deed merely for the purpose of facilitating registration in an office which has no jurisdiction otherwise to register the deed, the registration is invalid and void. 22 M L T 516 : 7 L W 33 : 43 Ind Cas 515: AIR (Vol 5) 1918 Mad 360 (DB).

(d) No valid title.

——S. 28—Fraud on registration law—Assignor having no right to assign house included in assignment.

The test to decide the validity of the registration is whether the parties intended the particular property to pass under the deed. Where the parties knew that the assignor had no right to assign a house which was included in the assignment deed and the parties did not intend to assign the house but the deed was registered by the Sub-Registrar who had jurisdiction only by virtue of that house, it was held that the registration was a fraud on registration law and was, therefore, invalid. AIR (Vol 26) 1939 Mad 467 : 49 L W 387 (2) : 1939 M W N 554 (DB).

—— S. 28—Fraud—Transfer-deed.

Where the vendor neither intends to sell nor the purchaser intends to buy any particular item of property included in the deed of transfer and the inclu-

sion of such property in the deed of transfer is a mere device to evade the provisions of the Registration Act, there can be no effective registration of the deed of transfer at all. AIR (Vol 24) 1937 Mad 32 : 1936 M W N 852 : 168 Ind Cas 87.

——S. 28—Validity of registration.

Property not belo. ging to vendor included in sale deed for convenience of registration but without intention to convey it—Registration of sale-deed is invalid. AIR (Vol 16) 1929 All 984: 119 Ind Cas 255.

——S. 28—The intentional inclusion by both parties of a certain property in which the mortgagor has no interest for the purpose of obtaining registration in a district, property wherein was not intended to be charged in fact, is a fraud on the registration law, and no registration obtained by means thereof is valid. AIR (Vol 15) 1928 Oudh 439 : 4 Luck 13 : 5 O W N 725 : 112 Ind Cas 273 (DB).

——S. 28—Where the property situate within the district of a Sub-Registrar did not belong to either party, and was inserted by transferee, with the knowledge that it did not belong to the transferor, for the purpose of giving the Sub-Registrar jurisdiction.

Held, that it is a fraud on registration and consequently the document cannot be admitted in evidence. AIR (Vol 13) 1926 Bom 165: 28 Bom L R 75 : 93 Ind Cas 218 (DB).

——S. 28—Including, intentionally, property in the sale deed not belonging to vendors, am ounts to fraud and vitiates registration and confers no title. A I R (Vol 12) 1925 Nag 460 : 89 Ind Cas 367.

——S. 28 - Inclusion of property not belonging to executant with a view to give jurisdiction to registrar — Effect of.

Where an item of property which was not owned by the vendor and not intended to be conveyed is included in a sale deed merely for the purpose of obtaining registration of the deed in district where none of the property actually intended to be conveyed is situate such registration is invalid and does not operate to confer title. AIR (Vol 6) 1919 All 261 : 41 All 385 : 17 A L J 363 : 49 Ind Cas 543 (DB).

——S. 28—Wrong inclusion of property — Effect.

The Registration of mortgage deed of property not owned by the mortgagor to the knowledge of the mortgagee but intentionally to get the deed registered in a place in which the property really charged is not situate is invalid. AIR (Vol 6) 1919 Nag 129 : 15 N L R 75 : 50 Ind Cas 764.

——S. 28—Evasion of — Property not belonging to vendor entered in sale-deed — Sale-deed invalid.

A sale deed is invalid and does not pass title to the vendee, where a certain property is included in a sale-deed which at the date of sale was not the property of the vendor and was only made use of for the purpose of evading the Registration Law. AIR (Vol 4) 1917 All 97 : 39 All 523 : 15 A L J 550 : 41 Ind Cas 3 (DB).

(e) Property non-existent.

——S. 28—Fraud on registering authority.

No title passes to a vendee of a land where the sale-deed is registered by practising fraud on the registering authority by inclusion of an item which never existed in the sale-deed in order to give the registering authority a jurisdiction which it would never have. AIR (Vol 24) 1937 Nag 330 : ILR (1937) Nag 111 : 169 Ind Cas 675.

——S. 28—Land bona fide purchased and included in a subsequent document — Purchase for facilitating registration of the subsequent document—No fraud is thereby committed and the transaction is not invalid.

In cases however where a non-existing property is mentioned or in cases where property which is existing but which does not belong to the mortgagor or vendor is mentioned, or in cases where the parties enter into a nominal transaction without any intention of passing title and yet the sale is registered, in such cases it may be said that there is a fraud with the object of defeating the provisions of the Registration Act. AIR (Vol 14) 1927 Mad 863 : 50 Mad 800 : 26 M L W 300: 1927 M W N 395: 39 M L T 311 : 53 M L J 364 : 105 Ind Cas 424 (DB).

—— S. 28—When on the date a deed of gift was registered there was no property for transfer belonging to the donor situated in the Sub-Registrar's jurisdiction :

Held, that the Registration of the gift deed in that Sub-Registry is void and a mere nullity. AIR (Vol 13) 1926 Nag 93 : 91 Ind Cas 1018.

——S. 28—Non-existence of any property within the jurisdiction of the Sub-Registrar invalidates registration even in absence of fraud by mortgagee.

Where it was admitted that the registered deed included a house which in fact never existed and which alone gave jurisdiction to the Sub-Registrar to register it held, that the registration was invalid though the mortgagee was no party to the fraud committed on the law of registration and it was the mortgagor who was solely to be blamed in the matter. The mortgagee himself was indifferent as to the value or nature of the property. The property being non-existent within the jurisdiction of the Sub-Registrar he had no jurisdiction to register the deed. AIR (Vol 11) 1924 All 373 : 22 A L J 241 : 5 L R A Civ 182 : 78 Ind Cas 265.

——S. 28—Property not existing or not belonging to mortgagor, if included only to get Registration done, invalidates registration. AIR (Vol 11) 1924 Cal 348 : 38 C L J 355 : 70 Ind Cas 583 (DB).

——S. 28—Where the item of property is non-existent within the jurisdiction of the Sub-Registrar who registered the deed the circumstance was treated as an index of the intention of both the parties to deceive the Sub-Registrar. AIR (Vol 11) 1924 Nag 363 : 78 Ind Cas 398.

(f) Wrongful inclusion.

——Ss. 28, 49—Registration of mortgage, in district where no part of property is situate — Validity.

When a mortgage is registered in a district in which no part of the mortgaged property is situate, its registration is invalid under S. 28 and the document cannot be received in evidence under S. 49. Such invalidly registered document, in case of a possessory mortgage, cannot be treated as a registered bond as in such a case, there is no personal covenant to re-pay the money AIR (Vol 24) 1937 All 711 : 1937 A L J 815 : 1937 A W R 731 : 171 Ind Cas 825.

——Ss. 28, 29—Fraud on registration — Part of mortgaged property represented to be within jurisdiction, such item being fictitious—Effect.

Where the registration of a mortgage-deed has been obtained by fraud by representing to the Registering Officer who registered the deed in question that there were certain properties within the jurisdiction of the said Registering Officer in order to give the officer jurisdiction to register and it has been found that that property was a fictitious property and had no existence in fact, the registration having been obtained by practising fraud on the law of registration, the deed as a mortgage-deed is invalid. The effect is that the deed should be deemed to be an unregistered document for all purposes and it cannot be deemed to be a registered document for the purposes of S. 29, Registration Act so as to entitle the mortgagee to sue on personal covenant. A I R (Vol 24) 1937 Cal 347 : 41 C W N 783 : 171 Ind Cas 965 (DB).

——S. 28—Fictitious property included to give jurisdiction.

The inclusion of fictitious property in a deed for purposes of giving jurisdiction to the Sub-Registrar is a fraud on the registry. The effect is that there is, in such cases, no proper registration.

There is no material difference on principle between the inclusion of a property not intended to pass by a deed and a property to which the vendor has no title. AIR (Vol 21) 1934 Pat 127 : 15 P L T 73 : 13 Pat 111 : 153 Ind Cas 602 (DB).

——S. 28 — That a fictitious inclusion of an item of property never intended to be sold can amount to fraud on registration admits of no doubt. If the parties never intended that a certain item should be sold at all, and transferred under the deed, the deed does not relate to it, and by concealing the fact from the Sub-Registrar they commit a fraud on the registration law. AIR (Vol 17) 1930 All 786 (DB).

——S. 28 — Property included in sale-deed only to give jurisdiction to Sub-Registrar — No valid transfer is effected, because of the fraud on the law of registration. AIR (Vol 16) 1929 All 659 : 1929 A L J 801 : 117 Ind Cas 341 (DB).

——S. 28—Fraud—Effect.

Parties to sale-deed entering piece of property within Sub-Registrar's jurisdiction in order to give him jurisdiction, cannot get any relief in Court of justice. AIR (Vol 16) 1929 All 578 : 118 Ind Cas 589.

——S. 28—Certain land belonging to mortgagees inserted in mortgage-deed with mortgagee's knowledge in order to obtain registration at certain Sub-Registrar's office, where it could not otherwise have been obtained — Insertion, being fraud on Registration Law, rendered deed void. AIR (Vol 16) 1929 Mad 426 : 120 Ind Cas 876.

——S. 28 — It was found that one square yard of house site was included in the mortgage deed merely to give jurisdiction to the Peddapur Sub-Registrar who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. Held, following 41 Cal 972 (P C) and 48 Cal 509 (P C) that the mortgage deed is invalid as being 'in fraud of the registration law."

Held, further that the general personal covenant to repay was not invalid and that Art. 116, Limitation Act, was applicable in accordance with the ruling of Ameer Ali, J. in 29 Cal 654.

There is nothing in the Registration Act to prevent the registration of a simple money bond in the office of any Sub-Registrar at which the parties desire to have the document registered.

Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts of the document invalid or inoperative.

The Registration Act does not prohibit the use of a document as a registered one even if the provisions of S. 28 of the Act are contravened. If a document is otherwise properly registered, there can be no objection to the use of it as a registered one. AIR (Vol 10) 1923 Mad 447 : 44 M L J 373 : 17 M L W 695 : 32 M L T 222 : 1923 M W N 166 : 46 Mad 435 : 73 Ind Cas 188 (DB).

——S. 28—No property situate within jurisdiction—Registration is a nullity. AIR (Vol 9) 1922 Lah 243 : 4 Lah L J 245 : 3 Lah 242 : 68 Ind Cas 769 (DB).

——S. 28—Fictitious entry of property so as to give jurisdiction.

If property which the mortgagor does not possess and does not intend to mortgage is intentionally sought to be included in the mortgage for the purpose of obtaining registration in a district in which no part of the property actually charged or intended to be charged in fact exists, it is a fraud on the Registration Law, and the registration is invalid. AIR (Vol 7) 1920 Nag 99 : 55 Ind Cas 66 (DB).

——Ss. 28, 49 and 87—Fictitious property—Inclusion of, to give jurisdiction to registrar.

Where in order to obtain registration of a mortgage at the office of the Sub-Registrar of a particular district (where no part of the property mortgaged is in fact situate) the parties make a fictitious entry of an item of property purporting to be within that district, the entry is a fraud on the registration law and the registration itself is invalid.

The same considerations apply to the jurisdiction of a Court in a suit to enforce the mortgage and such fictitious item will be totally ineffective to give jurisdiction to a Court which would not have had jurisdiction but for the inclusion of the fictitious property. AIR (Vol 1) 1914 P C 67 : 41 Cal 972 : 1 L W 1050 : 41 I A 910 : 27 M L J 80 : (1914) M W N 462 : 16 M L T 6 : 18 C W N 817: 19 C L J 484 : 16 Bom L R 400 : 12 A L J 774 : 23 Ind Cas 637.

——S. 28 — A document upon which the suit was brought purported to be a mortgage deed hypothecating two pieces of property, one situated within the jurisdiction of the Registrar of Calcutta and the other under that of the Sub-treasury of Sealdah, upon the basis of the latter property the document was registered in the Sealdah registration office in 1896. It was found that there was no such property under the jurisdiction of the Sub-treasurar of Sealdah.

Held — The Sub-treasurer of Sealdah had no jurisdiction to register the document under S. 28 of the Registration Act. The document was therefore not to take effect as a mortgage deed but was sufficiently registered as a money bond and the claim was therefore not barred by limitation although the suit was brought more than three years after the execution of the document. (1902) 6 C W N 856 : 29 C 654 (660, 661).

(g) Miscellaneous.

——Ss. 28 and 30 (2)—Fraud on registration—Registration by officer with special powers—Property of inconsequential character within his registration district included in deed—Title to such property not intended to pass — Validity of registration.

Where the registration is by an officer vested with special powers under S. 30 (2) of the Registration Act, the existence of some property within the registration district of that officer is immaterial and accordingly no intention to commit a fraud on the law of registration could be inferred from the mere fact that some property of an inconsequential character within his registration district which is not intended to pass, is included in the deed. Nor can there be a fraud on the law of registration if such an item of property is deliberately included, for, by such inclusion jurisdiction is not conferred and the registration also cannot be held to be void, because the document happens to comprise some property of such character. AIR (Vol 33) 1946 Cal 465 : 50 C W N 569 : 81 C L J 123 : 227 Ind Cas 449 (DB).

——S. 28—Fraud—Necessity of particulars.

Where a receipt does not purport expressly to extinguish the mortgage but merely acknowledges receipt of the money due thereon, it is not inadmissible for want of registration. 32 P L R 407: (1931) 133 Ind Cas 867 (DB).

——S. 28—Fraud—Absence of collusion.

Any fraud or misrepresentation by one party alone is ample to render the registration a nullity. AIR (Vol 13) 1926 Nag 93 : 91 Ind Cas 1018.

——S. 29.

——S. 29 — Inclusion of small item so as to give jurisdiction — Property in existence.

Where the parties to a mortgage document intended a particular property however small in value as compared with rest, to be part of the security although the motive for its inclusion might be to have the document registered by a particular Sub-Registrar that motive cannot in any way be said to be in fraud or in violation of the Registration Act, and the document must be held to have been duly registered. AIR (Vol 7) 1920 Mad 974 : (1920) MWN 487 : 58 Ind Cas 849 (D B).

——S. 29 — False statement made in a document to give Sub-Registrar jurisdiction.

If a false statement is made as to the extent and situation of the property in a deed to give the Sub-Registrar jurisdiction to register the deed, the registration is invalid and the deed is deemed as unregistered. (1913) 9 A L J 766 : 16 Ind Cas 108 (D B).

——S. 30.

——Ss. 30, 87 — Registrar registering document registrable by Sub-Registrar — Omission to state that Registrar was acting under S. 30 — Validity of, registration.

In a certain town, there was a Sadar Sub-Registrar, whose office was amalgamated with that of the Registrar and another Sub-Registrar under the same Registrar but in a different sub-district. A document containing one item of property within the jurisdiction of the former and several other items within the jurisdiction of the latter was registered in the office of the former. It was subsequently found that the one item referred to was non-existent and it was contended that the registration was, therefore, invalid :

Held, that under S. 30, the Registrar had power, in his discretion to receive an l register any document which might be registered by a Sub-Registrar under him, and under S. 87, the Registration was valid even though the Registrar had not expressly stated that he was acting as a Registrar pursuant to the discretion under S. 30. A I R (Vol 18) 1931 Cal 478 : 58 Cal 133 : 133 Ind Cas 110 (D B).

—— S. 30 (1) — Sub-Registrar at one place having no jurisdiction wrongly accepting and registering document — District Registrar, if can register it himself — Irregularity, if can be cured under S. 87.

The discretion conferred by S. 30 (1), is wide and unfettered. It is not controlled, in so far as re-presentation of a document which has been accepted and duly registered in a wrong place by either S. 32 or S. 34 or by any other provisions of Part VI, or by any other part. These provisions deal with initial presentation and do not refer to re-presentation of a document which has been accepted for registration and duly registered in the wrong place through a mistake of the registering authorities for which the parties were not responsible. These sections no more impose a time limit or any other restriction upon re-presentation. The discretion should not be lightly exercised. It should not be exercised at all when there is gross neglience, or carelessness or fraud. A I R (Vol 27) 1940 Nag 13 : 1939 N L J 520 : I L R (1940) Nag 74 : 187 Ind Cas 295 (D B).

——Ss. 30 (2) and 28 — Scope and effect — Registration by officer with special powers — No part of property within his district — Lower fee charged — Validity of registration.

Per Chakravartti J. — Ss. 28 and 30 (2) of the Registration Act do not provide for two different modes of registration and do not warrant the view that if an officer, specially empowered under S. 30 (2), registers a deed comprising property no part of which is situated within his own registration district, such registration shall be valid only if the registration is impliedly or in substance under S. 30 (2), and shall be invalid if the registration is under S. 28. The authority conferred by S. 30 (2) is absolute and it is in no way affected by the Registrar charging the lower fee chargeable in cases where some part of the property is situate within his jurisdiction. The levying of a lower fee may be an irregularity and if it is an irregularity, it may be curable under S. 87 of the Act. But it has no bearing whatever on the jurisdiction of the Registrar to make the registration in such circumstances. A I R (Vol 33) 1946 Cal 465 : 50 C W N 569 : 81 C L J 123 : 227 Ind Cas 449 (D B).

——Ss. 30 (2), 51 — Notice, what is.

Where a document relating to immovable property situate at Delhi is registered under S. 30 (2), by the Registrar at Lahore, it would not amount to a notice unless a memorandum of the instrument is entered in the files by the Registrar's office at Delhi under S. 51. A I R (Vol 23) 1936 Lah 482 : 38 P L R 8 : 163 Ind Cas 69 (D B).

——S. 31.

——S. 31 — Place of registration.

Ordinary documents are permitted to be registered under S. 31 at the office of Registrar or Sub-Registrar or at the executant's residence, while it is otherwise in the cases of extraordinary ones, which can be validly done at places other than these. Thus registration in an ambulance car, court house, or in a train or at a railway station or on a journey, when there is a necessity is not invalid. A I R (Vol 7) 1920 Oudh 160 : 23 O C 275 : 58 Ind Cas 903 (D B).

——S. 32.

1. Object of the section.
2. Strict compliance necessary.
3. Person executing.
   See also S. 35.
4. Presentation.
5. Presentation by representatives.
6. Presentation by agent.
   See also N. 3 and S. 33.
7. Certification of registration—Presumption.

1. Object of the section.

——S. 32 — The object of the legislature in enacting S. 32 is to prevent a mere outsider from presenting for registration a document with which he has no concern and in which he has no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery, and the legislature therefore, intended to provide that the registration should be vitiated by the document being presented for registration by a person "having a direct relation to the dead". A I R (Vol 15) 1928 Cal 565 : 55 Cal 1008 : 32 C W N 646 : 112 Ind Cas 721.

——S. 32 — One object of sections 32 to 35 of the Registration Act, is to make it difficult for persons to commit fraud by means of registration under the Act, and it is the duty of the Courts not to allow the imperative provisions of the Act to be defeated. A I R (Vol 9) 1922 Lah 98 : 2 Lah 5.

——S. 32 — The terms of Ss. 32 and 33 of the Act are imperative. One object of those sections and Ss. 34 and 35 of the Act was to make it difficult for persons to commit fraud by means of registration under the Act and it is the duty of Courts of India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it. A I R (Vol 1) 1914 P C 16 : 34 All 49 : 42 I A 22 : 28 M L J 577 : 17 M L T 148 : (1915) M W N 592 : 19 C W N 282 : 21 C L J 218 : 2 L W 277 : 12 A L J 129 : 17 Bom L R 413 : 28 Ind Cas 422.

[On appeal from (1912) 34 All 331 : 9 A L J 420 : 15 Ind Cas 881].

2. Strict compliance necessary.

——Ss. 32, 33 — Scope.

The provisions of Ss. 32 and 33, must be precisely complied with. A I R (Vol 24) 1937 Rang 293 : 172 Ind Cas 613 (D B).

——S. 32 — Provisions of S. 32 are imperative; and unless a document presented for registration is presented by one of the persons described in the section, mere presentation does not give to the registrar the indispensable foundation, of his authority to register it, and the registration, if made, is invalid. A I R (Vol 9) 1922 P C 359 : 50 Cal 166 : 37 C L J 343 : 27 C W N 533 : 2 Bur L J 264 : 49 I A 395 : 17 M L W 213 : 31 M L T 304 : 44 M L J 732 : 70 Ind Cas 937.

——S. 32—The Registration Act has imposed several conditions regulating the presentation of documents for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances, should not be weakened or strained on the ground that they may appear to be exacting and strict. A I R (Vol 9) 1922 P C 279 : 20 A L J 361 : 37 C L J 377 : 25 Bom L R 655 : 18 M L W 124 : 1923 M W N 873 : 44 All 514 : 49 I A 375 : 27 C W N 437 : 31 M L T 284 : 69 Ind Cas 44.

3. Person executing.

See also S. 35.

——Ss. 32 (a), 34 (3) (a)—Person authorised to present document for registration.

As S. 32 (a) is explicit and states that every document to be registered shall be presented by some person executing the same, it follows that the sale-deeds are also property presented for registration if the person presenting them has full power under his power-of-attorney to transfer the properties and to execute the documents, his act being as effectual in law, under S 2, Powers of Attorney Act, as if the documents had been executed by the donee of the power in the name, and with the signature and seal of the donor thereof. The donee of the power, therefore, can admit the execution under S. 34 (3) (a). AIR (Vol 26) 1939 Lah 127: 41 PLR 8: ILR (1939) Lah 255 : 182 Ind Cas 794 (DB).

—— S. 32—Person executing on other's behalf.

A person executing a document on behalf of himself, and on behalf of any person under a power-of-attorney, which power does not comply with the requirements of S. 33 of the Indian Registration Act, 1908, is competent to appear and admit execution of the first-mentioned document before the Registrar of Assurances. AIR (Vol 14) 1927 Bom 487: 51 Bom 971: 29 Bom LR 1124: 103 Ind Cas 906 (FB).

——S. 32—Meaning.

The expression "the persons executing" means the persons actually executing, and does not include a principal who only executes by means of an agent: 50 Bom 628 : A. I R. 1926 Bom 479; 98 I. C. 6 9, Overruled. AIR (Vol 14) 1927 Bom 487: 51 Bom 971: 29 Bom LR 1124: 103 Ind Cas 906 (FB).

——S. 32—General power to execute document includes power to present for registration.

Where a person holds a power of attorney to execute a document on behalf of his principal and the document has been executed by him as such he is, so far as the Registration Office is concerned, the actual executant of the document and is entitled under S. 32 (a) to present it for registration and to get it registered. He need not possess separate power authenticated as under S. 33. AIR (Vol 11) 1924 All 148: 74 Ind Cas 776.

——S. 32—Person signing "on behalf of" another must be taken to have signed as agent, prima facie in compliance of the requirements of the Act. AIR (Vol 10) 1923 Bom 37: 72 Ind Cas 993 (DB).

——S. 32—"Presentation by agent of a deed executed by him for principal.

A deed executed and signed by an agent for the principal and presented before the Registrar by the Agent himself who admits execution thereof, is said to be presented by the actual executant himself and is not to be supposed to be one presented under S. 32 (c) of the Act. AIR (Vol 2) 1915 Nag 18: 11 NLR 177: 31 Ind Cas 867.

4. Presentation.

(a) What is.
(b) Presentation by executant.
See also N. 3.
(c) Security bond in favour of Govt., presentation of.
(d) Presentation by pardanashin lady.
(e) Presentation by minor.
(f) Presentation by guardian.

(a) What is.

——S. 32—Obligor present at a time of presentation but not joining it, nor presentation done at his request or on his behalf—Presentation, if made by him.

No doubt it is not necessary for the physical act of presentation to be performed by the presenter. But it is necessary to show more than mere attendance for the purpose of admitting execution, it is necessary to show that the obligor joined in the presentation or, that presentation was made at the request of the obligor; or on behalf of the obligor. When all that has been shown in the case is that the obligor was present at the time of presentation, and not that he joined in it or that it was done at his request and on his behalf, it cannot be said that the presentation was made by him. AIR (Vol 27) 1940 Rang 297: 1940 Rang LR 638: 191 Ind Cas 656 (DB).

——S 32—Formality about presentation.

Presentation is a question of fact requiring no formality. AIR (Vol 11) 1924 All 799: 46 All 743: 22 ALJ 700: 5 LRA Civ 524: 92 Ind Cas 345 (DB).

——S 32—The Act will be sufficiently complied with if a person competent to present the document for registration is present before the sub registrar and assents, to the registration. (1913) 35 All 134: 11 ALJ 99: 18 Ind Cas 697 (DB).

——S. 32—Presentation by servant—If valid.

Presentation for registration by a servant of the mortgagee in the presence of the mortgagor who assents to it is a valid presentation. (1913) 35 All 72: 10 ALJ 510: 17 Ind Cas 465 (DB).

——S. 32—Presentation by unauthorised person—"Presented" meaning of.

Where all the executants of a deed are present at the Registrar's office and acquiesce in the handing over of the document to the Registering officer by an unauthorised person, the document is duly "presented" within the meaning of the Act. In order to decide whether a document was duly presented, the Court has to consider the attending circumstances of the case. (1912) 34 All 355: 9 ALJ 362: 14 Ind Cas 812 (DB).

(b) Presentation by executant.

See also N 3.

——S. 32—Deed executed by two or more persons—Presentation by one of them.

If a document is executed by two or more persons, it is not necessary that all of them should present it for registration; and the presentation thereof by one of them is a sufficient compliance with the law. AIR (Vol 24) 1937 P C 46: 1937 AWR 327: 45 LW 361: 1937 OWN 311: 3 BR 342: 39 PLR 217: 1937-1 MLJ 479: 18 PLT 315: 42 CWN 590: 1937 MWN 520: 11 R (1937) 2 Cal 148: 65 CLJ 140: 1937 A I J 604: 39 Bom LR 713: 31 SLR 203: 64 IA 77: 167 Ind Cas 1.

——S. 32—Physical delivery by third person, effect of.

Where the executant of a document is present in the Registry Office and the document is handed over to the Sub-Registrar in his presence and at his request the presentation amounts to a presentation by the executant himself. AIR (Vol 19) 1932 All 63: 1931 ALJ 909: 135 Ind Cas 232 (DB).

——Ss. 32, 33 and 61—Presentation of document by unauthorised person.

It is the duty of the Courts in India not to allow the imperative provisions of the Registration Act to be defeated when it is proved that an agent who presents a document for registration has not been duly authorised. If a person is ill and unable to attend at the proper Registration Office to present for registration, execution in the presence of the Registrar is not necessary; all that the Registrar has to do is to satisfy himself that the document has been voluntarily executed. A document was presented for registration by an unauthorised person who stated that the executant was ill and deposited the fee for the Registrar to visit the executant or issue a commission for his examination to ascertain if the document had been voluntarily executed. The Registrar visited the executant at his house and he admitted execution and requested that after registration the document be given to his attorney.

Held, that the executant was the real presentor and the registration was therefore valid. AIR (Vol 8) 1921 PC 93: 39 MLJ 41: 18 ALJ 717: (1920) MWN 413. 28 MLT 98: 47 IA 177: 58 Ind Cas 386.

—— Ss 32 and 47—Executant present before Registrar—Presentation by another.

Where the executant of a document is present before the Registrar and presentation of the document to the Registrar is made on his behalf and with his assent it is quite immaterial by S. 47 when the physical act of handing over the document is performed. AIR (Vol 6) 1919 Oudh 201: 6 OLJ 39: 1 UPLR (JC) 24: 49 Ind Cas 375 (DB).

——S. 32—Presentation by father of executant in presence of executant—If valid.

Presentation by the father of the executant of a document who is a lady and admission of execution then and there before the Sub-Registrar is a valid presentation within the meaning of S. 32. (1912) 9 ALJ 148: 13 Ind Cas 961 (DB).

(c) Security bond in favour of Govt., presentation of.

——S. 32 — Security bond filed in Court—No person named as obligee.

Where, in a security bond filed in Court, no person is named as the obligee, the bond is given to the Judge of the Court and therefore, if not presented by the obligors, ought to be presented by a person holding a duly authenticated power-of-attorney from him. AIR (Vol 22) 1935 Rang 39 : 155 Ind Cas 512.

(d) Presentation by pardanashin lady.

——S. 32—Pardanashin lady.

Where a pardanashin lady executes a sale-deed and her husband hands it over to the Sub-Registrar, who then comes out of his office where the lady is on an ekka and there ascertains from her if she had executed it and had received its consideration and having satisfied himself goes back to his office and makes an endorsement on the back of the deed that the lady presented it for registration, the deed is not invalid on account of the defect in its registration. AIR (Vol 27) 1940 Oudh 152 : 185 Ind Cas 441 (DB).

——S. 32 — Handing over the deed to Sub-Registrar by husband, and asking the Sub-Registrar to go to pardanashin lady's house, does not amount to presentation.

The handing over by the husband, of the deed was inoperative, but not injurious to the subsequent presentation which in fact took place at the house of the lady. A I R (Vol 11) 1924 All 799 : 46 All 743 : 22 ALJ 700 : 5 LRA Civ 524 : 92 Ind Cas 345.

——Ss. 32 and 33 — Presentation, by husband of a pardanashin lady.

Presentation for registration by the husband of the executant who had no authority to make the presentation is a nullity even though the executant is a pardanashin lady (1913) 35 All 34 : 10 A L J 440 : 17 Ind Cas 274 (FB).

(e) Presentation by minor.

——S. 32—Minor claiming under deed.

Section 32 provides that a document may be presented for registration by a person claiming under it. A minor so claiming is entitled to present it for registration. A I R (Vol 25) 1938 Cal 120 : 177 Ind Cas 517.

——Ss. 32, 73 — Presentation by minor — Validity—Presentation under Ss. 32 and 73—Difference.

Fresh evidence in an appeal can only be taken if the Judge on an examination of the record, discovers some lacuna which makes it necessary for him in the exercise of his duty to decide the case to get some more evidence. It is not a right of the parties ; it can be exercised only by the Judge and that exercise is hedged in by the requirement that 'grounds' must be stated.

Presentation by a minor claiming under a document in her favour for the purpose of registration, before a Sub-Registrar is perfectly valid.

Principles which apply to the first presentation of a document under S 32 need not necessarily apply to the presentation of an application under S. 73 (1).

There is no question of presentation at all under S. 73. AIR (Vol 20) 1933 Mad 407 : 37 L W 471 : 64 MLJ 449 : 1933 MWN 636 : 142 Ind Cas 646.

——Ss. 32 and 35—Presentation by minor.

Presentation of an instrument by a minor for registration is not invalid if he has a claim thereunder. AIR (Vol 3) 1916 Low Bur 31 : 33 Ind Cas 33.

(f) Presentation by guardian.

——S. 32— Presentation of deed of adoption by natural father of the minor adopted boy — Competency. 1950 SCJ 120.

——Ss. 3 (c) and 2 (10)—Representative of minor — Gift deed in favour of Mahomedan minor — Presentation by mother and de facto guardian—Validity.

Obiter: — In the case of a minor, the only person competent to represent him in matters relating to the registration of a document is the guardian entitled in law to act for him.

The mother and de facto guardian of a Mahomedan minor, being competent to accept an unburdened gift or to do an act purely advantageous to the infant, can represent him at the registration of a deed of gift which creates no such obligations as would take away its advantageous character. The acceptance of such a gift being an act purely advantageous to the infant, she is competent in law to do everything necessary in furtherance of this act and consequently competent to present the document for registration. ILR (1948) 1 Cal 13 : 51 CWN 675 (DB).

——S 32—Deed of adoption— Presentation by natural father, when proper.

Where the wife of the adoptive father denies the adoption of a minor by her husband, the presentation of the deed of adoption by the natural father of the minor for purposes of registration is in accordance with law. A I R (Vol 31) 1944 Mad 551 : 1944 MWN 534 : 1944-2 M L J 126 : 219 Ind Cas 227 (DB).

——S. 32 — The presentation of a sale deed by the maternal uncle of a claimant who was an orphan and who had no agnatic male relations for registration on behalf of the claimant as his guardian is valid. A I R (Vol 17) 1930 Mad 425 : 120 Ind Cas 77 (DB).

——S. 32—Deed of adoption by natural father.

Per Sadasiva Aiyar J. — The natural father of a minor boy adopted by a widow in pursuance of a written authority to adopt given by her husband is competent to present that document for registration on behalf of the minor. A I R (Vol 7) 1920 Mad 763 : 43 Mad 288 : 38 MLJ 149 : 59 Ind Cas 978 (DB).

5. Presentation by representatives.

——S. 32 (b) — Presentation by one of several representatives.

The word 'representative' in S. 32, cl. (b) includes the case of one of several representatives. Presentation by one of several representatives is valid presentaion. AIR (Vol 19) 1932 Cal 558 : 55 C L J 107 : 139 Ind Cas 234.

——Ss. 32, 33, 35, 87 — Death of executant — Presentation — Non-joinder of all legal representatives — Validity of registration.

Where the executant of a document dies before it is registered, it is not incumbent under the law that all his representatives should join in presenting the document for registration; and supposing that it is so incumbent, non joinder of all is a mere defect in procedure curable under S. 87. AIR (Vol 19) 1932 Cal 110 : 58 C 876 : 133 Ind Cas 191 (DB).

——S. 32 Scope.

Section 40 does not exclude the provisions of S. 32 and does not limit the persons entitled to present for registration an authority to adopt, to the actual donor if living, and to the donee and the adopted son after the donor's death. Presentation by the representative of the adopted son is sufficient. A I R (Vol 16) 1929 P C 24 : 56 M L J 218:52 Mad 175 : 56 I A 21 : 33 C W N 261:49 C L J 148 : 29 M L W 118 : 1929 M W N 47 : 1929 A L J 41 : 31 Bom L R 299 · 114 Ind Cas 17.

——S. 32 — Executant dead — All legal representatives need not join in presenting the document — Any one of such persons may present the document for registration.

The object of the legislature in enacting S. 32 is to prevent a mere outsider from presenting for registration a document with which he has no concern, and in which he has no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery, and the legislature, therefore, intended to provide that the registration should be initiated by the document being presented for registration by a person "having a direct relation to the dead." AIR (Vol 15) 1928 Cal 565 : 55 Cal 1008 : 32 C W N 646 : 112 Ind Cas 721 (DB).

——S. 32 — Presentation by one representative is sufficient.

In so far as the provisions of S. 32 (b) can be applied at all to the case of a deceased executant, it is sufficient if the document is presented for registration by a person who is a representative of the estate of the deceased, and it is not necessary for the entire body of persons, who between them represent the whole estate, to join in making the representation. AIR (Vol 12) 1925 All 215:47 All 294:22 A L J 1112 : 6 L R A Civ 135 : 84 Ind Cas 786 (DB).

——S. 32—The term "representative" in S. 32 refers to the legal personal representative or (by virtue of S. 2) the guardian or committee of the persons described and does not include a clerk or agent. A I R (Vol 9) 1922 P C 359 : 50 Cal 166 : 37 C L J 343 : 27 C W N 533 : 2 Bur L J 264 : 49 I A 395 : 17 M L W 213 : 31 M L T 304 : 44 M L J 732 : 70 Ind Cas 937.

——S. 32 — Registration is intended to be a contemporaneous publication of a transaction as a guard against the subsequent fraud or alteration. A document can be registered by a legal representative when the executant does not or cannot appear, registration will be effected, even if consideration is denied on proof of execution. Registration of a deed is something different from the validity thereof and from the value of the title of the executant to the property affected by the deed. AIR (Vol 2) 1915 Nag 33 : 11 N L R 4 : 27 Ind Cas 861.

6. Presentation by agent.

See also N. 3 and S. 33.

(a) Duly authorised.
(b) Not authorised.
(c) Effect of.

(a) Duly authorised.

——Ss. 32 and 87 — Presentation by ammuktar — Registration — Defect in — Effect of.

Improper registration of a document or an error on the part of a Registrar, does not affect its validity. The presentation of a document for registration by a person holding an ammukhtarnamah empowering him to do all acts relating to the executant's estates in Courts and offices, and in "in the District Registration office," etc., is a presentation by a person duly authorised. AIR (Vol 6) 1919 Cal 235 : 23 C W N 534 : 29 C L J 305 : 51 Ind Cas 88 (DB).

——S. 32 — The presentation of a mortgage deed for registration by an agent having authority in that behalf, is a valid presentation under Registration Act. (1910) 32 All 179 : 7 A L J 157 : 5 Ind Cas 766 (DB).

——S. 32 — After revocation of power of attorney—Contract Act, S. 208.

When a document is registered by an agent holding power of attorney from the executant of the document, the fact of the power being revoked by the principal before the date of registration does not make the registration invalid if the revocation is not made known either to the person in whose favour the document is executed or to the Registering Officer. (1902) 7 C W N 229 (238) : 30 Cal 265 (DB).

(b) Not authorised.

——S. 32—The presentation of a document for registration by an agent who does not hold a power of attorney duly executed under S. 33, although authorized to execute the document, is not valid, and the registration following such presentation is of no effect. AIR (Vol 13) 1926 Bom 479 : 50 Bom 628 : 28 Bom L R 949 : 98 Ind Cas 629 (DB).

——S. 32 — Presentation by pleader.

Presentation by pleader without any power of attorney does not make the registration valid. AIR (Vol 13) 1926 Rang 17 : 3 Rang 398 : 91 Ind Cas 644 (DB).

——Ss. 32, 33 — Presentation by agent.

Presentation of document by agent not duly authorised is not proper presentation though its execution and registration is admitted by the executants. AIR (Vol 9) 1922 Lah 98:58 Ind Cas 333 (DB).

——S. 32 — Presentation by son of executant.

A presentation of a document for registration by the son of a person not authorised to present it as provided by S. 32, is not a valid presentation. (1913) 18 Ind Cas 286 (DB) (All).

——S. 32 (a) and (b) — Presentation by agent of mortgagee not authorised by statute — Presence of mortgagor and admission of execution, if cures defect — Provisions imperative.

A Registrar or Sub-Registrar under the Registration Act has no jurisdiction to register a document unless he is moved to do so by a person who has executed it or claims under it or by the representative or assign of such person or by an agent of such person, representative, or assign duly authorised by a power of attorney executed and authenticated in the manner prescribed by S. 33. Where the document is presented for registration by an agent not so authorised the executant who attends merely to admit that he had executed it cannot be treated

for the purpose of S. 32 of Act III of 1877 as presenting the deed for registration. The terms of Ss 32 and 33 of the Act are imperative. One object of those sections and Ss. 34 and 35 of the Act was to make it difficult for persons to commit fraud by means of registration under the Act and it is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it. AIR (Vol 1) 1914 P C 16 : 37 All 49 : 42 I A 22 : 28 M L J 577 : 17 M L T 148 : (1915) M W N 592 : 19 C W N 282 : 21 C L J 218 : 2 L W 277 : 13 A L J 129 : 17 Bom L R 413 : 28 Ind Cas 422.

[On appeal from (1912) 34 All 331 : 9 A L J 420 : 15 Ind Cas 881.]

——Ss. 32, 33, 87 — Power to attorney not in proper form — Presentation by person holding defective power of attorney — Subsequent appearance of the executant and acknowledgment of execution — Registration invalid.

The jurisdiction of a registering officer only comes into force when a document is presented to him in accordance with law. A presentation by a person holding a power of attorney not executed or authenticated in the manner prescribed by S. 33 is not a valid presentation; and the fact that the Registrar registered it after summoning the executant himself and getting his acknowledgment cannot make it a valid registration; and S. 87 cannot cure the defect. 1906 A W N 195 : 3 A L J 743 : 28 A 707 (711) (DB).

(c) Effect of.

——Ss. 32, 33 — Applicability — Provisions, if imperative — Agent presenting mortgage deed for registration — Agent not authorized as prescribed — Registering officer of Rampur State, whether 'Court or Judge.'

Sections 32 and 33, relating to the presentation of documents for registration are imperative, and their provisions must be strictly followed. Where an agent who presented a mortgage-deed for registration has not been authorised in the manner prescribed by the Act, the deed is invalid and cannot affect the immovable property to which it relates.

A Registrar acting under S. 73 is not a Court within the meaning of Civil P. C. The Sadar Registrar of Rampur State is not a Court or Judge within the meaning of S. 33, Registration Act.

The proviso to S. 33, and sub-ss. (2) and (3) apply only to cases mentioned in cls. (a) and (b) of that section which deal with power-of-attorney to be executed and authenticated in British India and do not apply to cl. (c), which provides for the manner in which a power-of-attorney is to be authenticated in place outside British India. In such cases, the power-of-attorney must be executed before and authenticated by the officers named in S. 33 (c) personally and execution and authentication before a Commissioner is not a sufficient compliance with that section. AIR (Vol 20) 1933 All 233 : 1933 A L J 159:145 Ind Cas 572 (DB).

——S. 32 — Person presenting not properly authorised — Registration is invalid — Sections are imperative.

Sections 32 and 33 of the Registration Act, relating to the presentation of documents for registration are imperative and their provisions must be strictly followed and therefore, if the agent who presented a deed for registration, had not been duly authorised in the manner prescribed by the Act, the deed would not be validly registered so as (under Section 49) to effect immovable property, or to be received in evidence of any transactions affecting such property. One object of Sections 32 to 35 of the Registration Act, is to make it difficult for persons to commit fraud by means of registration under the Act, and it is the duty of the Courts not to allow the imperative provisions of the Act to be defeated. AIR (Vol 9) 1922 Lah 98 : 2 Lah 5 (DB).

——S. 32 — Where a deed is presented for registration on behalf of the executants by a person not duly authorised by them, the registration is invalid and the fact that the executants had represented to the other party that the person who presented it had been duly authorised by them cannot estop the executants from challenging the validity of the registration. AIR (Vol 18) 1931 P C 52 : 53 C L J 198 : 60 M L J 441 : 1931 M W N 241 : 8 O W N 548:33 L W 596 : 33 Bom L R 434 : 1931 A L J 419 : 12 P L T 543 : 10 Pat 481 : 35 C W N 354 : 58 I A 58 : 131 Ind Cas 321.

——Ss. 32 and 33 — Presentation — Presumption — Burden of proof.

The presentation of a document by a person without authority renders the registration invalid, notwithstanding the presence and acquiescence of the party entitled to present it. AIR (Vol 4) 1917 Low Bur 54 : 9 Bur L T 197 : 37 Ind Cas 26 (DB).

——Ss. 32 and 33 — Deed in possession of mediators — Registration.

Where a document is in the possession of mediators and could have been obtained and presented for registration by one of the parties, the other party is not liable unless the non-registration was due to any default on his part. AIR (Vol 3) 1916 Mad 627 : 29 Ind Cas 585 (DB).

——Ss. 32, 34 - Presentation of document by a person without authority.

A person, who had executed a document disposing of property made his power-of-attorney to his agent to present it for registration, but died before the registration. The Registrar was aware of his death; but accepted and registered the document.

Held, that this was not a mere defect in procedure falling under S. 87 of Act the registration was illegal and invalid. (1901) 23 All 233 (242):21 I A 15 (PC).

7. Certification of registration—Presumption.

——S. 32—Presentation by authorised agent — Evidence to show that endorsement is wrong, admissibility of.

Where a document is presented for registration by an agent not authorised by a power-of-attorney, the Registering Officer has no jurisdiction to register it or to endorse thereon a certificate under S. 60. But even if the endorsement purports to show an invalid presentation, there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate, and proving the real facts. AIR (Vol 18) 1931 P C 75 : 35 C W N 577 : 1931 A L J 444 : 53 C L J 373 : 60 M L J 652 : 1931 M W N 615 : 9 R 170 : 33 Bom L R 867 : 34 L W 36 : 58 I A 115 : 131 Ind Cas 767.

——S 32—Execution of deed—Presumption.

The fact that the Sub-Registrar accepted a document from the executant and duly registered it is prima facie proof that the executant was not in an intoxicated condition when he presented it for registration. AIR (Vol 18) 1931 Sind 78 : 136 Ind Cas 525 (DB).

——S. 32—Where the endorsement showed that the document was presented by an agent who produced his power of attorney which was duly authenticated by the Sub-Registrar, and there was no evidence that it did not contain the usual power.

Held, that it must be presumed that the Registrar acted properly and that the mortgage was duly registered. 76 Ind Cas 522 : 1 Rang 121 : AIR (Vol 10) 1923 Rang 254 (DB).

——S. 32—The fact that the presentation is accepted by the Sub-Registrar as in proper form is prima facie

evidence that the conditions have been satisfied; and after such acceptance, the burden of proving any alleged informality rests on the person who challenges the registration. Specific authority to present is necessary in the power of attorney. 69 Ind Cas 44: 21 A L J 361 : 37 C L J 377 : 25 Bom L R 655 : 18 M L W 124 : 1923 M W N 873 : 44 All 314 : 49 I A 375 : 27 C W N 437 : 31 M L T 284 : AIR (Vol 9) 1922 P C 279.

——S. 32—The presumption of due registration of document arising from the certificate of registration loses much of its weight by the apparent presentation of document by a person other than the person signing the endorsement. Where an agent presents a document for registration the principal must show that the agent held a power-of-attorney recognisable under S. 33 of the Act. 9 Bur L T 197 : 37 Ind Cas 26 : AIR (Vol 4) 1917 Low Bur 54.

——Ss 32, 33 and 87 and Evidence Act S. 114—Presumption of authority.

It is a rebuttable presumption by the Court that a registered document was presented for registration by a duly and legally authorized person. If it is proved that an attorney with a general power unauthenticated under S. 33 of the Registration Act and without conferring power of registering documents, presented a document for registration, the presumption of the validity of the registration proceedings is rebutted. The fact that the executant was present at the time of registering a document and admitted its execution is unable to justify the inference of the executants presence at the time of its actual presentation for registration. The presumption of validity of a proper registration must be given effect to, if it is not sought to prove the absence of proper authority of the karinda of the executant presenting a document at the time of its presentation for registration. (1912) 34 All 331 : 9 A L J 420 : 15 Ind Cas 881 (DB).

[On appeal See (1915) 37 All 49 : 28 Ind Cas 422 : A I R (Vol 1) 1914 P C 16.]

——Ss. 32 and 60 — Certificate of Registration—Effect of — Evidence Act, (1 of 1872), S. 114—Presumption.

The certificate of due registration on a bond raises strong presumption in favour of due registration and the Court is bound to admit it in evidence unless proof is given that it did not comply with the provisions of the Law. (1912) 34 All 253 : 9 A L J 188 : 13 Ind Cas 531 (DB).

——S. 33

——Ss. 33, 35, 28—Executant executing deed on his own behalf and on behalf of another as his general attorney — Admission of execution—Production of power-of-attorney, if necessary — Document registered only against executant—Registration, whether against the other also - Several persons executing document — Presentation to Sub-Registrar where portion of property is situate—Registration refused against owner of said part—Original presentation, if invalid.

Where a person executes a deed on his own behalf and also on behalf of another as his general attorney, admission by executant of the execution is enough so far as he himself and the others are concerned. It is unnecessary for him to produce any power-of-attorney. Similarly, the Sub-Registrar need not look at that power-of-attorney for purposes of registration.

Where such a document is registered only against the executant and not against the other on the ground that the power-of-attorney held by the executant does not comply with S. 33, the document is registered against the executant so far as his individual right is concerned, and cannot be deemed to have been registered so far as his vicarious right is concerned.

It is only the act of the parties that has got to be considered, and if the parties themselves intended to perpetrate a fraud on the law of registration, then the matter assumes a different complexion, but if, on account of any action of the Sub-Registrar, certain consequences flow, the act of presentation itself will not be invalid. So where many persons execute a document and present it before a Sub-Registrar within whose jurisdiction a part of the property comprised in the document is situated but the Sub-Registrar refuses to register it as against the executant owning the said part, the fact that because of this refusal the deed does not operate upon that part has no effect on the original question of Sub-Registrar's jurisdiction.

In such a case, the portion of the property cannot be said to have been fictitiously entered in the document in order to give jurisdiction to the particular Sub-Registrar, if the document relates to that portion of the property for effective purpose of enjoyment or use AIR (Vol 25) 1938 All 170 : 1938 A L J 23 : 1938 A W R 98 : I L R (1938) All 125 : 174 Ind Cas 738 (DB).

——S. 33 - Temporary residence, sufficiency of.

The expression 'resides' as used in S. 33 is not defined in the statute; but there is no reason for assuming that it contemplates only permanent residence and excludes temporary residence. AIR (Vol 24) 1937 P C 46 : 1937 A W R 327 : 45 L W 361 : 1937 O W N 311 : 3 B R 342 : 39 P L R 217 : 1937-1 M L J 479 : 18 P L T 315 : 41 C W N 590: 65 C L J 140 : 1937 M W N 520 : I L R (1937) 2 Cal 148 : 1937 A L J 604 : 39 Bom L R 713 : 31 S L R 203 : 64 I A 77 : 167 Ind Cas 1.

——S. 33—"At the time aforesaid" construed—Mortgage-deed presented for registration, by agent, while principal is residing in British India—Plea of defect in presentation not raised before Registering Officer or trial Court—Whether can be allowed to be raised in appeal.

In S. 33 (1) (c), the words "at the time aforesaid" are not related back to S. 32 which speaks about presentation but obviously relate to the time mentioned in S 33 (1) (a), viz. at the time of executing the power-of-attorney. In a mortgage suit, the fact that the principal was residing in British India at the time of presentation of mortgage-deed for registration by agent ceases to have any relevance unless the power-of-attorney was drafted in such a way as to cause it to cease to be operative if and when the principal returned to India.

And where such a plea as to want of proper presentation is raised neither before the Registering Officer nor before the trial Court, it being a purely technical plea, the Appellate Court can, in its discretion, refuse it to be raised in appeal. AIR (Vol 24) 1937 Nag 227 : ILR (1938) Nag 364 : 172 Ind Cas 97 (DB).

——S. 33—Power-of-attorney—Contemplated.

Power of-attorney under the Act is only for purposes of registration and does not show the executant's authority to execute the deed—Recital in the deed or Sub-Registrar's endorsement thereon does not raise the presumption as to executant's authority to execute. 91 Ind Cas 209 : AIR (Vol 13) 1926 Oudh 241.

——S. 33 — Parda lady — Power-of-attorney by—Attestation by Sub-Registrar—Presumption of voluntary execution arises—Power to sign bond does not imply power to enter into transaction but power to execute document does.

A pardanashin lady is exempt by law from personal appearance in Court. She cannot therefore execute the power-of-attorney in the manner provided by paragraph (a) of S. 33 but by S. 33 (2). Where the Sub-Registrar did attest the document, it will be

presumed that he was satisfied that it had been voluntarily executed by the person purporting to be the principal. But still a presumption is only a rule of evidence which throws the onus on the other side. A power to sign a bond does not carry with it a power to enter into a transaction, but the power to execute a document carries with it the necessary powers to enter into the transaction itself. All powers-of-attorney have always to be construed very strictly. 67 Ind Cas 315 : 3 Pat L T 442 : AIR (Vol 9) 1922 Pat 559 (DB).

——S. 33—Power of attorney—Not executed before Sub-Registrar — Authentication — Presentation of document by the attorney—Validity of such presentation.

A pardanashin lady executed a power of attorney and signed it before its presentation to the Sub-Registrar. The Sub-Registrar went to her house, satisfied himself that she had voluntarily executed it, and authenticated the document by a certificate to the effect that he had so satisfied himself. Held that the requirements of S. 33 were carried out. Held further that the presentation of a mortgage deed for registration by the agent who acted under such a power of attorney was a valid presentation. (1909) 5 Ind Cas 766 (767) : 7 A L J 157 : 32 All 179 (DB).

——S. 33 (1) (c)—Execution of power-of-attorney by pardanashin lady.

Where a pardanashin lady executes a power of-attorney after the arrival of the Magistrate at her house and in his presence while she herself is sitting behind the purdah, the execution is "before" the Magistrate and in accordance with S. 33 (1) (c). AIR (Vol 27) 1940 All 108 : 1939 A L J 1151 : 1939 AWR 878 : 186 Ind Cas 505 (DB).

——S. 34.

——S. 34—"Person executing the document" Meaning of — Agent under power of attorney executing and signing document and admitting execution for registration — Registration— Validity —Power of attorney not authenticated under S. 33 (1) (a) — Effect —"Authorised agent."

The expression person executing the document in S. 34 of the Registration Act, means the person who actually signed the document, and not the person who on the face of it is a party to it or by whom it purports to have been executed. The person who executes the document is the person who actually puts his signature to the document, whether he is the person who actually incurs the obligation or not. When an agent under a power-of-attorney signs a deed on behalf of the principal, he is the person executing the document within the meaning of S. 34; and if the document is registered on his admitting execution, the registration is valid, he being the person executing the document for purposes of S. 34.

The fact that he cannot be regarded as an "authorised agent" under S. 34 (1), inasmuch as the power-of attorney is not executed before and authenticated by the registrar as required by S. 33 (1) (a) of the Act would not render the registration invalid. 50 Bom 628, Not foll. A I R (Vol 37) 1950 Bom 326 : I L R (1950) Bom 473 : 52 Bom LR 338 (DB).

——Ss. 34, 35, 58, 59, 60 and 61 — Provisions of Ss. 34, 35, 58 and 59 — Complied with - Final certificate of registration as required by S. 60 (1) not made as document was forcibly taken away from the registrar's office—Document, if duly registered.

After complying with the provisions of Ss. 34, 35, 58 and 59 of the Registration Act a document was retained for purposes of copying and before the final certificate of registration as required by S. 60 (1) could be made the document was forcibly taken away from the Registrar's Office :

Held, it is the compliance with the provisions of Ss. 34, 35, 58 and 59 of the Act which really constitutes registration and not the presence of the certicate. Hence, all subsequent acts of the registrar which are all ministerial acts cannot affect the validity of the registration and the absence of final certificate of registration cannot affect its validity. A I R (Vol 35) 1948 Oudh 223 : 23 Luck 268 : (1948) O A (C C) 14 : 1948 AWR (CC) 14 (DB).

——S. 34—Compliance with requirements of rules in respect of executants—Presumption.

There is a strong presumption that the general requirements of the registration rules in respect of executants would not have been disregarded by the Sub-Registrar. A I R (Vol 33) 1946 Nag 277 : I L R (1946) Nag 159 : 1946 NLJ 690 (DB).

——S. 34—Scope.

Where the Sub-Registrar on commission visited the village of the executant and obtained her admission of execution, the date of his doing so under S. 38 has no bearing on the provision in S. 34 which is for persons not exempt from appearing under that section to appear before the Sub-Registrar. A I R (Vol 26) 1939 All 486 : 1939 ALJ 604 : 1939 AWR 350 : 183 Ind Cas 270 (DB).

——Ss. 34, 75 (2)— Presentation, what is — Entry in wrong book—Effect.

Obiter. — The presentation of a document under S. 75 (2), does not take the place of a presention under S. 34. The procedure to be followed after a presentation under S. 75 (2) is different from the procedure to be followed after a re-presentation under S. 34 and this might make a vital difference in a particular case.

The mere fact that a document which was intended to be registered as an alienation, was by mistake entered in some wrong book, does not make the registration invalid for the purpose of an alienation; so, similarly, where a document was intended to be registered as a partnership deed under the order of the Registrar but was by mistake entered in the book pertaining to alienations, the document is not validly registered as an alienation but is only validly registered as partnership deed. A I R (Vol 25) 1938 Lah 255 : 181 Ind Cas 747 (DB).

——S. 34—Evidence as to age— Sub-Registrar's opinion, value of.

Under S. 34, an enquiry as to whether any of the parties concerned in the registration is a major or not is not one of the duties imposed on the Registrar. The opinion of the Sub-Registrar, therefore, as to the executant's age when the document was presented for registration cannot be accepted as evidence of his age at all, much less as conclusive evidence. AIR (Vol 25) 1938 Nag 385 : I L R (1939) Nag 324 : 178 Ind Cas 920.

——S. 34 — Registrar extending time under S. 34 — Order not signed by him but by Sub-Registrar — Effect.

It is more proper for the District Registrar when he makes an order extending time under S. 34 to sign it himself; but where such an order is signed for him by the Sub-Registrar, the effect of this order cannot be regarded as invalid because the District Sub-Registrar signed it for him. A I R (Vol 25) 1938 Pat 136 : 16 Pat 660 : 19 PLT 67 : 4 BR 439: 174 Ind Cas 385 (DB).

——Ss. 34, 47, 58, 59 — Attestation—Enquiry by Registry Officer — Object is to satisfy about execution— — Endorsement under S. 58, does not amount to attestation— Identifying witnesses cannot be said to be attestors to signature of executant. AIR (Vol 23) 1936 Bom 94 : 37 Bom LR 913 : 161 Ind Cas 374.

——S. 34—Non-compliance—Effect.

Where a deed, after being duly attested, was presented for registration to the Sub-Registrar by one of

the mortgagees and he registered it in the absence of the executant :

Held, that though S. 34 was contravened, the defect being only one of procedure, the registration was not illegal so as to make the document inadmissible. AIR (Vol 22) 1935 Lah 416: 16 L 1019: 38 P L R 35 : 157 Ind Cas 78 (DB).

——Ss. 34 and 35 — One of the executants not present at time of registration—Sale-deed, if void quoad his share—Transaction given effect to by all.

When the sale-deed was presented for registration by one of the vendees, all the vendors except K were present. The Sub-Registrar, while registering the document noted in the endorsement that K was absent and that the deed was being registered on behalf of the other executants. Presence of K was not secured and the possession of land was taken by vendees :

Held, that the appearance of K before the Sub-Registrar should have been secured and the deed registered after hearing him; and since this was not done, the registration was not valid quoad his share. A I R (Vol 21) 1934 Lah 751 : 154 Ind Cas 1088 (DB).

——Ss. 34, 77 — Suit for compulsory registration of document - Question to be decided.

In a suit for compulsory registration of a document, the only question which the Court has to decide is whether the document bears the genuine signature of the alleged executant. Enquiry into questions of consideration or fraud, etc., is not relevant.

Section 34 is subject to S. 77. Consequently, the refusal to register a document on account of the executant not having appeared within the four months prescribed can be interfered with by the Court in a suit under S. 77. A I R (Vol 21) 1934 Mad 113 : 1933 MWN 1373 : 38 LW 1000 : 66 MLJ 424: 148 Ind Cas 94 (DB).

—— S. 34—Consent of executant.

Consent of executant, is not necessary for valid registration. A I R (Vol 17) 1930 Sind 25 : 118 Ind Cas 737 (DB).

——S. 34—Presence of executants.

All executants must appear either personally or by agents duly authorized under S. 33. A I R (Vol 13) 1926 Bom 479 : 50 Bom 628 : 28 Bom L R 949 : 98 Ind Cas 629 (DB).

——S. 34—Delay in presentation — Powers of Registrar on reference under S. 34 (4) and proviso to S. 34 (1)—Order by Registrar—Interpretation of.

Where a matter is referred to the Registrar under S. 34 (4) and proviso to S. 34 (1), the Registrar may direct the registration if he is of opinion that the delay was due to "urgent necessity or unavoidable accident." If he is not so satisfied about the delay the proper form of the order is to express his opinion that the delay is not due to urgent necessity or unavoidable accident. When he so expresses his opinion (such opinion being remitted to the Sub-Registrar), the Sub-Registrar ought to follow it up by endorsing on the document "Registration refused" and then the remedy of the person who seeks registration is to file an appeal under S. 72.

Where the District Registrar did not pass an order expressing his opinion about the delay, but he passed an order on the document "Registration refused" nor did the Sub-Registrar follow up the order of the Registrar by passing an order "Registration refused":

Held, that one way of construing the order of the Registrar is to regard him as having abridged the proper and regular procedure i.e., instead of the matter going before the Sub-Registrar for his endorsement and an appeal being filed against the order of the Sub-Registrar and the Registrar passing final orders on such appeal, he anticipated such last order in appeal and passed his final order at an earlier stage. If so, the plaintiff's suit was maintainable. AIR (Vol 12) 1925 Mad 619 : 48 MLJ 221: 86 Ind Cas 797 (DB).

——S. 34—Inter-relation with S. 77 — S. 34 does not limit Ss. 71 to 77.

Section 34, which is subject to the provisions of various sections including S. 77, is not intended to lay down any limitation upon the effect of Ss. 71 to 77. It simply provides that the document shall not be registered unless the delay is excused. But where there is an order made by the Sub-Registrar refusing the registration and where the Registrar has refused to direct the registration of the document on an application which, may be treated as an appeal, the final order of the Registrar can be said to satisfy requirement of S. 72 of the Registration Act. A I R (Vol 10) 1923 Bom 187 : 25 Bom LR 45 : 47 Bom 290 : 72 Ind Cas 118 (DB).

——S. 34 — Proper presentation, what is — Deed in favour of a married minor — Presentation for registration by the father — Presentation is not proper and Registration is invalid.

A presentation by the father of a married minor girl for registration of a deed executed by a third person in her favour is presentation by an unauthorised person under S. 34 of the Indian Registration Act and both the registration and the deed, are void. A I R (Vol 9) 1922 PC 135 : 26 C W N 369 : 14 MLW 575 : 68 Ind Cas 754.

——S. 34 — Execution on behalf of oneself and another—Presentation.

If a document is executed by one of two parties on behalf of himself and the other, he can present it for registration, the registration is not invalid for non-appearance of the other party. A I R (Vol 7) 1920 Cal 316 : 31 C L J 447 : 57 Ind Cas 226 (FB).

——Ss. 34, 87 — Registration contrary to S. 34 — Effect.

Non-compliance with the provisions of S. 34 of the Registration Act, in registering a document, is a mere defect in procedure which is cured by S. 87 of the Act. (1911) 14 OC 207 : 11 Ind Cas 925 (DB).

——S. 34—Execution by pardhanashin lady— Registration.

The execution of a power of attorney by a pardhanashin lady, at her house when the sub registrar was seated outside the Pardha and after enquiry of its due execution, endorsed that it was executed of her free will, is quite in accordance with S. 33, even though the lady did not sign in the presence of the Sub-Registrar. (1910) 32 All 179 : 7 ALJ 157 : 5 Ind Cas 766 (DB).

——S. 35.

1. Admission of execution.
2. Denial of execution.
3. Person executing—Meaning of.
   See also S. 32.
4. Registration—Validity.
   See also S. 17.
5. Scope.
6. Sub-s. (2).
7. Sub-s. (3) cl. (b).

1. Admission of execution.

(a) General.
(b) Admission by legal representative.
(c) Admission before incompetent officer.
(d) Admission by some of executants.

(a) General.

——Ss. 35 and 77—"Admission of execution"—Essentials.

The admission required under S. 35 of the Registration Act is admission of execution of the document. It may be a sale deed, it may be a mortgage deed. It is not enough for the person, who is the ostensible executant, to admit his signature on a

paper on which, it may be, the document is ultimately engrossed. The identity of the paper on which the signature occurs is not sufficient. If a man says that he signed a blank paper on the representation that it was required for presenting a petition, or if he signed a completed document on the representation that his signature or thumb impression is required as an attesting witness, that admission of the signature or thumb impression in those circumstances cannot be construed to be an admission of the execution of the document. Far from its being an admission it is clear and unambiguous denial of the execution of the document. He must admit in order to attract the provisions of S. 35 (1) of the Registration Act that he signed the document, viz., a sale deed or a mortgage deed or a lease deed as the case may be. (1949) 1 M. L. J. 479, dissented from.

Case-law discussed.

The same considerations should guide the Court in directing registration under S. 77 which guide also the Registrar. AIR (Vol 37) 1950 Mad 239: 62 LW 843: 1949 MWN 757: (1949) 2 MLJ 684: ILR (1950) Mad 709 (DB).

——S. 35 — "Admission of execution" — What amounts — Admission of signature on blank paper—"Execution"—What is.

The "execution" of a document consists in signing a document written out and read over and understood, and does not consist in merely signing a name upon a blank sheet of paper, in order that a document may be said to be executed, the document must be in existence; where there is no document in existence, there cannot be execution. Where the alleged executant says that he signed on blank paper and that the document which he had authorised is not the document which he contemplated, his statement is a denial of execution and not an admission of execution for purposes of S. 35, Registration Act. AIR (Vol 37) 1950 Pat 370 (DB).

——S. 35—Admission of execution, what amounts to.

For purposes of the Registration Act, execution means signing or affixing a mark. Where the executants admit to the Registrar that they have marked the document but add that their marks were obtained by fraud, it is nevertheless a sufficient admission of execution on the basis of which the Registering Officer is competent to register the document. AIR (Vol 18) 1931 Nag 159: 27 NLR 116: 134 Ind Cas 286.

——S. 35—Is an irregularity curable by S. 87.

Admission of execution of a document by the husband of a lady on behalf of the lady, who had given general power of attorney to the husband would amount to no more than an irregularity of procedure curable by the provisions of S. 87 of the Registration Act, and would not affect the validity of the registration. AIR (Vol 12) 1925 All 215: 47 All 294: 22 ALJ 1112: 6 LRA Civ 135: 84 Ind Cas 786 (DB).

——S. 35 (1)—"Assign," if includes donee.

An 'Assign' of the executant under S. 35 (1) of the Act includes a donee under a gift-deed, in the event of the donee personally admitting the execution before the Registering officer, a deed of gift can be registered under S. 35 of the Act. AIR (Vol 4) 1917 Cal 269: 20 CWN 1345: 37 Ind Cas 362 (DB).

——S. 35—'Execution,' meaning of—'Admission of signature,' but denial of execution—Duty of Registrar to make inquires.

Where a person admits his signature to a document before a Registrar, but denies its execution, the Registrar is entitled to regard it as an admission of its execution and is not bound to make inquiries and refuse registration. The court cannot go behind the certificate in such cases. (1901) 6 CWN 329 (331) (DB).

(b) Admission by legal representative.

——S. 35 (1) (c) and ( ) (c)—Person executing document not alive—Admission of all the legal representatives, necessity of.

Under S. 35 (1) (c) and S. 35 (3) (c), where the person executing the document is dead, the Sub-Registrar should have before him the admission of all the legal representatives of deceased person before he should proceed to register the document. AIR (Vol 20) 1933 All 302: 1933 ALJ 318: 145 Ind Cas 754 (DB).

——S. 35 - Admission by widow—Is only a defect in procedure—Registration is valid.

The executant of an instrument died shortly after executing the deed, leaving behind two widows and two sons by one of them. On his death, his childless widow admitted the execution of the document and it was duly registered. One of the two sons attained majority and challenged the proper registration of the deed.

Held, that the document was duly registered, as the widow was a representative of her husband for the purposes of registration, and that, assuming that she was not a representative, it was only a defect in procedure which was not sufficient to invalidate the registration. AIR (Vol 13) 1926 Bom 137: 27 Bom LR 1334: 94 Ind Cas 560 (DB).

(c) Admission before incompetent officer.

——S. 35—Admission of execution before an incompetent officer, is no compliance with the provisions of the Act. AIR (Vol 13) 1926 Rang 17: 3 Rang 398: 91 Ind Cas 644 (DB).

(d) Admission by some of executants.

——S. 35 (3)—Execution admitted by some only of the executant—Registration—Permissibility.

S. 35 (3)—of the Registration Act permits registration where execution is admitted only by some of the executants of a document. Whether circumstances exist which make it permissible to register a document in respect of some of the executants is, however, a matter for investigation. AIR (Vol 36) 1949 Pat 393 : 27 Pat 86 (DB).

——Ss. 35 (3) and 87—Admission of execution by one of several executants—Registration.

The registration of a document on the admission of execution by one of several executants is irregular.

Quaere: Whether the irregularity may be cured by S. 87 of the Registration Act. AIR (Vol 5) 1918 Pat 637: 4 Pat LW 72: 43 Ind Cas 777.

2. Denial of execution.

——S. 35—Award—Binding nature of—One of arbitrators not admitting its execution before Registrar.

The registering officer has jurisdiction to register a document so far as regards the persons who appear and admit execution. An award is binding on the parties although one of the arbitrators accidentally, inadvertently or deliberately does not admit execution of that award before the Registrar, if it is found that the award contains his signature and was executed by him. AIR (Vol 37) 1950 Pat 77 : 28 Pat 514 (DB).

——S. 35 — Admission of signature on blank paper—"Execution"—What is.

Where the alleged executant says that he signed on blank paper and that the document which he had authorised is not the document which he contemplated, his statement is a denial of execution and not an admission of execution for purposes of S. 35, Registration Act. AIR (Vol 37) 1950 Pat 370 (DB).

——S. 35 — Deed does not take effect as regards persons not admitting execution — Provisions of the Registration Act must be strictly complied with.

Where only the Chairman of the Chittagong Municipal Committee admitted the sale-deed before the Sub-Registrar, but neither the Vice-Chairman who

signed it in the capacity of a Commissioner as required by S. 37 of Bengal Municipal Act, nor the vendee admitted, its execution before the Sub-Registrar.

Held, as the registering officer never registered the document as regards the executants other than the Chairman, although the indenture took effect as a deed executed and registered by the Chairman, it had no legal operation as a deed executed and registered by the Vice-Chairman or by the purchaser. In such circumstances, there is no room for the suggestion that what has happened is a defect in procedure curable by S. 87 of the Indian Registration Act. It cannot be disputed that where by the constitution of a corporation any special mode of execution of its deed is prescribed or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding, be executed in the manner or with every formality so prescribed. The provisions of the Indian Registration Act with which we are here concerned were very carefully designed to prevent forgeries and the procurement of deeds by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with these provisions, it is necessary to do so. A I R (Vol 10) 1923 Cal 35 : 36 C L J 109 : 50 Cal 180 : 70 Ind Cas 794 (DB).

——S. 35—Illiteracy.

Statement by the illiterate executant of a sale-deed, that he sold only a part of the property and not the whole mentioned in the sale deed, before the Sub-Registrar amounts to a denial of execution under S 30 of the Act. A I R (Vol 5) 1918 Lah 34 : 37 P R 1918 : 66 P W R 1918 : 124 P L R 1918 : 45 Ind Cas 161.

——S 35 (3) — Denial of execution by alleged executant.

A Registrar cannot register a document whose execution is not admitted by the executant. AIR (Vol 3) 1916 Pat 206 : (1917) Pat H C C 40 : 3 Pat L W 226 : 35 Ind Cas 56 (DB).

—— S. 35 — Deed nevertheless registered as against person denying execution Admissibility of deed in evidence.

Where a Sub-Registrar in disregard of the provisions of S. 35 registered a document as against a person denying execution thereof, it was held, that his action was ultra vires and without jurisdiction, and that the document could not be admitted in evidence as against the party denying execution. 1903 A W N 195 (196) (DB).

3. Person executing—Meaning of.

See also S. 32.

——S. 35—A document is executed when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required and another person duly authorised may, by writing the name of the party executing, bring about his valid execution and put him under the obligations involved. Hence the words "person executing" in the Registration Act cannot be read merely as person signing. They mean something more, namely the person who, by a valid execution, enters into obligation under the instrument. A I R (Vol 23) 1936 Cal 442 : 40 C W N 1051 : 64 C L J 31 : 166 Ind Cas 443 (DB).

——S. 35—A document is executed, when those who take benefits and obligations under it, have put, or have caused to be put, their names to it. Personal signature is not required, and another person, duly authorized, may, by writing the name of the party executing, bring about his valid execution, and put him under the obligations involved. Hence the words "person executing" in the Act cannot thereby be read merely as "person signing." They mean something more, namely the person, who by a valid execution enters into obligation under the instrument. When the appearance referred to is for the purpose of admitting the execution already accomplished, there is nothing to prevent the executing person appearing either in person or by any authorized and competent attorney in order to make valid admission : AIR 1925 Cal 703, Affirmed. AIR (Vol 15) 1928 P C 38 : 55 Cal 532 : 55 I A 81 : 26 A L J 121 : 27 M L W 336 : 1928 M W N 149 : 47 C L J 396 : 32 C W N 629 : 30 Bom L R 783 : 54 M L J 473 : 108 Ind Cas 342.

4. Registration—Validity

See also S. 17.

——Ss. 35, 87 — Death of executant — Registration on admission by person who is not really the legal representative — Validity.

Where the executant of transfer of a mortgage died after the execution of the transfer and the document was presented for registration by the transferee and execution was admitted by a person purporting to be but not in fact the representative of the deceased and the document was registered :

Held, that the defect was merely one of procedure following within S. 87 and the document was not invalid. AIR (Vol 21) 1934 Mad 425 : 39 L W 715 : 66 M L J 677 : 1934 M W N 624 : 149 Ind Cas 1174.

——Ss. 35, 19 —Mortgage of sir land, reserving right to trees—Sir land, whether includes trees.

Where a Registering Officer disobeys a direction such as those in Ss. 19 and 35 of the Registration Act, that he shall refuse to register the document, it may be that the registration should be held improper if the fact that he has disobeyed a clear and simple direction is evident from the proceeding. But registration is not invalid if due care has been exercised and disobedience is due to a mistaken view of the law. A I R (Vol 20) 1933 Nag 53 : 29 N L R 1 : 16 N L J 1 : 142 Ind Cas 147 (DB).

——S. 35—Execution and admission — By different agents.

Execution by one agent duly authorised — Admission before registration by another authorised agent —Registration is valid. AIR (Vol 12) 1925 Cal 703 : 29 C W N 539 : 88 Ind Cas 33 (DB).

——S 35—Correctness of official endorsement.

Where the writing at the foot of the document showed that the person who presented the document was only an agent and was directly opposed to the official statement signed by the Registering Officer that the document was presented for registration by the mortgagee.

Held, there is no provision in the Regulation or the Rules that requires the signature of the person presenting the document for registration. The correctness of the Official endorsement is to be presumed and the signature for which there was no legal sanction, cannot operate to contradict it.

Where any party to a document is unable or refuses to appear, Rule 5 of Burma Regulation (II of 1897) requires a note of the circumstances to be made, but the omission is one for which the person presenting the document cannot be held responsible : it is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation. AIR (Vol 1) 1924 P C 48 : 22 A L J 42 : 19 M L W 345 : 1924 M W N 196 : 34 M L T 50 : 51 I A 18 : 51 Cal 354 : 2 Rang 99 : 5 L R P C 73 : 28 C W N 1029 : 79 Ind Cas 940.

——S. 35—Defect.

No act in good faith will invalidate registration merely because of defect in procedure. AIR (Vol 10) 1923 P C 114 : 40 C L J 1 : 28 C W N 689 : 50 I A 162 : 4 Lah 284 : 25 Bom L R 1248 : 45 M L J 497 : 33 M L T 349 : 75 Ind Cas 7.

——S. 35—The word 'representative' does in no way exclude a representative when he or she is himself or herself benefited by the act of registration (e. g., a deed of gift to the representative himself) and consequently, a registration by the representatives after the donor's death of the deed of gift will make it a registered deed of gift (1906) 10 C W N 717 : 4 C L J 340 (342, 343) : 33 Cal 584 (DB).

5. Scope.

——S 35—Scope of—Ground for refusal to register.

Section 35 does not include all the grounds on which a Registrar may refuse registration. A I R (Vol 32) 1945 Mad 309 : 58 L W 124

— S. 35—Registrar's duty before registration.

There is no duty imposed on the District Registrar to read out to the parties deeds brought to him for registration. 1903 A W N 70 : 25 A 358 (365) (DB).

6. Sub-section (2).

——Ss. 35 (2), 82—Person telling lie—Desire only to save ladies of household from appearing before Registrar—Offence, nature of.

In an enquiry under S 35 (2), a person made an untrue statement, without any intention to benefit himself and cheat anyone. The reason which prompted him to give vent to this half-truth was to save his sisters (who were Muhammadan ladies not accustomed to go to offices) from the trouble of turning up before the Sub-Registrar :

Held, that though it was an offence making him liable under S. 82, yet it was certainly not a serious one.

[Their Lordships upheld the conviction and sentenced the accused to imprisonment for the period already undergone.] A I R (Vol 23) 1936 Cal 418 : 40 C W N 1059 : 37 Cr L J 1151 : 165 Ind Cas 415 (DB).

7. Sub-s. (3) cl. (b).

——S. 35(3) (b)—Presumption that person presenting document for registration is major, if arises.

Once a document is registered, all that can be said is that at the time the document was presented for registration, the executant or the person putting forward the document before the Registering Officer appeared to him to be a major But this is very far short of a statutory presumption that the person executing the document and presenting it for registration was at that time a major and not a minor. AIR (Vol 26) 1939 Cal 183 : 68 C L J 28: 180 Ind Cas 654 (DB).

——S. 35, cl. (3) (b)—Effect of endorsement by Registration Officer—Plea of insanity at time of execution — Duty of Court.

Registration is a solemn act and if there is a registration endorsement, it shows that necessary formalities required by law have been complied with. Where the effect of a registered document is sought to be avoided by pleading insanity at the time of execution and the lower Appellate Court, in ignorance of these rules of law, has discarded the registration endorsement as of no consequence in deciding the issue about the mental condition of the executant when the deed was executed, such a decision is not binding on the second Appellate Court. AIR (Vol 25) 1938 Nag 204 : 177 Ind Cas 80.

——S. 35—Certificate of Sub-Registrar as to the age of executant is admissible.

On the question whether the executant was a minor at the date of the registration of a document, the certificate of Sub-Registrar that when the parties appeared before the Sub-Registrar, the mother and uncle of the executant appeared with him and produced a medical certificate that the executant was 18 years of age, is admissible evidence although not conclusive. AIR (Vol 13) 1926 All 674 : 96 Ind Cas 332 (DB).

——S. 35—Execution by minor.

A instrument executed by a minor cannot be admitted to registration. AIR (Vol 4) 1917 Mad 630 : 40 Mad 308 : 31 M L J 575 : 20 M L T 407 : (1916) 2 M W N 363 : 36 Ind Cas 921 (FB).

——S. 35—Endorsement as to age of executant — If proof of age.

The endorsement by a registering Officer in the document that the executant described himself as major is no proof that he was so, inasmuch as a Registering Officer is not bound to record the age of executant, under the Act. AIR (Vol 1) 1914 Oudh 44: 1 C L J 366 : 25 Ind Cas 648 (DB).

——S 36.

——Ss. 36, 77 — Process served on executants not in prescribed form — Effect.

The Sub-Registrar when moved to issue process under S. 36, ought to apply to the prescribed Local Court for issue of a summons; but the fact that he does not take the proper steps to secure the attendance of the defendants cannot, in any way, prejudice the right of the plaintiffs to institute a suit under S. 77, when registration is refused. A I R (Vol 25) 1938 Pat 136 : 16 Pat. 660 : 19 P L T 67 : 4 B R 439 : 174 Ind Cas 385 (D B).

——S. 36 — Suit for compelling registration.

Where the document was in the possession of plaintiff from the time of execution and it was open to him at any time to apply to get it registered. He is not entitled to sue for a decree compelling defendant to execute and register that or similar document. His remedy is to proceed under Ss. 36, 72 to 77 : 1922 M W N 70 : 100 Ind Cas 344 (D B).

——Ss. 36 and 34 — Limitation - Validity.

A deed is validly registered though it is presented for registration after the period fixed but the delay is excused owing to production of a false certificate of illness of the executant. A I R (Vol 5) 1918 Cal 590 : 40 Ind Cas 215 (D B).

——Ss. 36 and 77 — Refusal to register for failure to summon heirs of executant — Suit for declaration of a right to register.

A document in favour of plaintiff was presented by plaintiff to the Sub-Registrar for registration after the death of the executant. Registration was refused on the ground that the heirs of the executant had not been summoned by plaintiff under S. 36 Regn. Act. Plaintiff appealed to the Dt. Registrar, who dismissed his appeal.

Held, that registration being refused on grounds other than denial of execution, a suit to enforce registration of the document would lie. (1912) 9 A L J 756 : 16 Ind Cas 97 (D B).

——Ss. 36, 73 and 77 — Registration — Non-attendance of executants — Refusal — Appeal.

Where the parties to a document did not appear and the Sub-Registrar refused to register it on instructions from the Registrar and the latter refused to entertain an appeal.

Held, that a suit to compel registration was maintainable as the refusal by the Sub-Registrar was not due to denial of execution and as the order on appeal by the Registrar was a dismissal of the appeal. (1912) 34 All 315 : 9 A L J 234 : 14 Ind Cas 433 (D B).

——S. 38.

——Ss. 38, 34 — Sub-Registrar visiting executant on commission and getting his admission as to execution — Date of visit has no bearing on provisions of S. 34. A I R (Vol 26) 1939 All 486 : 1939 A W R 350 : 1939 A L J 604 : 183 Ind Cas 270 (D B).

——S 39.

——S. 39 — (As amended) — Defect, if cured.

The defect of the want of registration cannot be cured by the provisions of S 53 A of the T. P. Act. A I R (Vol 24) 1937 All 578 : 1937 A L J 627 : 1937

A W R 610 : I L R (1937) All 817 : 170 Ind Cas 843 (F B).

—— S. 40.

——S. 40 — Scope.

Section 40 does not exclude the provisions of S. 32 and does not limit the persons entitled to present for registration an authority to adopt to the actual donor if living, and to the donee and the adopted son after the donor's death. Presentation by the representative of the adopted son is sufficient. A I R (Vol 16) 1929 P C 24 : 52 Mad 175 : 31 Bom L R 299 : 56 I A 21 : 1929 A L J 41 : 1929 M W N 47 : 29 M L W 118 : 46 C L J 148 : 33 C W N 261 : 56 M L J 218 : 114 Ind Cas 17.

——S. 40 — Authority to adopt.

Document containing authority by husband to adopt — Father of the minor widow cannot present for registration, on her behalf.

The only kind of guardian who can present a document for registration on behalf of a minor at all, is either a guardian according to the personal law of the minor concerned or a guardian legally appointed under the Guardians and Wards Act or otherwise. A I R (Vol 15) 1928 Mad 537 : 51 Mad 462 : 27 M L W 469 : 55 M L J 102 : 109 Ind Cas 548 (D B).

——S. 40 — Authority to adopt — Person presenting for registration must be one mentioned in S. 40 (2). A I R (Vol 12) 1925 P C 196 : 48 Mad 614 : 30 C W N 193 : 52 I A 305 : 23 A L J 799 : 42 C L J 38 : 1925 M W N 522 : 27 Bom L R 1082 : 22 M L W 435 : 6 L R P C 157 : 49 M L J 247 : 89 Ind Cas 733.

—— S. 41.

——S. 41—Will executed by R in favour of his minor wife S — On R's death, will presented for registration by S's father — No objection taken before Registrar — Will, held properly presented. A I R (Vol 30) 1943 Mad 332 : 56 L W 185 (2) : (1943) 1 M L J 272 : 1943 M W N 209 : I L R (1943) Mad 462 : 207 Ind Cas 104 (F B).

——S. 41, Cl. (2) — Enquiry by sub-registrar into truth of will — Deposition of witnesses — Admissibility in subsequent suits.

Depositions made before a sub-Registrar holding an enquiry into the genuiness of a will sought to be registered are admissible in evidence in a subsequent suit as the witnesses before the registrar were liable to be cross-examined under the rules. A I R (Vol 6) 1919 Mad 540 : 42 Mad 103 : 35 M L J 657 : (1918) M W N 913 : 9 L W 98: 49 Ind Cas 638.

—— S. 42.

——Ss. 42 to 46 — Effect of.

The object and effect of Ss. 42 to 46, plainly are that the contents of the sealed cover deposited by the testator, that is, the provisions of his will shall remain secret during his life time, but on his death, the terms of his will shall be made public and copies of the will shall be available to the public. A I R (Vol 28) 1941 Rang 305 : 1941 Rang L R 410 : 197 Ind Cas 452 (D B).

——S. 43.

——S. 43 — Document evidencing transaction affecting immoveable property — How far admissible in evidence of collateral agreement not affecting immoveable property.

A document which requires to be registered in order to affect immoveable property or to confer a power to adopt, may, if not registered be used for a collateral purpose which does not require registration. (1902) 4 Bom L R 883 (886).

——S. 47.

1. Operation of document, when begins.
See also N. 3.
2. Pre-emption.
3. Priority.
4. Registered document—Presumption.
5. Registration pending suit or attachment.
See also N. 1.
6. Scope and applicability.

1. Operation of document, when begins.
See also N. 3.

——S. 47 — Scope — If to be read with and if subject to Ss. 54 and 123, T. P. Act—Attachment of property between execution of transfer deed and registration of deed—Effect on transfer.

Section 47 of the Registration Act can be read together with S. 54, T. P. Act only on the basis that a transfer by a registered instrument under S. 54, T P. Act, once effected, relates back to the date of execution or other conventional date. Section 123. T. P. Act, is as categorical and as mandatory as S. 54, and it cannot be distinguished in its relation to S. 47 of the Registration Act. Where a deed of transfer of immovable properties is executed but before it can be registered the properties covered by it are attached, the attachment cannot prevail against the deed when it is registered or prevent registration thereof. When registered the deed operates from the date of execution. AIR (Vol 35) 1948 Pat 60 : 13 Cut L T 21 (DB).

——S. 47 — Normally a document becomes effective between the parties from the date when it is drawn up. AIR (Vol 32) 1945 Pesh 9 : 1945 Pesh L J 9 : 218 Ind Cas 367 (DB).

—— S. 47 — Registered document, when takes effect —Position of parties and third parties.

It is undoubtedly true that as between the transferor and the transferee the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property both of which are registered the one executed earlier in point of time will have priority but as regards third party, the point of time at which the deed is to be effective is when it is registered. AIR (Vol 28) 1941 Cal 78 : I L R (1941) 2 Cal 270 : 44 C W N 802 : 193 Ind Cas 530 (DB).

——S. 47 — Operation of registered sale-deed, when begins.

One S sold a piece of land under a sale deed on August 7, 1934 to D but the sale-deed was registered on February 26, 1935. On August 17, 1934, S again sold the same land to P under a registered sale-deed of that date and P entered into possession but was dispossed by D. In P's suit for possession :

Held, that according to S. 47, the sale-deed in favour of D operated immediately after its registration, not from the date of registration, but from the date of its execution, namely August 7, 1934, and hence D had a good title by sale and subsequent sale to P did not give him any title. Section 54 did not affect the position as sale to D was made by a registered instrument, though registration actually took place after the date of the sale-deed to P and its registration. The sale to P was always subject to the sale to D being perfected by registration in which case nothing would pass to P at all. AIR (Vol 28) 1941 Pat 247: 7 B R 417 : 22 P L T 116 : 192 Ind Cas 812.

—— S 47—Registration after attachment—Effect.

Where a deed of baimokasa in respect of certain property is executed which required registration, but before it could be registered the property is attached and the deed is subsequently registered, as the document when registered takes effect from the date of execution, it prevails against the attachment. A I R (Vol 25) 1938 Pat 134 : 19 P L T 383 : 4 B R 433 : 174 Ind Cas 372 (DB).

——S. 47—Retrospective effect of registration—Sale deed executed before but registered after attachment of property covered by sale deed—Sale deed, though subsequently registered, operates from date of its execution — Its operation is not affected by attach-

ment of property sold between its execution and registration — Sale deed on execution confers right of registration on vendee—This right is not affected by subsequent attachment of same property before registration.

A property was sold by a duly executed sale deed. Subsequently the same property was attached in a suit by a creditor of the vendor. The sale deed was registered subsequent to attachment :

Held, the operation of the sale deed started from its execution and not from the time of its registration and it was not affected by the attachment of the property sold before the registration of the sale deed. Registration was a necessary solemnity only for the enforcement of the sale and it did not suspend the sale until registration actually took place. The execution of the sale deed conferred a right of its being registered on the vendee, and attachment cannot affect that right under R. 10, O. 38, Civil P. C., and consequently S. 64, Civil P. C., could be so construed as to make the registration and thereby the perfecting of the transfer void, as such construction of S. 64 would violate R. 10, O. 38, Civil P. C. in affecting the rights springing from the sale deed by preventing the registration of that sale deed. AIR (Vol 24) 1937 Nag 143: ILR (1939) Nag 266 : 174 Ind Cas 321.

—— S. 47 — Deed of alienation—Conveyance, when complete.

'The alienation is complete when the conveyancing document is completed and is not postponed until the date of registration. A I R (Vol 24) 1937 Nag 1 : ILR (1937) Nag 291 : 167 Ind Cas 48 (DB).

——S. 47—Registered deed—When takes effect.

Under S. 47, a registered document takes effect from the date of its execution and not from date of registration. A I R (Vol 23) 1936 Pesh 103 : 162 Ind Cas 900 (DB).

— Ss. 47 and 49—Date of transfer.

Where a sale is executed on a certain date but is not registered until a later date, its operation dates back to the date of execution, although until registration the sale-deed cannot affect the property in question. Once registration is effected, S. 49 no longer applies and S. 47 begins to apply. AIR (Vol 21) 1934 All 70 : 1933 A L J 1200 : 146 Ind Cas 159 (DB).

——S. 47 — Under S. 47, Registration Act, although the registered document operates from the date of its execution, the title purported to be transferred thereby does not pass until the registration is effected. A I R (Vol 21) 1934 Rang 216 : 12 Rang 263 : 151 Ind Cas 670 (DB).

——S. 47—Date of transfer.

While registration is a necessary solemnity in order to the enforcement of a mortgage of immovable property, it does not suspend the mortgage until registration actually takes place. AIR (Vol 20) 1933 Cal 212: 36 C W N 733 : 59 Cal 1176 : 142 Ind Cas 452 (DB).

——S. 47—Date of transfer.

Registration can be effected even in absence of the vendor and indeed without his consent, and in such a case, it will be incorrect to hold that transfer has taken place on the date of registration. So it is the date of execution and not the date of registration that should be taken as date of transfer. A I R (Vol 20) 1933 Lah 821 : 149 Ind Cas 853.

——S. 47—Release of attachment between execution and registration does not invalidate sale.

A sale-deed of certain immovable property worth more than Rs. 100 was executed on the 4th of December, 1912. The property was then under attachment. It was released from that attachment on the 10th of December. The sale-deed was registered on the 13th of February, 1913.

Held : that the transfer was made on the date of registration because if the deed had not been registered there would have been no transfer at all. That for certain purposes, or even for all purposes, it took effect as from the date of execution has nothing to do with the date on which it was made. A I R (Vol 14) 1927 Nag 289 : 103 Ind Cas 65.

——S. 47—Retrospective effect of registration.

Although a document, so long as it remains unregistered is not valid, yet as soon as it has been registered and that requirement has been complied with, it takes effect from the date of its execution. When the law has given to a transaction a retrospective effect, it must have that effect. AIR (Vol 13) 1926 All 549: 95 Ind Cas 138 (DB).

——S. 47—Registration of sale-deed after suit.

A sale-deed executed before but registered after the institution of a suit is not affected by the doctrine of lis pendens in S. 52, T. P. Act as the sale-deed on registration takes effect from the date of execution. 5 P L J 715, Not foll. A I R (Vol 12) 1925 Mad 359 : 83 Ind Cas 133.

——S. 47—Registration makes title complete from date of execution of document.

The effect of the sections, is that, if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor, as the case may be, can defeat the title which, on registration, becomes an absolute title dating from the date of the execution of the document. The subsequent birth of a child, or the adoption of a child, or the death of the vendor or donor has no effect in defeating a title obtained under an instrument executed before the happening of these events but registered thereafter. A I R (Vol 10) 1923 Mad 282 : 73 Ind Cas 206 : 17 M L W 232 (FB).

——S. 47 — Sale of immovable property worth more than Rs. 100—Title does not pass until registration—After registration title dates back to the date of sale deed. AIR (Vol 8) 1921 Pat 150: 59 Ind Cas 290: 1921 P H C C 122 : 2 P L T 95 (DB).

—— S. 47 — Operation of registered deed, date of—Suit for Zar-i-chaharum.

Where a house was sold on 20-1-1909 and the sale deed presented for registration on 21-1-1909, registration completed on 29-1-1909, and a suit for Zar-i-chaharum brought on 28-1-1915.

Held, that the suit was time-barred, the right to sue having accrued to the plaintiff from the date of the sale and not from the date of completion of registration. AIR (Vol 3) 1916 All 199 : 14 A L J 382 : 35 Ind Cas 347 (DB).

— S 47—Date of operation of registration.

Under S. 47 a registered deed operates from the date of its execution. : A I R (Vol 2) 1915 L B 112 : 8 Bur L T 98: 27 Ind Cas 802; See also 52 P W R 1915: 128 P L R 1915 : A I R (Vol 2) 1915 Lah 124 : 27 Ind Cas 481.

2. Pre-emption.

——S. 47—Deed compulsorily registrable—Transfer, when becomes effective as regards third parties.

In the case of a deed compulsorily registrable, incompleteness due to want of registration is not a thing of which the executant can take any advantage and if the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective, because registration does not depend upon the executant's consent but is the act of the officer appointed for the purpose. But as regards third parties, the point of time at which the transfer is to be effective is when the deed of transfer can be said to be a registered deed. Registration includes the getting made and the making of certain endorsements, making the certification of registration and the copying of the documents in the register book and the filing of the map or plan, if any, in Book No. 1. The substantial portion is apparently

complete with the making of the certificate of registration. AIR (Vol 23) 1936 Cal 17 : 61 C L J 360 : 62 Cal 979 : 160 Ind Cas 730.

——S. 47—For purposes of S. 2 a transfer sought to be pre-empted would come into force on the date of the deed of sale and not when it was registered. Therefore, Agra Pre-emption Act of 1922 does not apply to a transfer made before the 17th of February, 1923, when the Act came into force although the deed of transfer is registered after that date. AIR (Vol 14) 1927 All 545: 25 A L J 742: 103 Ind Cas 308 (DB).

——S. 47—In a pre-emption suit the limitation runs from the date of registration and not from the date of execution of the deed of sale and the article applicable is 120. Section 47 of the Registration Act does not apply to the case. AIR (Vol 9) 1922 Nag 200 : 68 Ind Cas 715.

3. Priority.

——S. 47 — Priority between two registered documents relating to same property.

The law gives a four months' period for registration and if the document is registered within that date, the subsequent transferee cannot be heard to say that as he got his document without notice, and, during the period allowed to the earlier transferee, got his own document registered first he must be deemed to be a bona fide purchaser for value. Such a plea, if allowed, would lead to much fraud. In such a case, therefore, the document executed first in order of time has priority over the other though the first document may not have been registered until after the second. AIR (Vol 33) 1946 Mad 140: (1945) 1 Mad L J 425 : 58 Mad L W 244 : 1945 MWN 342.

——S. 47 — A document, when registered, operates from the date of its execution. Where there are two registered documents in respect of the same property, the one which was executed first has priority over the other, though the former was registered after the registration of the latter. AIR (Vol 29) 1942 Oudh 201 : 1941 O W N 1298 : 1941 A W R 1109 : 197 Ind Cas 686

——S. 47—Powers of Registrar.

The appellant obtained a compromise decree on February 19, 1932, by which a charge was created on the property which was the subject-matter of a mortgage executed in favour of the respondent on April 26, 1932 The compromise of the appellant was registered on June 10, 1933 :

Held that the Registrar had no jurisdiction to register the document. That the mortgagee of the mortgage of April 26, 1932, had priority over the appellant. AIR (Vol 26) 1939 Pat 96 : 5 B R 110 : 178 Ind Cas 505 (DB).

——S. 47—A registered document operates from the date of its execution and not from that of its registration; so a document executed on February 2, but registered only in the following December should be given priority over another deed executed and registered on February 13, even though the latter was accompanied by possession. AIR (Vol 18) 1931 Sind 74 : 124 Ind Cas 371 (DB).

——S. 47 — P's deed executed after, but registered before D's deed in respect of the same property — D fraudulently delaying registration and misleading P.

Held, that though the effect of registration is to confer validity on the document from the date of its execution, D should not be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale-deed in P's favour executed later but registered earlier. AIR (Vol 13) 1926 Mad 39: 49 M L J 396: 1925 M W N 596: 90 Ind Cas 875.

——Ss. 47, 74 and 75 — Priority—Sale — Enquiry under S. 74 — Sale-deed executed and registered in the interval.

A sale-deed executed earlier but registered later owing to proceedings under Ss. 74 and 75 of the Act takes effect as against a deed executed and registered in the interval. AIR (Vol 6) 1919 Lah 196 : 7 P L R 1919 : 52 Ind Cas 99.

——S. 47—Priority of registration—Priority of execution—Conflict between.

A mortgage deed executed prior to a deed of sale but registered after the registration of the latter within the time limited by the Registration Act, has priority over the deed of sale. AIR (Vol 5) 1918 Cal 539 : 42 Ind Cas 616 (DB).

——S. 47—Date of operation of a Kabala and priority of title in case of different Kabalas.

A duly registered Kabala operated from the date of its execution and not from the date of its registration. Thus, there being two different kabalas one later than the other in favour of two different persons in respect of the same property, title under the first has priority over title under the second though the second is registered prior to the first and possession is delivered under it. 6 Bom 165; 8 Bom 182 not foll. AIR (Vol 5) 1918 Mad 960 : 22 C W N 318 : 37 Ind Cas 817 (DB).

——Ss. 47 and 50 — Suit on unregistered mortgage-deed — Attachment of mortgaged properties, after execution but before registration of another mortgage-deed—Priority.

Where between the dates of execution and registration of a mortgage-deed another unregistered mortgage is sued upon and the mortgaged properties attached, the unregistered mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment order obtained in that suit. AIR (Vol 4) 1917 Mad 364 : 32 Ind Cas 431 (DB).

——S. 47 — Two sale deeds—Conflict — T. P. Act, S. 41.

A deed executed after another deed but registered before the other, must give way to the earlier deed. Section 41, T. P. Act, should not be construed so as to conflict with S. 47, Registration Act. AIR (Vol 1) 1914 All 313 : 12 A L J 993 : 25 Ind Cas 725.

——S. 47—Priority of — Registered — Documents—Effect.

According to S. 47, a previously executed deed, gets priority over a subsequently executed deed, though the latter is registered first, provided the previous one is registered within four months of its execution. 153 P W R 1912 : 185 P L R 1912: 105 P R 1912 : 16 Ind Cas 29.

——Ss. 47 and 50.

Where a mortgage was executed and attested on January 19th, 1908 and another mortgage was executed and registered on January 22nd and the first mortgage was registered on the 23rd and its date was altered to the 23rd ;

Held, that the 1st mortgage was entitled to priority. (1912) 15 C L J 61 : 16 C W N 612 : 13 Ind Cas 653 (DB).

——S. 47—Priority between registered deeds—Test—Date of the deed—Date of registration—Possession.

Where two deeds bearing different dates are each registered on different days, the priority as between them is ascertained with reference to the date of the deed and not with reference to the date on which they are respectively registered. The priority is not influenced by the fact that the party having the latter deed is in possession of the property, 2 B. 299; 6 B. 380; 8 B. 182 declared overruled by 11 I. A. 218 on the point that possession was necessary to complete a title by purchase on the point of priority between registered instruments. (1904) 6 Bom L R 687 : 29 B 42 (44, 45) (DB); See also (1905)29 B 46 (51): 6 Bom L R 690.

4. Registered document — Presumption.

——S. 47—Neither under S. 53-A, T. P. Act, nor the amended S. 47, Registration Act, can a landlord claim rent under an unregistered lease. If the lease required registration, I cannot accept the argument that under S. 47, Registration Act, a claim for rent is permissible when the lease is not registered, for that would be to repeal part of the Act. AIR (Vol 23) 1936 Cal 628 : 62 Cal 294 : 163 Ind Cas 845.

——S. 47—Registered document should be presumed to be written on the date it bears. The onus is on the contesting party to show that it was not. In all such cases lapse of time does strengthen the onus cast. AIR (Vol 13) 1926 Mad 744 : 23 MLW 664 : 1926 M WN 938 : 96 Ind Cas 28 (DB).

5. Registration pending suit or attachment.

See N. 1.

6. Scope and applicability.

——S. 47—Scope—If operates as against third parties.

Section 47, Registration Act, operates not only as between parties to the deed but also affects rights of third parties. AIR (Vol 35) 1948 Pat 60 : 13 Cut L T 21 (DB).

——S 47—Section 47 refers to a registered document and its operation from the date on which it would have operated if no registration had been required or made. AIR (Vol 26) 1939 Pat 96 : 5 BR 110 : 178 Ind Cas 505 (DB).

——S. 47—Applicability.

There is nothing in S. 47 which shows that it only relates to S. 17 and it would seem to relate to any requirement of registration made by any other statute for the time being in force. AIR (Vol 24) 1937 Rang 446 : 1937 Rang LR 375 : 172 Ind Cas 126 (FB).

——S 47—Scope—Registered document — Time for operation.

Section 47 says that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. The section contemplates that any document presented for registration shall be complete and valid in law before its presentation. AIR (Vol 23) 1936 Bom 94 : 37 Bom LR 913 : 161 Ind Cas 574.

——S. 48.

1. Applicability and scope.
2. Oral or unregistered agreements.
3. Oral agreements and possession.
4. Priority.
5. Notice.

1. Applicability and scope.

——S. 48—Mortgage by deposit of title deeds — Section does not apply.

A mortgage by deposit of title deeds cannot be looked upon as a mere oral transaction as the act of deposit is the essential part of it. In fact the intention to create security is inferred in such cases from the mere deposit of deeds coupled with the loan without more, without writing, without words of mouth. A mortgage of this type does not fall within the purview of S. 48. AIR (Vol 17) 1930 Lah 920 (DB).

2. Oral or unregistered agreements.

——S. 48—Unregistered contract—Specific performance.

An unregistered agreement, unless it operates as a present demise does not, of itself, create any interest or charge on the subject-matter of the agreement and is not admissible for enforcing specific performance unless it is registered. (1910) 14 CWN 65 : 5 Ind Cas 38.

——S 48 — Deposit of title deed under oral agreement.

Deposit of title deeds of property under a verbal arrangement to secure payment of debt is not an oral agreement or declaration relating to such property within the meaning of S. 48. (1905) 10 CWN 276 : 4 Cr J 102 : 33 Cal 410 (422) (DB).

3. Oral agreements and possession.

——S. 48 — Possession under unregistered deed prevails over later registered conveyance.

Section 48 makes it clear that a registered document shall take effect against an oral agreement or declaration relating to any property only when the said agreement or declaration has not been accompanied or followed by delivery of possession. But an oral agreement or an unregistered written agreement as to sale of immovable property followed by delivery of possession without any registered document with respect thereto, shall effect the validity of the subsequent sale of the same property. AIR (Vol 16) 1929 Pat 620 : 10 PLT 449 (DB).

——S. 48 — Prior unregistered deed of possession — Vendee paying the price and let in possession — Registered deed not executed — Vendee can defend his possession

Where a purchaser of immovable property under an unregistered kobala has paid the agreed price to the vendor, and is placed in possession, in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance cannot succeed in a suit to recover possession of the property from such purchaser :

To permit such a defence to be taken does not amount to an invasion or evasion of the Registration Act. AIR (Vol 15) 1928 Pat 44: 7 Pat 95: 9 PLT 308: 105 Ind Cas 63 (DB).

——S. 48 Unregistered lease deed

Lease though unregistered can be used to determine nature of possession and landlord's title. AIR (Vol 12) 1925 Lah 500 : 26 PLR 115: 86 Ind Cas 733.

——S. 48—Can be enforced against subsequent purchaser.

An oral agreement to sell to a mortgagee in possession can be enforced against a subsequent registered purchaser because the previous possession of the mortgagee together with the agreement to sell, is equivalent to transfer of possession under the agreement of sale. But oral agreement is not admissible if no previous possession is proved. AIR (Vol 10) 1923 Lah 560 : 5 LLJ 163 : 74 Ind Cas 577.

4. Priority.

See also N. 5.

——S. 48—If a person who if in possession of the property already by virtue of another title, subsequently secures another title to that property by means of a document, which requires registration but which has not been registered, the factum of possession prior to the subsequent acquisition of title puts a subsequent purchaser of the same property by means of a registration of document on enquiry as to the title of the person already in possession and has the effect of postponing him to the title subsequently acquired by the person in possession. AIR (Vol 25) 1938 Lah 39: 171 Ind Cas 265.

——S. 48—Oral sale to mortgagee in possession—Subsequent registered sale-deed in favour of another vendee having the notice of former sale.

Held, that the former sale prevails over the latter. AIR (Vol 22) 1935 Lah 164.

——S. 48—Prior unregistered document.

The fact that a sale deed was unregistered may give priority to a third person claiming under a registered deed, but it has no bearing on the question whether the vendor did sell the land to the vendee. AIR (Vol 16) 1929 PC 303.

——S. 48—Registered gift—Prior oral sale.

Where a previous oral sale is made of certain property to the knowledge of a person who subsequently takes a registered deed of gift it is not open

to the latter to impeach the oral transfer previously made or to claim the benefit of S. 43 of the Registration Act. AIR (Vol 6) 1919 Lah 404 : 1932 PR 1919 : 52 Ind Cas 245.

——S. 48—Oral gift—Subsequent mortgage of same property - Priority.

S. 48 of the Regn Act, gives a subsequent registered mortgage preference over a prior oral gift not accompanied by delivery of possession. AIR (Vol 3) 1916 Lah 291: 30 PR 1916: 21 PWR 1915: 34 Ind Cas 920 (DB).

——S. 48—Registered mortgage and mortgage by deposit of title deeds.

A mortgagee who holds a registered deed of mortgage cannot claim priority over an earlier mortgage created by deposit of title deeds as the English doctrine of the real estate prevailing over the equitable estate does not obtain in India where there is no distinction between legal and equitable estates. AIR (Vol 3) 1916 Lah 39: 31 PR 1916 : 215 PWR 1915: 34 Ind Cas 937 (DB).

——S. 48—Effect of possession—Notice.

When the usufructuary mortgagee of certain property purchased by an unregistered deed of sale the equity of redemption and subsequently another person purchased the same by a registered sale deed the latter could claim no priority over the former if he was aware of the possession of the former, and did not make enquiries as to the nature of his possession. (1913) 18 Ind Cas 46 (Cal) (DB).

——S. 48—Oral and registered mortgage.

An oral mortgage is postponed to a registered mortgage. (1913) 6 LBR 144: 6 Bur LT 72: 19 Ind Cas 2.

——S. 48—Mortgage—Registered instruments and oral agreement.

A Registered instrument of mortgage takes effect against an oral agreement relating to the hypothecated property. (1905) 3 ALJ 275 (284) (DB).

5. Notice.

See also N. 4.

——S. 48—Possession, if tantamount to notice — Absence of enquiry—Effect.

The underlying principle of S. 48 is that possession is tantamount to notice of the interest or claim in the property of the person in possession and whoever deals with such property is put on enquiry as to the title of the person in possession. If, therefore, the factum of possession is proved, notice to the transferee of the claim or interest of the person in possession must be assumed. That being so, he is put on enquiry as to the claim to the property and when no enquiry is made, there is postponement of the claim. AIR (Vol 25) 1938 Lah 39: 171 Ind Cas 265.

——S. 48—Subsequent registered deed — Prior unregistered deed or oral transaction — Subsequent transferee had actual notice of the prior transaction —Registered subsequent deed will not prevail—Onus or proof lies on claimant under unregistered deed or oral transaction. AIR (Vol 16) 1929 Lah 500: 119 Ind Cas 754.

——S. 48—Third party in possession.

If the property to be sold is not in the possession of the vendor, but of an another person it is the duty of the purchaser to make enquiries from that person, and that he is bound by all the equities which the party in possession may have in the property. AIR (Vol 16) 1929 Pat 284 : 8 Pat 316: 117 Ind Cas 170 (DB).

——S. 48—Knowledge of prior agreement.

Subsequent purchaser knowing prior agreement to sell, gets no right to the property. AIR (Vol 15) 1928 Cal 754: 116 Ind Cas 370 (DB).

——S. 48 — Registered sale — Prior oral gift with possession—Notice.

A, the owner of a house worth more than Rs. 100, gave it to the deft. in satisfaction of a debt, and put the deft. in possession. A sold the house afterwards by registered deed to the plff. who sued for possession ; Held, that as the house was given over to deft. in satisfaction of a debt and the deft. was in possession, the plff. must have had notice of deft.'s right. (1911) 4 Bur LT 137: 12 Ind Cas 905.

——Ss. 48, 50—Priority—Notice — No delivery of possession—Conflict between registered document and prior unregistered document or oral agreement to sue in a suit for specific performance.

A subsequent registered document cannot be pleaded in bar of a prior unregistered document or a prior oral agreement to sell if the registered document has been taken with notice of the latter. The provision as to delivery in S. 48 does not preclude the party to the oral agreement from relying on the doctrine of notice when there has been no delivery of possession. (1907) 17 MLJ 319 (320) (DB).

——S. 49.

1. Applicability.
2. Scope.
3. "Or by any provision of the Transfer of Property Act."
4. "Affect any immoveable property comprised therein"—Clause (a).
5. Authority to adopt—Clause (b).
6. Clause (c).
7. Collateral transaction.
   See also N. 9.

7a. Part performance.

8. "Unless it has been registered."
9. Particulur transactions.
10. Amendment, if retrospective.
11. Question of admissibility when to be raised.
12. Registered document confirming another unregistered document
13. Proof of transaction independent of document.
14. Oral evidence of terms of compulsorily registrable document.

1. Applicability.

——S. 49—Section 49 has no application to an award under Beng. Agri. Debtors' Act. AIR (Vol 29) 1942 Cal 337 : 46 C W N 391 : 200 Ind Cas 341.

——S. 49 — Section 10A, Dekkhan Agriculturists' Relief Act, 1879, has been amended so as to make it clear that the words "any other law for the time being in force" are sufficiently wide at least to include the provisions of S. 49 of the Registration Act. A I R (Vol 23) 1936 Sind 209 : 30 S L R 198 : 166 Ind Cas 321 (DB).

——S. 49—Effect of Non-Registration.

If its registration is invalid, it is so for all purposes, and even a simple money-decree cannot be passed that there is an acknowledgment of debt in the deed. 90 Ind Cas 792 : AIR (Vol 13) 1926 Oudh 138.

——S. 49 — Applicability to Will—Will operates in respect of all property though illegally registered.

A deed of gift or transfer of sir land without reservation of occupancy rights and of other property as well would be wholly inoperative and wholly inadmissible in evidence only by reason of the provisions of S. 49 of the Registration Act, which apply only to documents of which Registration is compulsory under S. 17 of the same Act. They do not forbid the operation or admissibility in evidence of documents of which Registration is optional under S. 18, and a will is such a document. Provided therefore that the will has been properly proved it can operate in respect of all property mentioned in it which the testator legally was competent to devise, even if it was illegally registered. 62 Ind Cas 246 : 4 N L J 43 : AIR (Vol 8) 1921 Nag 34 (DB).

——S. 49—Construction.

The provisions of S. 49 of this Act do not affect the admissibility of the evidence regarding the contract of sale of immovable property of less than one hundred rupees where the deed is not registered and delivery of possession has not been given because S. 49 relates only to documents compulsorily registrable under S. 17. (1916) 2 M W N 136 : 34 Ind Cas 921 : AIR (Vol 4) 1917 Mad 951 (DB).

——S. 49—Construction.

The Registration Act excludes from evidence unregistered documents of certain value. A registered deed of sale not only makes the transfer but also proves it. 12 N L R 139 : 38 Ind Cas 547 : AIR (Vol 3) 1916 Nag 93.

2. Scope.

——Ss. 49 and 17—Scope.

The document falling within S. 17 (1) (c) of the Registration Act need not of itself effect the creation of right, title, or interest in immoveable property and it is sufficient for the bar of S. 49 (c) of the Act to operate in respect of such a document, that on account of such creation of interest even though effected otherwise than by the document in question, the document acknowledges the receipt of payment of any consideration. (1950) 1 M L J 446 : AIR (Vol 37) 1950 Mad 603.

——S. 49—Scope and effect of.

It is clear from the provisions of the above sections that a document in itself creating or declaring, etc., any right in immoveable property over the value of specified amount should be registered, and if not registered it cannot affect any property comprised therein nor can be received as evidence of any transaction affecting such property except in the three specified cases mentioned in the proviso to S. 49. In our view the document clearly creates an interest in immoveable property therefore it can neither affect immoveable property nor can be used in evidence. (1950) 1 M L J 151 : AIR (Vol 37) 1950 Mad 433 (DB).

——S. 49 and Specific Relief Act, S. 27-A—Relative scope and effect of. See AIR (Vol 36) 1949 Nag 389.

——S. 49—No equitable doctrine can operate so as to make an unregistered document create title if it requires registration. It cannot override the specific provisions of S. 49. AIR (Vol 28) 1941 Lah 407 : 43 P L R 656 : I L R (1942) Lah 79 : 197 Ind Cas 282 (FB).

——Ss. 49, 17—Document not registrable at time of execution.

The rule in S. 49 is not that of adjective law. Section 49, is as much a portion of substantive law as S. 17, and they go hand in hand. Section 49 will rule out only the documents which were registrable under S. 17 and S. 49 does not go beyond S. 17 and does not rule out documents at the time of their production which were not registrable at the time when they were executed. AIR (Vol 23) 1936 Pesh 125 ; 163 Ind Cas 64 (DB).

——S. 49—Where a sale is executed on a certain date but is not registered until a later date, its operation dates back to the date of execution, although until registration, the sale deed cannot affect the property in question. Once registration is effected, S. 49 no longer applies. AIR (Vol 21) 1934 All 70 : 1933 A L J 1200 ; 146 Ind Cas 159 (DB).

——S. 49—Documents not required to be compulsorily registered under S. 17 are good evidence of the transaction set forth in them. 10 P L T 449 : AIR (Vol 16) 1929 Pat 620 (DB).

——S. 49—Section 49, Registration Act, must be read together with S. 17 of that Act and S. 91, Evidence Act, and a fair interpretation of S. 49 does not preclude an unregistered document which is required by law to be registered from being given in evidence as to the terms of the contract for sale. 35 Mad 63 (FB), not Foll. 120 Ind Cas 232 : 7 Rang 414 : AIR (Voj 16) 1929 Rang 293 (DB).

——S. 49—S. 49 applies only to documents mentioned in S. 17 and not to documents under Transfer of Property Act, S. 54. 41 Bom 550, not Foll. 118 Ind Cas 177 : 50 All 986 : 26 A L J 1884 : AIR (Vol 15) 1928 All 726 (FB).

[Case before Amendment—Ed.]

——S. 49—Construction.

The non-registration of a compulsorily registrable document leads to two consequences ; one it is inadmissible in evidence of any transaction affecting immovable property and (2) it cannot affect immovable property comprised therein. The entry of an unregistered but compulsorily registrable agreement in a decree or order of Court would be relevant to prove the agreement. (1913) 36 Mad 46 : 21 M L J 870 : 10 M L T 232 : (1911) 2 M W N 265 : 12 Ind Cas 317 (DB).

——S. 49—Construction.

S. 49 consists of two parts. It provides "that no document required by S. 17 to be registered shall affect any immovable property comprised therein." The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property," i.e., the immovable property. As regards immovable property, not comprised in the instrument or a transaction in respect thereof the section does not refuse to admit the instrument. The first part presupposes that the document itself is the transaction or the mode in which it is carried out. The second part refers to cases where the document itself is not the transaction but only the record of a transaction or being itself a transaction contains, a reference to or a recital of another transaction affecting the immovable property comprised therein. (1912) 35 Mad 63 : 21 M L J 44 : 9 M L T 142 : (1910) MWN 743 : 8 Ind Cas 520 (FB).

3. "Or by any provision of the Transfer of Property Act."

——S. 49—Interpretation.

The reference in S. 49 cannot be deemed to be applicable to the provisions of S. 54, Transfer of Property Act where a document purports to transfer tangible immoveable property of value of less than Rs. 100. Section 49 does not make it admissible in evidence. AIR (Vol 23) 1936 Cal 130 : 61 C L J 590 : 161 Ind Cas 734.

——S. 49 — Document called division settlement karar, creating rights in immovable property with more than Rs. 100 is inadmissible without registration. A I R (Vol 12) 1925 Mad 1195 : 22 M L W 116 : 90 Ind Cas 1016 (DB).

——S. 49 — Lease for less than 1 year — Written instrument though registrable under Transfer of Property Act, S. 107, does not come under Registration Act, Ss. 17 and 49. So such a lease is not a document required by S. 17 to be registered and S. 49 can have no application to the case. A I R (Vol 8) 1921 Mad 337 : 44 Mad 55 : 59 Ind Cas 350 (FB).

[Case before Amendment—Ed.]

4. "Affect any immoveable property comprised therein"—Clause (a)

——S. 49 — "Document affecting immovable property" in proviso—Interpretation.

Obiter.—The words "document affecting immovable property" in proviso to S. 49, Regis. Act, are not only meant to cover the documents containing agreements such as a contract to lease or a contract to sell but also cover documents which convey or purport to convey title to immovable properties. The words are unambiguous and full effect should be given to them. The language of the proviso should be construed in a

manner which would make all the documents affecting immovable property admissible as evidence of contracts in suits for specific performance, particularly when it is found that documents conveying title to immovable property do not ordinarily come into existence without prior contracts. A I R (Vol 26) 1939 Mad 391-1939-1 M L J 82 : 1939 M W N 165 : 184 Ind Cas 465.

——S 49—"Affecting such property."

The establishment of a title by adverse possession is a transaction affecting immoveable property. AIR (Vol 2 1915 Mad 573 : 38 Mad 1158 : I L W 754 : 16 M L T 344 : (1914) M W N 768 : 27 M L J 497 : 25 Ind Cas 772 (DB).

——S. 49 (c) — Whether lessee under unregistered lease can resist ejectment.

A lessee cannot resist an ejectment by relying upon the lease which serves him in possession for an indefinite period and the registration of which is thus compulsory inasmuch as the unregistered lease does not under law affect the land it relates to. (1914) 1 O L J 585 : 26 Ind Cas 542.

——Ss. 49, 87—Death of executant —Registration at the instance of one of several heirs — Validity — Document if binds immoveable property.

A document which was presented for registration by one of the heirs of the deceased executant and registered is not precluded by S. 49 from affecting the immoveable property specified in it, although the registration might have been irregular.

Quaere:—Whether S. 87 which cures defects in the procedure of the registering officer can be extended also to cure the shortcomings of persons who apply to have documents registered. (1909) 13 C W N 722 (723) : 4 Ind Cas 69 (DB).

——S. 49—The admissions of the defts. do not make the document admissible as evidence of a transaction affecting immovable property nor can secondary evidence be given of its contents. But a decree may be given in respect of so much of the immovable property which is mentioned in the plaint and admitted by the defts., in their written statement that the plff. was entitled to. (1909) 19 M L J 228 : 4 M L T 354 : 3 Ind Cas 321 (DB).

5. Authority to adopt—Clause (b).

——S. 49—An authority in writing under S. 22 (8) Oudh Estates Act given by a Hindu taluqdar to his wife to adopt after his death did not require registration. The Oudh Estates Act being a special Act providing for a special class of persons and succession to a special class of property is not affected by a subsequent general Act such as the Registration Act of 1871 or 1877 which makes no reference to the class of persons governed by the special Act and therefore was not intended to apply to the class of persons specially governed by the Oudh Estates Act: Case law discussed. A I R (Vol 34) 1947 Oudh 180 (FB).

——S. 49—Authority to adopt.

An authority to adopt, which is in writing and not contained in a will must be compulsorily registered under Ss. 17 and 49 of the Registration Act.

Quaere:—When it is not registered, whether oral evidence is admissible. (1903) 13 M L J 283 (284) : 27 Mad 30.

——S. 49—An authority to adopt though not registered may be admissible in evidence for collateral purposes. (1902) 4 Bom L R 883 (886).

6. Clause (c).

——S. 49—If the document falls within the purview of S. 17, Registration Act, and is not registered, it will not be admissible in evidence by virtue of S. 49 of the same Act. A I R (Vol 24) 1938 Lah 135 : 39 P L R 253 : 164 Ind Cas 63.

——S. 49—Non-registration—Effect stated.

The rights under contract arise immediately after the execution and do not arise in consequence of registration. The effect of non-registration is to prevent the enforcement of those rights in a Court of law inasmuch as the contract cannot be received in evidence unless registered. The rights do not arise upon registration. A I R (Vol 24) 1937 Pat 36 : 17 P L T 963 : 15 Pat 786 : 3 B R 233 : 166 Ind Cas 797 (DB).

——S. 49 — Deeds transferring immovable property, if unregistered, are not admissible and cannot be considered where the title to the property is in dispute. AIR (Vol 24) 1937 Pesh 28 : 168 Ind Cas 41 (DB).

——Ss. 49, 17 — Contest between parties to a deed and third parties—Admissibility of the unregistered deed compulsorily registrable under S. 17 of the Act.

An unregistered document compulsorily registrable under S. 17 cannot be received in evidence in accordance with the provisions of S. 49 and there is no warrant for the proposition that these provisions are applicable only when the contest is between the parties to the deeds inter se and not when it is between third parties and the executants. A I R (Vol 21) 1934 Lah 759 : 36 P L R 25 : 153 Ind Cas 813 (DB).

7. Collateral transaction.

See also Note 9.

(a) General.
(a-1) Admission.
(b) Acknowledgment of liability.
(c) Covenant for title.
(d) Contract to transfer.
(e) Suit for damages.
(f) Date of possession, fact of possession, delivery of possession.
(g) Fraud, and state of mind.
(h) For contradicting fact in issue.
(i) Indivisible transaction.
(j) Nature of character of possession.
(k) Terms of document.
(l) Unregistered document comprising moveable and immoveable property.
(m) Fact of payment of money.

(a) General.

——S. 49, proviso — Applicability to N.-W. F. Province.

The T. P. Act does not apply to the N.-W. F. Province. The portion of the proviso to S 49, Registration Act, which refers to the T. P. Act must, therefore, be eliminated when considering the applicability of the proviso to a case in the N.-W. F. Province. A I R (Vol 30) 1943 Pesh 82 : 211 Ind Cas 68 (DB).

——S. 49 — Proviso to S. 49 is merely a statement of what was held to be law before its introduction. AIR (Vol 29) 1942 Bom 268 : 44 Bom L R 534 : ILR (1942) Bom 595 : 203 Ind Cas 238 (DB).

——S. 49—Collateral purpose—Meaning of.

Per Wassoodew, J. — Collateral purpose, within meaning of S. 49, proviso is any purpose other than that of creating, declaring, assigning, limiting or extinguishing right to immovable property. A I R (Vol 29) 1942 Bom 268 : 44 Bom L R 534 : I L R (1942) Bom 595 : 203 Ind Cas 238 (DB).

——S. 49 — An unregistered document affecting immovable property may be received as evidence of a collateral transaction not required to be effected by registered instrument. A I R (Vol 23) 1936 Pat 634 : 3 B R 139 : 166 Ind Cas 209.

——S. 49—Admissibility for collateral purpose—Extent of.

A document of which registration is compulsory, but which has not been registered, may be used as evidence for any collateral purpose. i e., any purpose other than that of creating or extinguishing a right

to immovable property. That implies that the terms of an alleged mortgage cannot be properly proved by evidence of a kind not falling under Ss. 63 and 91, Evidence Act, merely on the ground that the Court is ascertaining the quantum of interest that remains with a person in possession of the land. This is getting round the provisions of S. 49 in an illegitimate manner (to that of the majority.) A I R (Vol 15) 1928 Bom 484 : 115 Ind Cas 379 : 52 Bom 875 : 30 Bom L R 1277 (DB).

——S. 49—A document creating an interest in immovable property being inadmissible for want of registration, cannot be looked at, and admitted in evidence to prove the secondary purpose for which the document is executed. A I R (Vol 13) 1926 Bom 573 : 98 Ind Cas 426 : 28 Bom L R 1152 (DB).

——S. 49 — Unregistered deed affecting immovable property is admissible otherwise than as affecting immovable property. A I R (Vol 13) 1926 Mad 1040 : 96 Ind Cas 881 : 49 Mad 738 : 1926 M W N 732 : 24 M L W 529 : 51 M L J 410 (DB).

——S. 49—Unregistered deed though not capable of passing title is yet admissible for other purposes.

An unregistered mortgage or sale-deed though not capable of passing title is yet admissible for other purposes; for instance to show that a person is in possession of land not as tenant of another i. e., that the relationship of landlord and tenant does not exist between the parties or to show that since the date of the deed a person is in possession adversely to the owner. AIR (Vol 11) 1924 All 837 : 78 Ind Cas 955.

(a-1) Admission.

——S. 49—Section 49 will not apply to a case where there has been an admission in the pleadings. A I R (Vol 19) 1932 Bom 305 : 34 Bom L R 415 : 138 Ind Cas 433 (DB).

——S. 49—Admissibility—Admissions—Unregistered documents—Are admissible as evidence of admissions contained therein.

Although under S. 49 document which should be registered and is not registered is inadmissible as evidence of a transaction affecting property, yet when it is put forward as containing an admission it is not being put forward as evidence of a transaction affecting property and so it cannot be said to be inadmissible as evidence of an admission. AIR (Vol 16) 1929 Cal 636 : 121 Ind Cas 409 : 49 C L J 532 (DB).

——S. 49—Mere admission need not be registered.

An application for correction of papers filed in the Revenue Courts in which the defendant admitted that the plaintiffs were in possession of the area in suit by mutual arrangement and asked that the papers should be corrected accordingly to prevent future disputes, is not a document of title; it is merely an admission of possession based on a previous arrangement between the parties and a request to the Court to give effect to that possession and, as such admission, it is admissible without registration. AIR (Vol 11) 1924 All 304 : 73 Ind Cas 462.

——S. 49—Affecting such property—Admissions, unregistered deed.

In an ejectment suit, if the defendant admits the terms of the lease, the production of the document is unnecessary and an unregistered lease does not affect the defendant's admission. A I R (Vol 8) 1921 Lah 64 : 57 Ind Cas 262 (DB).

——S. 49—Defendant admitting terms of lease as set out in plaint—Admissibility of document of a lease attacked — Court can act on defendant's admission. AIR 1921 Lah 64 : 3 L L J 253 (DB).

——S. 49 — An unregistered deed of lease for more than a year although inadmissible in evidence as a lease, or for proving title, it may be admitted for proving an admission contained therein. (1921) 61 Ind Cas 328 : 3 U P L R (Lah) 44 (DB).

(b) Acknowledgment of liability.

——S. 49—Evidence of acknowledgment.

A compulsorily registrable document, though unregistered and inadmissible as evidence of a transaction affecting immovable property, may be admitted as evidence of a collateral fact or for any collateral purpose.

The defendant in mortgage suit while executing another mortgage in respect of the suit properties, addressed a letter to the proposed mortgagee containing a statement that the suit properties were subject-matter of a mortgage executed in favour of the plaintiff in the suit :

Held, that the letter, although unregistered, was admissible as evidence of a collateral fact, viz., the acknowledgment by the defendant of the mortgage in favour of the plaintiff and could be admitted under S. 49. A I R (Vol 25) 1938 Mad 865 : 1938 M W N 785 : 48 L W 292 : (1938) 2 M L J 534 : 181 Ind Cas 827 (DB).

——S. 49 — Recital of first mortgage in subsequent mortgage-deed — Subsequent-deed unregistered — Admissibility of deed to prove acknowledgment of prior deed.

Where a mortgage deed was executed in 1914, and after the death of the mortgagor, his heirs executed in 1926 a document described as a mortgage-deed in favour of the mortgagee in which they acknowledged the mortgage of 1914, and said that they were re-mortgaging the property for the balance of the mortgage debt, but the subsequent deed was not registered :

Held, (i) that though the deed of 1926 was inadmissible in evidence as a mortgage-deed, it was admissible to prove an acknowledgment of the prior mortgage ;

(ii) that in the document in question, the reference to the earlier mortgage was a mere recital of a pre-existing fact and, therefore, it was exempt from registration. A I R (Vol 19) 1932 Lah 592 : 34 P L R 593 : 140 Ind Cas 387.

——S. 49 — Unregistered deed — If can be basis of claim.

A suit lies on an unconditional acknowledgment as it implies a promise to pay. Therefore, where the registration of a deed of assignment is refused on the ground that it contravenes the provisions of the Punjab Alienation of Land Act, the deed, though unregistered, can be used as the basis of a claim for return of the money acknowledged to be due therein. It is not necessary to base the claim on the original dealings which may, however, afford good evidence if the claim is contested. A I R (Vol 19) 1932 Lah 400 : 33 P L R 517 (2) : 137 Ind Cas 155.

——S. 49 — Collateral purpose — Unregistered sale-deed is admissible for collateral purposes.

An unregistered sale-deed, though inadmissible for proving any transaction affecting the property which it purported to convey, can be received in evidence for collateral purposes. For example, it can be used to prove the acknowledgment of debt contained therein. AIR (Vol 17) 1930 Lah 985 (DB).

——S. 49—Mortgage-deed unregistered — Mortgagee admitting his position and terms of mortgage—Non-registration will not destroy mortgagor's right to redeem — Deed can be used to prove terms agreed upon. A I R (Vol 14) 1927 Mad 92 : 98 Ind Cas 195 : 25 M L W 327.

——S. 49—Collateral fact — Covenant to pay dower —Amount of dower—Unregistered document.

An unregistered deed of a sale executed on the date of the marriage in lieu of dower purporting to convey properties in lieu of Rs. 1,000 fixed as dower, is admissible in evidence to prove the collateral purposes; (1) of the amount of dower and (2) the personal

obligation to pay that sum. AIR (Vol 5) 1918 Lah 61: 23 P R 1918 : 44 Ind Cas 837.

——S. 49 (c)—Collateral facts — Lease unregistered —Covenant to pay for improvements—Admissibility.

An unregistered lease is admissible in evidence to prove a collateral fact but this must be independant one and not based on the conditions in the instrument. An unregistered lease is inadmissible to prove a covenant to pay compensation for improvements by the lessee. A I R (Vol 5) 1918 Nag 74 : 15 N L R 31 : 48 Ind Cas 923.

——Ss. 49 (c) and 17—Collateral fact — Rent agreed —Admissibility of unregistered lease to prove occupation rent.

An unregistered lease is not only inadmissible under S. 49 to prove a lease, but also to prove rent agreed to be paid. AIR (Vol 3) 1916 Mad 517 : 18 M L T 483 : 2 L W 1186 : 31 Ind Cas 604.

——S. 49 — Collateral fact—Debt — Unregistered mortgage.

An unregistered deed of usufructuary mortgage, unaccompanied by delivery of possession is inadmissible as a mortgage-deed but can be admitted to prove the debt, and a simple money decree can be passed on the strength of the document. (1910) 7 A L J 71 : 5 Ind Cas 519 (DB).

(Affirming 2 Ind Cas 516 (All).)

——S. 49—Collateral fact—Covenant to pay debt—Unregistered mortgage — Evidence of personal covenant.

A registered mortgage-deed either unattested or attested by only one witness, is admissible as evidence of a personal covenant to repay the debt; so also is an unregistered mortgage deed. 18 Mad 29, Overruled. (1909) 32 Mad 410 : 19 M L J 584 : 1 Ind Cas 1 (DB).

(c) Covenant for title.

——S. 49—Defective registration—Mortgage deed is admissible to prove personal covenant. A I R (Vol 8) 1921 Low Bur 34 : 11 Low Bur Rul 148 : 66 Ind Cas 589 (DB).

——S. 49—Deed of mortgage attested by one witness only — Evidence Act, S. 68 — Admissibility — Transfer of Property Act, S. 59.

A mortgage, whether registered or not, which has not been attested or has only been attested by one witness, is admissible as evidence of a personal covenant contained therein. (1909) 19 M L J 584 : 32 Mad 410 (412, 413) : 1 Ind Cas 1 (FB).

(d) Contract to transfer.

——S. 49—Proviso — Sale-deed — Evidence of contract.

A sale-deed which has not been registered, though inoperative as a conveyance, is admissible as evidence of the contract in a suit to enforce its specific performance. AIR (Vol 33) 1946 Pat 62 : 24 Pat 325.

——S. 49, Proviso — Unregistered instrument affecting immovable property, whether sufficient to support suit for specific performance.

An unregistered instrument affecting immovable property is sufficient to support a suit for specific performance. In such a suit, the production of the document, and its proof will be sufficient to support the plaintiff's case if it embodies the whole agreement between the parties and there are no other factors to be taken into consideration. (AIR (Vol 25) 1938 Mad 801 : 179 Ind Cas 240, Overruled.) AIR (Vol 30) 1943 Mad 761 : 56 L W 627 : 1943 M W N 647 (2) : 1943-2 M L J 424 : ILR (1944) Mad 83 : 210 Ind Cas 389 (FB).

——S. 49—If a document falling under S. 17 (1) (b) is unregistered it is not admissible even to prove the agreement contained therein : 5 Bom 143, Dissented (obiter). AIR (Vol 13) 1926 Bom 375 : 50 Bom 334 : 28 Bom L R 591 : 96 Ind Cas 334 (DB).

——S. 49—Unregistered sale-deed is admissible as an agreement to sell, in suit for specific performance. AIR (Vol 13) 1926 Mad 1117 : 51 M L J 418 : 98 Ind Cas 39.

——S. 49—Admissibility — Kabala.

Although a kabala, which has not been registered is inoperative as a kabala yet it is admissible in evidence in a suit to enforce specific performance of the contract which must be deemed to have preceded the execution of the kabala. AIR (Vol 13) 1926 Pat 89 : 1926 P H C C 11 : 7 P L T 730 : 95 Ind Cas 187 (DB).

——S. 49—Collateral fact — Contract to sell — Unregistered sale-deed for less than one hundred rupees—Admissibility to prove contract of sale.

An unregistered deed of sale of immovable property for less than one hundred rupees though inoperative under S. 54 of Transfer of Property Act, where delivery has not been made is still admissible in evidence to prove the contract of sale. AIR (Vol 4) 1917 Mad 951 : (1916) 2 M W N 136 : 34 Ind Cas 921 (DB).

——S. 49 (c)—Collateral facts—Unregistered sale — Contract of sale.

If an unregistered sale deed contains a promise to execute a sale deed on stamp papers it is admissible in evidence in a suit for specific performance. AIR (Vol 1) 1914 Mad 577 : 37 Mad 480 : 12 M L T 262 : 1912 M W N 917 : 16 Ind Cas 587 (DB).

——S. 49 (c) — Collateral fact—Contract to lease — Lease unregistered — Admissibility in.

A compulsorily registrable but unregistered kabuliat, is admissible for proving the contract in a case where the suit is one for specific performance of the contract. 10 Bom 101, Dissent. (1910) 11 C L J 548 : 6 Ind Cas 634.

——S. 49—Collateral facts — Contract to sell— Admissibility of unregistered document.

A compulsorily registrable but unregistered sale deed cannot be used to prove the terms of the sale, but it may be used to prove contract to sell, to obtain specific performance. (1909) 5 N L R 70 : 2 Ind Cas 244.

(e) Suit for damages.

——S. 49—Unregistered agreement of lease required to be registered — If can be used as evidence of the agreement in a suit for damages for its breach.

Held by the Full Bench (Panchapagesa Sastri J., Contra.)—An agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach. 21 M L J 44 : I L R 35 Mad 63 (FB), Overruled.

Per Rajamannar C. J.—Section 49 (c) of the Registration Act prohibits the use of an unregistered instrument in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immoveable property. So long as the document is not sought to be relied on as evidence of any right, title or interest to or in immoveable property, there is nothing to prevent the document being received in evidence. In this view it may be that a distinction will have to be made between a suit for specific performance and a suit for damages. If the only claim in the proceedings is a personal one for damages for breach of contract then there can be no possibility of immoveable property being affected by the reception of the unregistered document which may be only used in support of the claim for damages.

Per Satyanarayana Rao J.—The prohibition against admissibility enacted by S. 49 of the Registration Act is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in clauses (a) and (c) and leaves it available to be used in evidence for other purposes.

A plaintiff in a suit for damages for breach of an unregistered agreement to lease immoveable property is not seeking to establish a "transaction affecting immoveable property", for he is not seeking to prove a present demise of the land. He is no doubt asking that the document be received in evidence. The reception of the document in evidence is not prohibited by clause (c) of S. 49 of the Registration Act.

Per Panchapagesa Sastri J.—What is prohibited by S. 49 (c) of the Registration Act is the reception of the unregistered document in evidence of the transaction itself. The section does not merely prohibit the granting of a relief by way of an ultimate decree, a relief affecting immoveable property. The reference to the conjoint words "any transaction affecting such property" is significant. A relief for damages for breach of a contract to lease can be given only if the plaintiff succeeds in establishing that there was a contract which was broken. It is to establish that contract that he wants the unregistered lease to be received in evidence. The section prohibits the reception of the document as evidence of the transaction. The section cannot be construed to mean that the document can be received in the evidence as establishing the transaction but relief should be denied on the basis of the transaction so established in so far as such relief affects immoveable property alone. A I R (Vol 38) 1951 Mad 12 : ILR (1951) Mad 473 : (1950) 2 MLJ 818 (FB).

——S. 49— Rent mentioned in lease will be measure of damages though lease is inadmissible not being registered.

If rent is claimed and only damages by way of rent are permissible these can be allowed and decreed.

Where rent is mentioned in the lease, such rent will be the measure of damages though the lease may be inadmissible in evidence on account of its not being registered. Although the figure as to rent mentioned in the lease cannot be looked at in order to establish the rent fixed it may be looked at to establish what damage the landlord suing for arrears of rent is entitled to by way of rent. A I R (Vol 17) 1930 Lah 915.

——S. 49 — Although the figure as to rent mentioned in an unregistered lease cannot be looked into to establish the rent fixed, it may be looked at to establish what damage the landlord suing for arrears of rent, is entitled to by way of rent. AIR (Vol 17) 1930 Lah 915.

——Ss. 49, 17—Essential terms—Evidence Act, S. 91—Unregistered agreement to lease—Suit for specific performance—Damages.

An agreement to lease, being unregistered is inadmissible in evidence and is also bar to the reception of evidence both as regards a claim for specific performance and a claim for damages. 17 M 456, Not foll. AIR (Vol 5) 1918 Mad 393 : 33 MLJ 596: 42 Ind Cas 948 (DB).

——S. 49 (c)—Collateral fact— Damages for use and occupation—Unregistered lease.

An unregistered lease deed which is compulsorily registrable, and which is not admissible in evidence to prove its terms is admissible to prove collateral matters such as damages for use and occupation. (1911) 11 Ind Cas 23 (Mad) (DB).

(f) Date of possession, fact of possession and delivery of possession.

——S. 49 — Unregistered lease deed if admissible to prove nature of lessee's entry into possession.

An unregistered lease deed which is compulsorily registrable, is not admissible in evidence for the purpose of finding out whether the lessee entered into possession of the property leased as permanent tenant. I L R (1942) Bom 595, Not foll. A I R (Vol 36) 1949 Nag 265 : ILR (1948) Nag 978.

——S. 49—Collateral purpose — Unregistered settlement deed—Admissibility to prove possession within meaning of S. 10 Cattle Trespass Act (1 of 1871).

(Obiter.)— Where there is no question of title at all but the only question is whether a person was an occupier of a certain field, within the meaning of S. 10, Cattle Trespass Act, the document of the settlement of the field, though unregistered, is admissible for proving the possession. A I R (Vol 34) 1947 Pat 172 : 12 BR 785 : 226 Ind Cas 556 (DB).

——S. 49—Lease—When admissible.

Lease required by S. 17 to be registered if unregistered may be admitted in evidence to prove collateral facts of present possession though not title. In other words if it has first been found definitely that the party is in possession, the unregistered lease may be taken in evidence not as proof of title but for the collateral purpose of explaining the present possession. AIR (Vol 17) 1930 Pat 110.

——S. 49—Usufructuary mortgage deed—Recital that possession was given — Deed being unregistered, it is inadmissible to prove delivery of possession. A I R (Vol 12) 1925 Oudh 628 : 85 Ind Cas 326.

——S. 49—Admissibility—Title-deed — Unregistered deed though not capable of passing title is yet admissible for other purposes.

An unregistered mortgage or sale-deed though not capable of passing title, is yet admissible for other purposes; for instance to show that a person is in possession of land not as tenant of another i.e., that the relationship of landlord and tenant does not exist between the parties or to show that since the date of the deed a person is in possession adversely to the owner. AIR (Vol 11) 1924 All 837 : 78 Ind Cas 955.

——S. 49 (c)—Colleteral facts—Proof.

Where the purchaser of property worth more than Rs. 100 is given possession under an unregistered sale, the deed of sale is admissible to prove the fact of possession. AIR (Vol 7) 1920 Cal 822 : 57 Ind Cas 985.

——S. 49 (c) — Collateral fact—Lease unregistered.

An unregistered lease though not admissible to affect the property leased, is yet admissible in evidence for collateral purposes, i.e., to explain the circumstances under which the lessee got into possession. AIR (Vol 2) 1915 Oudh 165 : 2 O L J 276 : 30 Ind Cas 258.

(g) Fraud, and state of mind.

——S. 49 — Admissibility—Fraud.

Unregistered deed is admissible to prove fraud where executant alleges that he executed it owing to misrepresentation. AIR (Vol 11) 1924 Rang 155 : 1 Rang 405 : 76 Ind Cas 855 (DB).

——S. 49 — Collateral facts—State of mind—Registered instrument — Admissibility of, to prove collateral purpose.

An unregistered instrument, though inoperative a deed of transfer of property can be looked at for a collateral purpose for example to ascertain the executant's state of mind on or about the time of its execution. AIR (Vol 1) 1914 Oudh 52 : 1 O L J 591 : 26 Ind Cas 547 (DB).

(h) For contradicting fact in issue.

——S. 49 — Admissibility—Deed.

A deed which is not admissible in evidence on account of its being barred under S. 49, Registration Act, can be admitted in evidence under S. 11 if it is inconsistent with fact in issue. AIR (Vol 17) 1930 All 130 : 122 Ind Cas 895 (DB).

(i) Indivisible transaction.

——S. 49 — Scope — Agreement relating to maintenance of widow and residence in house—Consideration one and indivisible—Agreement unregistered —Admissiblity to prove claim for maintenance.

R died in 1937, leaving a will by which he bequeathed all his properties to his three brothers, and a right of maintenance out of his property amounting to Rs. 30 per month to his widow. Subsequently the parties effected an agreement by which the will was affirmed and with a view to avoid disputes the widow was allowed maintenance at the rate o Rs. 50 per mensem and the right to reside in two houses belonging to the family. It was also provided that if the will in any way fell into dispute the agreement should be considered as cancelled. The agreement was not however, registered.

The widow having sued for a declaration of her rights to maintenance and residence under the agreement.

Held, that the agreement could be used in evidence to prove the widow's claim for maintenance at Rs. 50, a month, though unregistered, as the claim for maintenance was clearly divisible from the claim in regard to residence.

Held, further, that in such cases the test of admissibility of the unregistered document was the divisibility of the different claims from one another and not the divisibility of the consideration money. AIR (Vol 34) 1947 Bom 464 : 49 Bom L R 303 (DB).

—— Ss. 49, 17 b) — Two documents executed on the same date — One containing lease, the other containing condition on which the lease was to be valid — Property worth more than Rs. 100 - First document registered and the other not — Admissibility of the other in evidence.

A lessor executed two documents, one document embodying the lease itself and the other containing condition to be fulfilled by the lessee, on failure of which the lease was to be invalid; the lease related to property worth more than Rs. 100 and both the documents were executed on the same date, but the document containing the lease was registered and the other was not :

Held, that both the documents constituted one transaction; and this fact did not dispense with the necessity of the registration of the agreement if its registration is otherwise compulsory. The lease, as it stood, was unconditional. In order to make the limitation sought to be enforced by the other agreement effective, it was necessary under S. 17 (b) that the agreement should be registered. Therefore, under S 49 the document, being unregistered, was inadmissible in evidence. AIR Vol 21) 1934 Oudh 447 : 18 R D 487 : 11 O W N 1184 : 151 Ind Cas 1010.

—— S. 49 — Two documents forming one indivisible transaction - S. 49 applies.

Where there are two clearly divisible agreements in two documents jointly, and one of them makes the documents compulsorily registrable and the other does not, there is authority for saying that one can look at the part of the document which does not require registration. But, where the two documents are one indivisible transaction, there is no adequate ground for saying that S. 49 does not apply to both the documents considered together. AIR (Vol 13) 1926 Bom 384:28 Bom L R 743:96 Ind Cas 827 (DB).

——S. 49— Contract of lease contained in letters — Letters if unregistered cannot be admitted in evidence to prove the lease even for the purposes of a suit for damages for breach of agreement.

Where an agreement to lease certain premises was contained in certain letters which were unregistered.

Held, that to admit the letters to evidence the agreement to lease would be to receive them as evidence of a transaction which affects immovable property, and to do so would be to act in direct violation of the provisions of S. 49. 17 Mad 456; 14 C W N 65 and 19 C W N 347, Diss.

The test is whether the transaction evidenced by the particular instrument is single and indivisible or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation, and the other as merely strengthening it by adding a right to proceed against immovable property.

Where defendant admitted having received the letter written by the plaintiff as also having written a reply on the same date to the plaintiff but as to the contents and anything therein contained he said he would refer to 'original letters when produced.'

Held, that the admission in the written statement did not entitle the plaintiff to claim any relief without adducing in evidence the documents in question. AIR (Vol 12) 1925 Cal 1087:52 Cal 695:91 Ind Cas 320.

——S. 49 — The fact that certain members of a Hindu family possessed self-acquired property is not a collateral fact provable by unregistered partition deed.

While an instrument which is compulsorily registrable under the Registration Act may be used in evidence to prove a collateral fact the fact to be collateral, must be independent of or divisible from the purpose to effect which the law requires registration. Where the collateral fact sought to be proved by a Farkat (a partition deed) was that some members of the family owned self-acquired property which was not affected by the partition.

Held, that that was really a clause of the Farkat excluding certain property from partition and as such not independent of or divisible from the purpose to effect which the law requires registration, and therefore the Farkat could not be used for the purpose of proving it. AIR (Vol 11) 1924 Nag 325:79 Ind Cas 19.

(i) Nature or character of possession.

— S. 49 - Unregistered document—Collateral purpose—Admissibility.

It is permissible to look at a document which is inadmissible in evidence for want of registration for the limited purpose of showing the nature of possession. AIR (Vol 34) 1947 Lah 335 : 49 P L R 79.

——S 49 — Although a document may not be admissible in evidence for want of registration, it can be used for the collateral purpose of showing the nature of the possession of the person who holds the possession. This principle applies in the case of a plaintiff seeking a declaration of his title. AIR (Vol 30) 1943 Pesh 70:208 Ind Cas 366 (DB).

——S 49 — A document which requires registration under S. 17, but which is not registered, is admissible in evidence for any collateral purpose such as the nature of the possession. (1942) 46 C W N 419 : 76 C L J 369.

— S. 49 — Unregistered document can be used for determining the nature of the claimant's possession. AIR (Vol 21) 1934 Lah 885 : 16 L 313:37 P L R 592 : 155 Ind Cas 1064 (DB).

—— S. 49 — An entry in a bahi which is inadmissible for want of registration may yet be looked into to ascertain the nature of a party's possession. AIR (Vol 20) 1933 Lah 194 : 34 P L R 1033 : 143 Ind Cas 634.

——S. 49 — Admissibility of unregistered document to prove nature of subsequent possession of parties.

Though the terms of a deed, which is inadmissible in evidence for want of registration cannot be proved, nor can the deed be used to prove possession, when possession has been proved by other evidence, the deed can be admitted in evidence to prove that the possession was adverse or to prove separation between the members of a joint family. AIR (Vol 20) 1933 Nag 270 : 144 Ind Cas 312.

——S. 49— A document which is inadmissible for the purpose of proving the transaction between the parties may yet be admissible for the collateral purpose, such as for the purpose of explaining the nature of the possession of the claimant to the land in dispute.

Where hukumnama or sanad alleged to have been granted by the malik in favour of the plaintiff's father is relied on for the purpose of explaining that the possession of the plaintiffs was on their own account and not jointly for themselves and the defendants, it is admissible in evidence, though unregistered and inadmissible to prove the transaction between the parties. (1933) 146 Ind Cas 4 (Pat).

——S. 49 — Although a document surrendering a widow's estate in all her property, being unregistered is inadmissible in evidence as registration in such case is necessary, still it can be consulted to learn the nature of possession of the transferee. AIR (Vol 17) 1930 Lah 45 : 116 Ind Cas 186.

——S 49—Document is admissible for collateral purpose of proving nature of possessi n.

The result of non-registration of a document compulsorily registrable is that the instrument cannot affect any immovable property comprised therein. nor can it be received as evidence of transaction affecting immovable property. But though the instrument is not admissible for proving the concluded transaction yet it is admissible in evidence for collateral purpose of proving the nature of possession. AIR (Vol 17) 1930 Pat 530 (DB).

——S. 49 — Document admissible to prove nature of possession.

Section 54, T. P. Act, which provides that a transfer of tangible immovable property of less value than Rs. 100 may be made either by registered instrument or by delivery cannot be held as a matter of construction to have been inserted in S. 17, Registration Act. Therefore, S 49, Registration Act, does not apply to a written unregistered sale-deed of immovable property of less than Rs. 100, and thus it is admissible in evidence to prove the nature of possession of vendee. 38 Mad 1158, Not foll. AIR (Vol 17) 1930 Rang 188.

——S. 49—Immovable property worth above Rs. 100 conveyed by unregistered document—Document can be admitted to prove nature and character of possession, if the transferee is in possession and the document is genuine. AIR (Vol 16) 1929 Cal 710 (DB).

——S. 49 – Scope.

An unregistered document cannot be used to prove the quality of a person's possession. AIR (Vol 16) 1929 Nag 115 : 118 Ind Cas 57.

——S 49—A document, the registration of which is compulsory but is not registered, can be looked at in evidence to discover the nature of a party's possession of the property. (1928) 108 Ind Cas 892 (Lah).

——S. 49 — An unregistered deed is admissible to show nature of possession. AIR (Vol 14) 1927 Nag 402 : 10 NLJ 246 : 105 Ind Cas 431.

——S. 49 — Deeds of sale and partition inadmissible for want of registration — Factum of partition and nature of possession can be proved by oral evidence. Partition deed and the sale-deed can be relied upon to determine the nature of possession. (1926) 28 PLR 88 : 98 Ind Cas 940.

——S. 49 — Deed is admissible to prove nature and character of possession though unregistered. AIR (Vol 11) 1924 Rang 13 : 1 Rang 351 : 75 Ind Cas 166 (DB).

——S. 49 — Document not admissible to prove title may be admitted to prove nature of possession. AIR (Vol 10) 1923 Lah 495 : 5 LLJ 175 : 4 Lah 249 : 5 L LJ 555 : 73 Ind Cas 889 (DB).

——S. 49 (c)—Collateral fact—Nature of possession.

A deed of relinquishment in respect of immovable property though unregistered is admissible in evidence not for the purpose of proving the transfer but for the purpose of showing the nature of the possession held by a party. AIR (Vol 4) 1917 All 47 : 39 All 696 : 15 ALJ 761 : 42 Ind Cas 713 (DB).

——S. 49 (c)—Collateral fact—Nature of possession.

Per Abdur Rahim J —The Registration Act prevents documents of certain classes having any effect unless they are registered and does not deal with questions of evidence pure and simple. An unregistered document can be admitted to prove the circumstances in which the property came to be in possession.

Per Miller J.—An unregistered document is inadmissible in evidence to prove the nature of the possession or the circumstances in which a person came into possession of the property. (1912) 23 MLJ 652 : 12 MLT 579 : 17 Ind Cas 987 (DB).

(k) Terms of document.

——S. 49 — Tenancy for one year created by oral agreement and delivery of possession given — Subsequent execution of sarkhat embodying terms, by tenant only—Document can be looked into for proof of terms of contract — Such document not registered —It is still admissible in evidence as showing terms of the contract previously entered into by the parties and it is only evidence which is admissible to prove those terms. AIR (Vol 29) 1942 Oudh 408 : 1942 A WR 101 & 237 : 1942 OWN 357 : 18 Luck 201 : 200 Ind Cas 593.

——S. 49, Proviso (as amended in 1929) — Suit for redemption of usufructuary mortgage effected in 1900 by unregistered deed with delivery of possession— Property assessed in mortgagee's name for more than 14 years—Mortgagee's interest sold in execution :

Held, that since the amendment of the Registration Act in 1929, the terms of the mortgage in suit could only be proved by the document even though there was delivery of possession and as the document was inadmissible in evidence under S. 49, Registration Act, no evidence whatever could be given of the terms of the transaction in suit. The proviso to S 49 did not apply as the right conferred by S. 53 (a), T. P. Act, is a right only available to a defendant to protect his possession. The purchaser, defendant No. 3, had, in any case, no notice of the mortgage, the land being entered in defendant No. 1's name. AIR (Vol 26 1939 Rang 188 : 1939 Rang LR 39 : 182 Ind Cas 956.

——S 49—Draft of terms may be given as evidence of terms of contract.

When terms of contract in respect of immovable property are reduced into the form of an unsigned draft or memorandum of the terms which the parties had agreed should be embodied in a proper document there would be nothing in S. 91 of the Evidence Act or S. 49 of the Registration Act to exclude the document or other evidence of the terms of the contract, the parties proposed to make but never did make. AIR (Vol 13) 1926 Nag 466 : 95 Ind Cas 824 (DB).

—— S. 49—Construction—Lease — Deed of rent unregistered — Effect of.

A deed of rent not signed by lessor is invalid and unenforceable as a lease. (Benson J.— Krishnaswami Iyer J, doubting) A lease deed if it is not compulsorily registrable is admissible though unregistered to prove an oral letting, the delivery of possession and the covenant therein to surrender. (1910) MWN 437: 20 MLJ 298 : 8 MLT 69 : 6 Ind Cas 201 (DB).

(l) Unregistered document comprising moveable and immoveable property.

——S. 49 — Distinct provisions — Separability of deed.

If there are two distinct provisions in a contract, the one relating to rights in immovable property and the other to the payment of money, proof of the latter provision can be given though the document is not registered. But where the various terms are so inextricably mixed up that it can only be regarded as a single and indivisible transaction, no part of the agreement is admissible in evidence for the enforcement of any of its terms. AIR (Vol 18) 1931 Mad

580 : 60 M L J 527 : 33 L W 576 : 55 Mad 72 : 132 Ind Cas 305 (D B).

——S. 49 — Document dealing with movable and immovable property.

If an instrument embodies an entire and indivisible contract relating to immovable and movable properties and under the law, it cannot be looked at qua the immovables for want of registration, the whole must be excluded, but where it contains two or more distinct and separable contracts, one dealing with immovables and the other with movables, there is no bar to the Court admitting it for the purpose of setting the rights of the parties qua the movables. A I R (Vol 19) 1932 Lah 545 : 33 P L R 715 : 138 Ind Cas 369 (D B).

—— S. 49 — Movables and immovables dealt with by one document — Not separable — Document is inadmissible. A I R (Vol 10) 1923 Rang 57 : 1 Bur L J 111 : 74 Ind Cas 47 (D B).

——S. 49 — Movables and immovables — Unregistered document— Admissibility as regards movables.

The fact that the agreement relating to both immovable and movable property had not been registered does not prevent the party entitled from suing on that document in respect of the movable property. A I R (Vol 6) 1919 Bom 38 : 21 Bom L R 716 : 51 Ind Cas 954 (D B).

——S. 49 (a) — Movables and immovables — Documents creating charge on.

Where a document creating charge over movables and immovables is not registered, it will only deprive the promisee of his rights in the immovable property but will not affect his rights in the movable property. A I R (Vol 6) 1919 Mad 718 : 47 Ind Cas 563 (D B).

——S. 49 — Movables and immovables—Unregistered document.

Where a document has the effect of turning joint tenancy into tenancy in common it needs registration and could not affect immovable property unless registered nor does it affect movables unless they were intended to be separated apart from immovables. A I R (Vol 4) 1917 Mad 77 : 30 M L J 62 : 19 M L T 50 : (1916) 1 M W N 79 : 3 L W 115 : 32 Ind Cas 486 (F B).

——S. 49 — An unregistered deed of conveyance of immovable property and moveable property is not admissible in evidence even in regard to the movable property if there be no separate or distinct transaction concerning the movables and the document has been read as one whole. Though an unregistered document may be admissible for a collateral purpose it cannot be used to establish directly title in any part of the property conveyed. A I R (Vol 3) 1916 Lah 372 : 49 P R 1916 : 144 P W R 1916 : 149 P L R 1916 : 34 Ind Cas 542 (D B).

——Ss. 49, 17, 18 — Movables and immovables.

A document which as a whole requires registration contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which ex hypothesi do not affect immovable property of value of Rs. 100 or more. (1911) 13 Bom L R 162 : 10 Ind Cas 748.

(m) Fact of payment of money.

——S. 49—A sale-deed of immovable property worth more than rupees 100 but not registered cannot be admitted as evidence of any transaction affecting that property but it can be looked at to see that the consideration was paid by which a debt was liquidated. A I R (Vol 26) 1939 Lah 188.

——S. 49—A registered mortgage deed is, on account of lack of registration, inadmissible to prove the alleged mortgage of certain land, but as proof of the loan, it is relevant and extremely cogent evidence. A I R (Vol 21) 1934 Rang 196 : 153 Ind Cas 56.

——S. 49 — Admissibility — Document.

An unregistered bynapatra under which certain money was paid and which provided that the sale deed was to be executed at a later date is admissible in evidence. Effect of Amending Act (II of 1927) indicated. A I R (Vol 18) 1931 Cal 171 : 34 C W N 881 : 52 C L J 158 (D B).

——S. 49 — Suit for money lent on unregistered mortgage bonds is competent — Such documents can be used as evidence of loan.

All that the Registration Act says is that the unregistered documents cannot be used for the purpose of proving the mortgages unless they are registered. A I R (Vol 17) 1930 Rang 142.

——S. 49 — Unregistered mortgage deed is not admissible in evidence to prove consideration for mortgage, because consideration is not collateral fact.

A collateral fact is that which is independent of or divisible from the purpose to effect which registration is required i. e., from the mortgage transaction. A I R (Vol 16) 1929 Nag 115 : 118 Ind Cas 57.

——S. 49 — Unregistered mortgage-deed is admissible to prove debt. A I R (Vol 12) 1925 Lah 356 : 7 L L J 3 : 87 Ind Cas 609.

——S. 49 — The deed, purporting to transfer exproprietary rights though inadmissible for want of valid registration would, however, be admissible in evidence to prove a collateral fact, like the passing of the consideration, which is independent of the purpose to effect which the law requires registration. A I R (Vol 10) 1923 Nag 111 : 68 Ind Cas 252.

——S. 49 — Unregistered mortgage document is admissible to prove debt. A I R (Vol 10) 1923 Rang 15 : 1 Bur L J 157 : 70 Ind Cas 872.

——S. 49 (c) — Collateral facts—Payment of earnest money — Applicability of S. 49 of Registration Act in suits for refund of earnest money.

An unregistered document, required to be registered under S. 17 of Registration Act, can be admitted in proof of payment of earnest money in a suit for refund of earnest money, S. 49 of Registration Act not being applicable to such a suit. A I R (Vol 4) 1917 Lah 40 : 18 P R 1917 : 28 P W R 1917 : 37 Ind Cas 822 (D B).

7a. Part performance.

——S. 49 — Proviso — Scope of—Unregistered lease deed — Admissibility — Extent — Suit by lessor for possession after expiry of period of lease.

In a suit by lessor against lessee for possession of leased premises after expiry of the period of lease, the lessor can use an unregistered lease-deed not only as evidence of the contract for the purposes of S. 53-A of the Transfer of Property Act but also as proof that acts were done by him in part performance of it for the same purposes. In other words, the lessor can use the document not only as evidence that the right which he seeks to enforce is a right which is expressly provided by the contract and is, therefore, a right which is saved or sanctioned by S. 53-A, but also as evidence for showing that the lessee was let into possession and allowed to remain in possession by him for the full period of the agreement in part performance of the contract. A I R (Vol 37) 1950 Cal 23 : 54 C W N 58 (D B).

——S. 49, Proviso — Applicability — Punjab.

Per Full Bench (Cornelius J., dissenting.) — The words "for the purposes of S. 53-A, T. P Act 1882" in the proviso to S. 49 of the Registration Act merely mean that the unregistered document affecting immovable property shall be received as evidence of part performance to the limited extent to which part performance is imported into the law of India by S. 53-A, T. P Act. The mention of S. 53-A, T. P. Act in the proviso to S. 49 Registration Act, cannot deprive the province of the Punjab of the benefit of

the proviso simply because the T. P. Act is not in force in this province. A I R (Vol 34) 1947 Lah 1 : I L R (1947) Lah 449 : 228 Ind Cas 434 (F B).

——S. 49 — Unregistered agricultural lease — Recovery of rent from lessee — Part performance, doctrine of.

Neither under S. 53-A, T. P. Act, nor under S. 49 (amended) Registration Act can a landlord recover rent from a person in possession under an unregistered lease. Part performance must be the act of the person seeking to avail himself of the equity and acts of the person sought to be charged are of no avail. A I R (Vol 32) 1945 Nag 69 : I L R (1944) Nag 704 : 1944 NLJ 324 (DB).

——S. 49—Part performance carried out—Admissibility.

Where there has been a part performance of an unregistered contract, the document can be received as evidence of part performance of a contract for the purpose of S. 53-A, T. P. Act. AIR (Vol 25) 1938 Lah 721: 182 Ind Cas 220 (DB).

——S. 49—In a suit on a mortgage-deed executed by a Muhammadan, his wife objected to the execution and attachment of the property on the ground that the property belonged to her under a deed of dower which was unregistered though the property was worth more than Rs. 100. She claimed a declaration of ownership of the property :

Held, that the mortgagees were not seeking to enforce any right against the wife but were merely defending their rights against her suit and hence the deed was not admissible under the proviso to S. 49. AIR (Vol 24) 1937 Pesh 58: 169 Ind Cas 958 (DB).

——S. 49—Where in pursuance of a contract purporting to be the sale-deed of a house but which is not registered, one of the parties is put in possession of the house, the document can be admitted in evidence for a collateral purpose. AIR (Vol 23) 1936 Lah 366: 162 Ind Cas 314 (1).

——S. 49 — Where a family arrangement in the nature of a partition, though effected by an unregistered document has been acted upon and given full effect to by the parties, the doctrine of part performance will apply and the arrangement cannot be set aside on the ground that the deed was unregistered. AIR (Vol 20) 1933 Lah 648: 34 PLR 741: 14 Lah 635: 144 Ind Cas 396 (DB).

——S. 49—Part performance, doctrine of.

Per Cornish J.—The provisions of S. 49 are mandatory and the doctrine of part performance cannot be invoked in a case governed by the section. AIR (Vol 18) 1931 Mad 580: 60 MLJ 527: 33 LW 576: 55 M 72: 132 Ind Cas 305 (DB).

——S. 49—Lease.

Tenant entering into possession of land under an unregistered lease—Suit to recover rent—Independently of lease, tenant was liable to pay compensation to landlord for use and occupation of land—Defect of non-registration is cured by part-performance. AIR (Vol 15) 1928 Oudh 479: 110 Ind Cas 875 (DB).

——S. 49—A plaintiff permitting his agent to grant a lease and induct lessee into possession cannot be allowed to succeed merely on plea that document of lease was not registered. AIR (Vol 13) 1926 Pat 184: 5 Pat 40: 7 PLT 183: 90 Ind Cas 822 (DB).

——S. 49—Application of the principle of part performance.

Where the conduct of the parties creates a situation in which the parties stand upon nothing but an engagement which is not final or complete the locus penitentiae is not excluded, that is to say where the parties have given mutual promises but nothing has been done, the consideration is not performed on either side, and the contract remains merely executory, then unless it is clothed in the legal forms which make it binding it cannot be enforced against either party by the other, but where parties agreeing not to go to law and not to fight out their disputes but by mutual arrangement carry into execution their mutual promises so that the original contract by which they decided to terminate the disputes becomes an executed contract on both sides, and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India applying the rule of equity and good conscience will not permit either party who has bound himself both by the contract and by its performance to repudiate what he has done, and will also prohibit any person claiming under him from attempting the same thing. AIR (Vol 11) 1924 All 826: 22 ALJ 779: 5 LRA Civ. 568: 46 All 847: 83 Ind Cas 297 (DB).

——S. 49—Where a compulsorily registrable agreement is not registered but has been acted upon, it is binding on the parties though the agreement is inadmissible in evidence. AIR (Vol 11) 1924 Cal 135: 27 CWN 897: 79 Ind Cas 257 (DB).

——S. 49—Agreement acted upon — Parties cannot resile from it though it is unregistered—Part performance. AIR (Vol 8) 1921 All 248: 43 All 1 (DB).

8. "Unless it has been registered."

——S. 49—Registration, to be effective, must be in accordance with the provisions of the Act and if it is not and if the defect is not curable as a defect of procedure under S. 87, then S. 49 applies and the document cannot be used for any of the purposes specified therein. AIR (Vol 25) 1938 Nag 550: 1938 NLJ 403: 181 Ind Cas 24 (DB).

——S. 49—Where a document is presented for registration more than four months after its execution, and no attempt is made, pursuant to S. 25, to account for the delay in presentation on the ground of urgent necessity or unavoidable accident, the Registrar before whom it is presented has no jurisdiction to register it. The mere fact that he has registered it will not take the document out of the ambit of S. 49. AIR (Vol 20) 1933 Rang 194: 11 R 207: 147 Ind Cas 287 (DB).

——Ss. 49, 59 to 61—Construction—"In accordance with the provisions of the Act"—Scope of.

The words "In accordance with the provisions of the Act" in S. 49 of the Act refers only to the sections relating to procedure on admitting to registration, i. e., Ss. 59 to 61 and not to admission to registration. The certificate is generally conclusive of the registration, though it may be set aside in case of fraud. Wrong acceptance of a document does not invalidate registration. (1913) MWN 525: 24 MLJ 664: 14 MLT 237: 20 Ind Cas 385 (DB).

9. Particular transactions.

(a) Award.
(b) Compromise.
(c) Charge.
(d) Decree.
(e) Exchange.
(f) Gift.
(g) Grant.
(h) Lease.
(i) Mortgage.
(j) Partition.
(k) Partnership.
(l) Receipt
(m) Relinquishment.
(n) Rent note.
(o) Sale.
(p) Wakf.
(q) Miscellaneous.

(a) Award.

——Ss. 49, 17 (1) (b) - Unregistered award, effect of, when used for purposes of filing under Civil P. C., Sch. II, Para 20.

There is no law which requires an award to be registered before it can operate as an award in the same sense as the Transfer of Property Act requires the registration of sales and mortgages dealing with immovable property of the value of one hundred rupees and more. An unregistered award is not, therefore, invalid for all purposes. The only drawbacks attached to it are those mentioned in S. 49, Registration Act, that is to say, it cannot be used to "affect any immovable property comprised therein" and it cannot be received "as evidence of any transaction affecting such property." The filing of an award under para. 20 of Sch II, Civil P C, does not merely form a document which forms part of a judicial proceeding but it affects immovable property comprised in the award and, therefore, requires registration when it is used for the purpose of being filed under para. 20. AIR (Vol 26) 1939 Nag 233: 1939 NLJ 375: ILR (1939) Nag 607: 183 Ind Cas 845 (FB).

——S. 49—Where the arbitrator, in an arbitration proceeding is asked to settle disputes between parties relating to ownership of three plots of land and he gives his decision that two of them belong to one party and the remaining to the other, this decision in the award operates as a declaration of the rights of the respective parties in these lands and the award is an instrument which in itself creates title and, therefore, is compulsorily registrable under S. 17 and is inadmissible in evidence under S. 49, if not registered. AIR (Vol 25) 1938 Mad 55: 1937 MWN 1183: 176 Ind Cas 646

——S. 49 — Unregistered private award filed in Court—Decree passed—Admissibility.

Where an unregistered private award is filed in Court and a decree passed on its basis, it is not admissible in evidence and transgresses the provisions of S. 49. AIR (Vol 24) 1937 Cal 201: 171 Ind Cas 507 DB).

——S. 49—An award by arbitrators dividing a property between three brothers does not cease to be an award on the ground that the parties put their signatures in token of their acceptance of the award as made by the arbitrators. Such a document is admissible in evidence without registration. AIR (Vol 21) 1934 Pat 48: 148 Ind Cas 937 (2) (DB).

——S. 49—Bona fide award need not be registered—Unless it amounts to a deed of partition or evidence of agreement between parties.

A bona fide award affecting immovable property, would not ordinarily fall within the definition of any of the specific transaction referred to in the Transfer of Property Act, so as to require to be made by a writing duly registered, as it is not an act of the parties themselves but the act of a Judge chosen by the parties:

It is no doubt true that under certain circumstances an award may become inadmissible in evidence or inoperative as a valid transfer. For example where an award effecting a partition of immovable property is signed by the parties in token of their consent thereto, the award cannot be received in evidence unless it is registered. In such a case, the award is not a mere award but something more. It is an instrument of partition executed by the parties as well. As such it is compulsorily registrable and is rendered both ineffective and inadmissible under S. 49 of the Registration Act.

Again, where an award is not a genuine award based on a bona fide reference but a disguise to give effect to the agreement of the parties arrived at before the reference to arbitration and intended to evade the law relating to stamps and registration the award is not inadmissible in evidence for want of registration but is no award at all and is therefore inoperative as an award. AIR (Vol 14) 1927 Sind 206: 102 Ind Cas 277 (DB).

——S. 49—Award signed by parties is a deed of partition and must be registered—It can only prove intention to divide and not division.

Whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document.

A list of partition resultant upon the award passed by panchayatdars containing the shares given to several sharers and signed by them and attested by witnesses is too formal a document to be described as a mere memorandum. It is a deed of partition declaring an interest in the immovable property mentioned therein, and as such being unregistered, it cannot be received in evidence of any transaction affecting such property under S. 49. If such document were looked at not as evidence of a transaction affecting immovable property but merely in order to show that a division of status had taken place, it would only evidence an intention to divide and not the fact of division. AIR (Vol 12) 1925 Mad 1097: 87 Ind Cas 285.

(b) Compromise.

(i) General

(ii) Nature of possession.

(i) General.

——S. 49—Where a document relating to a previous compromise is sought to be used to prove not that a mortgage subsisted but that the judgment-debtor had offered the house as a security and thereby obtained time for payment of the decretal amount, the document will be admissible for this collateral purpose though unregistered. A I R (Vol 24) 1937 Lah 930 : 170 Ind Cas 896.

——S. 49 — Mere re-statement of pre-existing state of things.

Where, in a compromise, mention is made of one party's rights in certain immovable properties but no new rights in those properties are created or declared by the compromise which merely re-stated the pre-existing state of things, with regard to which there was no dispute between the parties at the time, the document is admissible even though unregistered. A I R (Vol 22) 1935 Lah 307 : 156 Ind Cas 834 (DB).

——S. 49—Defendant allowed to build structure on site worth less than Rs. 100 Payment of Rs. 50 to plaintiff—Parties acting on compromise.

Plaintiff sued for the demolition of certain structures made upon a piece of land by defendant who set up in defence a compromise said to have been arrived at between the parties in the course of criminal proceedings under S. 145, Criminal P. C. The site was valued at less than Rs. 100 and under the compromise, defendant was allowed to erect a building and plaintiff was also allowed to build a new room and was paid Rs. 50. The compromise was acted upon :

Held, that though unregistered, the compromise was admissible and that as the parties had enjoyed benefit under it, the plaintiff could not be allowed to resile from it. A I R (Vol 21) 1934 Oudh 116 : 11 O W N 450 : 148 Ind Cas 867.

——S. 49 — Compromise relating to immovable property worth more than Rs. 100 is admissible in evidence though not registered if it has been acted upon by parties. A I R (Vol 17) 1930 Lah 446 : 122 Ind Cas 493.

——S. 49—Unregistered compromise—Is admissible to prove the contract contained in it.

A compromise during suit by which plaintiff agreed to withdraw suit and under which plaintiff was to get a portion of the subject-matter of suit is not admissible if unregistered, in a subsequent suit for possession, for conferring title on plaintiff.

But it may be used for the collateral purpose of showing a mere contract to give the property in consideration of the appellant's agreeing to withdraw the application for leave to appeal, and as showing an admission of the defendants that they had entered into such a contract. (1929) 116 Ind Cas 871 : 1929 A L J 487 (Db).

——S. 49—Once the contents of the document have been admitted, question of its admissibility does not arise.

In a suit for partition of joint property the parties entered into a written compromise which was filed in Court and the suit dismissed in accordance therewith. The compromise provided the manner in which the joint property in suit was to be divided between the parties and, in order to a just the difference between the prices of the properties which fell to the shares of the two contesting parties, it was provided that a certain sum would be paid by D and G to B and his brothers. A subsequent suit was instituted by B against G and D for the recovery of the amount. In the plaint the relevant terms of the compromise were recited and it was alleged that the amount in suit was payable by the defendants to the plaintiff a month after the date of the compromise. The defendants in their written statement stated that "with reference to para. 2 of the plaint there was no condition as to the payment of amount after one month." In appeal G and D contended that the compromise was not admissible for want of registration.

Held, that as the terms of the agreement had been admitted by the defendants, the question of the admissibility or otherwise of the compromise did not arise. A I R (Vol 15) 1928 Lah 662 : 111 Ind Cas 29.

——S. 49 — Where the term of an oral compromise relating to rights in immovable property over Rs. 100 in value are reduced to writing, but the writing is not registered, the Courts will not be justified in ignoring the written compromise and falling back on the oral one. AIR (Vol 14) 1927 All 587 : 102 Ind Cas 8.

——S. 49 — Where petition of compromise filed in Court is the only evidence of title to property worth more than Rs. 100, registration is necessary. AIR (Vol 11) 1924 All 842 : 78 Ind Cas 1043.

——S. 49—An unregistered compromise of an offence compounded with the permission of the Criminal Court by which some rooms belonging to the accused were treated as belonging to the complainant, and were given in exchange for the rooms belonging to the accused, does not pass title to the complainant. AIR (Vol 11) 1924 All 596 : 79 Ind Cas 429 : 5 L R A Civ 186.

——S. 49—An unregistered compromise has no binding effect as a document which purports or operates to create or extinguish any right or interest in immovable property worth Rs. 100, even though it records a family settlement is compulsorily registrable. AIR (Vol 10) 1923 All 338 : 75 Ind Cas 593.

——S. 49—Even if a petition of compromise required registration, it would still be admissible in evidence although not registered as collateral evidence of an agreement, though it might not operate to effectuate a valid transfer of rights in immovable property. AIR (Vol 8) 1921 All 248 : 43 All 1 (DB).

——Ss 49 and 17 (2) (6) — Compromise petition to Court—Whether requires registration.

A petition to the Court does not require registration and is admissible in evidence where the Court impliedly incorporates the terms of the petition into its decree. The petition forms a part of the pleadings and is incorporated as such into the judicial record. AIR (Vol 2) 1915 Lah 469 : 91 P R 1915 : 211 P W R 1915 : 31 Ind Cas 537 (DB).

——Ss. 49 and 17 — Affecting such property—Compromise—Covenant to pay.

Under an unregistered compromise deed the defendant acknowledged his ownership of certain lands under a prior conveyance covenanted to pay a certain annuity and on default, to relinquish the property.

Held, that the deed could be enforced so far as the claim for payment of the annuity and for specific performance of the agreement to relinquish were concerned but not in respect of the claim for possession. (1912) 16 Ind Cas 851 (DB) (Mad).

——S. 49 — Compromise petition to Court — Unregistered compromise deed in mutation proceeding — Admissibility in evidence — Order of Revenue Court based on such compromise, if confers title.

An unregistered deed of compromise in a mutation proceeding is not admissible in evidence of title by reason of S. 49 of the Registration Act; an order of a Revenue Court based on such a deed also confers no title (1911) 33 All 728 : 8 A L J 918: 12 Ind Cas 109.

——Ss. 49, 17—Admissibility in evidence.

Section 49 is no bar to a document which was unregistered being used as evidence to prove that the decrees had been satisfied notwithstanding that it also purported to convey immoveable property. (1906) 11 C W N 342 (344) (DB).

(ii) Nature of possession.

——S. 49 — Unregistered compromise petition is admissible to prove nature of possession given under it.

An unregistered compromise petition giving possession to a Hindu widow in lieu of maintenance may be considered for the collateral purpose of explaining the nature of the possession of the widow. AIR (Vol 33) 1946 Pat 55.

(c) Charge

——Ss. 49, 17 (2) (v) — Registration of document creating charge.

Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale-deed. Where, however the promises are distinct and separable then a document, though it creates a charge can be put in evidence to establish a promise to execute a further document such as a sale-deed. A I R (Vol 27) 1940 Pat 92 : 19 Pat 90 : 6 B R 435 : 21 P L T 1033 : 187 Ind Cas 198 (DB).

——Ss. 49, 17 (b) — Document creating charge on immovables—Secondary evidence of agreement contained in document.

Where a document creates a charge upon immovables, it comes directly within the terms of S. 17 (b). Registration Act, and requires registration and is not admissible in evidence. Secondary evidence of the agreement contained in the document by producing entries in a journal or by tendering any other evidence cannot be given as this would be in violation of S. 91, Evidence Act. Nor can the document be used for the express and direct purpose of showing that a certain property was in fact released under the varied mortgage constituted by the document in question. A I R (Vol 22 1935 P C 21 : 1 B R 264 : 1935 O W N 118 : 1935 M W N 97 : 1935 A L J 242 : 41 L W 210 : 1935 A L J 242 : 68 M L J 339 : 39 C W N 440 : 61 C L J 42 : 37 Bom L R 315 : 59 Bom 180 : 1935 A W R 180 : 62 I A 23 : 153 Ind Cas 700.

——Ss. 49 (a), 17 (1) (b) — Document purporting to create charge of above Rs. 100 on property.

A document purporting to create a charge over a house and site for a sum of above Rs. 100, if unregistered is invalid under the provisions of Ss. 17 (1) (b) and 49 (a), Registration Act AIR (Vol 20) 1933 Rang 259 : 147 Ind Cas 562 (DB).

——S. 49 — Where a document purporting to create an equitable charge was compulsorily registrable

and was not registered no charge can be created by it. AIR (Vol 16) 1929 P C 141 : 7 Rang 234 : 31 Bom L R 873 : 33 C W N 652 : 30 M L W 18 : 50 C L J 99 : 1929 M W N 619 : 57 M L J 529 : 117 Ind Cas 489.

(d) Decree

(i) General

(ii) Compromise decree

(i) General

—Ss. 49, 17—Award not registered—Decree passed on award - Stranger, if can challenge it.

The decree based on an unregistered award creating a charge on immovable property is valid though it is unregistered, unless it is impeached in a proper proceeding, such as an appeal, review, or revision. A stranger to the proceeding cannot challenge its validity or underrate its effect on the ground that the decree was founded upon an award which ought not to have been admitted in evidence. AIR (Vol 30) 1943 Bom 283 : 45 Bom L R 526 : 211 Ind Cas 230 (DB).

—S. 49—Decree founded on.

Even if an award is compulsorily registrable and is not registered, the decree founded on it cannot be set aside on that ground in an independent suit by stranger to it. AIR (Vol 27) 1940 Bom289 :ILR (1940) Bom 526 : 42 Bom L R 486 : 190 Ind Cas 606 (DB).

—S. 49 (c)—A decree for specific performance of an agreement to lease does not affect the land. It is an ordinary decree of the Court of Equity, which according to the ordinary rules acts in personam and the execution of the decree is not by affecting the land but by suitable process against the defendants if he is in contempt with reference to the decree of the Court. A I R (Vol 5) 1918 Cal 222 : 42 Ind Cas 633 (DB).

(ii) Compromise decree

—S. 49 — Compromise decree creating lease of immoveable property not registered — Admissibility to prove nature of possession.

A compromise decree creating a lease of immoveable property for a term exceeding a year, although not registered, can be referred to for the purpose of determining the nature of possession. A I R (Vol 36) 1949 Assam 64.

—Ss. 49 and 17—Suit in respect of immovable property worth Rs. 100 or more compromised—Compromise incorporated in decree — No registration is required — But where order is "suit compromised and dismissed," registration is essential. A I R (Vol 31) 1944 Lah 394 : 46 P L R 220 : 218 Ind Cas 496 (DB).

—Ss. 49, 17 (2) (vi) and (1) (b) — Decree, held exempted from registration under S. 17 (2) (vi) and was admissible in evidence.

The lessor who had only an intermediate tenure-holder's right in land gave a mining lease to the lessees on annual rent of Rs. 1,554 9-6. Subsequently the zamindar sued both the lessor and the lessees claiming right and title to the underground coal, mineral etc. The suit was compromised and a compromise decree was passed under which the zamindar recognized the rights, both of the lessor and the lessees created by the lease subject to this condition that out of the jama of Rs. 1,554-9-6 he was to get half that is, Rs. 777-4-6 and further the lesssees would pay him commission or royalty at the rate of 4½ pice per ton of certain coal indicated in the compromise decree. In other words, the possession of the lessees over the leasehold property was maintained subject to their taking the additional burden of paying commission or royalty at the aloresaid rate to the zemindar :

Held, that in the circumstances, it could not be said that any fresh lease was created by the zamindar in favour of the lessees. Therefore, the compromise decree did not require registration. So far as the transfer of the jama of Rs. 777-4-6 to the zamindar was concerned, it came under S. 17 (1) (b) of the Registration Act. Consequently, the decree would be exempted from registration under S. 17 (2) (vi) of the same section of the Registration Act. The decree was, therefore, admissible in evidence. A I R (Vol 29) 1942 Pat 120 : 8 B R 121 : 196 Ind Cas 837 (DB).

—S. 49—If a compromise decree containing a lease of immovable property is not registered, S. 49, Registration Act prevents it from being used in evidence to prove the rent of the tenancy. A I R (Vol 28) 1941 Cal 102 : 72 C L J 132 : 45 C W N 129 : 193 Ind Cas 635.

—S. 49, Proviso — Decree based on award which itself was based on compromise.

The decree based on an award which itself was based on a compromise and is not registered can be received in evidence under the proviso to S. 49, Registration Act as amended by Act XXI of 1929. A I R (Vol 28) 1941 Oudh 587 : 1941 O W N 965 : 1941 A W R 275 : 17 Luck 121 : 195 Ind Cas 610 (DB).

—S. 49 — A solenama in a compromise decree which created lease not being registered, was not admissible in evidence. A I R (Vol 22) 1935 Cal 261 : 60 C L J 384 : 39 C W N 98 (DB).

—S. 49 — Compromise petition to Court— Decree dealing with properties other than those in suit.

So far as a compromise decree relates to properties within the scope of the suit it operates as res judicata but when it relates to properties outside the scope of the suit, if the terms of the compromise are embodied within the decree it is evidence of an agreement to transfer an interest in the property. In such a case the compromise petition need not be registered. AIR (Vol 4) 1917 Pat 9 : 1 Pat L J 208 : (1917) Pat H C C 161 : 36 Ind Cas 290.

(e) Exchange.

—Ss. 49, 17 — The deed of exchange being unregistered, is admissible in evidence but that cannot deprive the plaintiff from claiming possession of his land which he had given to the defendant under the deed because the defendant must be treated as a trespasser in respect of that land. (1938) 40 PLR 224.

—S. 49 — The Registration Law can be ignored only, when equities are very clear. An unregistered deed of exchange affecting immovable property of more than Rs. 100 cannot be admitted in evidence nor can it be acted upon. AIR (Vol 14) 1927 Lah 90 : 27 P L R 162 : 93 Ind Cas 843.

—S. 49—Possession under unregistered document —Deed of exchange, unregistered.

A person in possession of immovable property under an unregistered deed and hence with a defective title must be regarded as a trespasser and can be ejected. 203 P L R 1913 : 155 P W R 1913 : 19 Ind Cas 236 (DB).

(f) Gift.

(i) General.

(ii) Nature of possession.

(i) General.

—S. 49—Collateral purpose — Unregistered gift deed, though compulsorily registrable.

An unregistered deed of gift is admissible in evidence with reference to collateral recitals therein where the executant of deed is dead, a statement therein that the donee is his legally married wife, is clearly admissible under section 32, clause (5) of the evidence Act — See Evidence Act, S 32 (5). A I R (Vol 38) 1951 Orissa 337 : I L R (1949) Cut 527.

— S. 49—Unregistered gift deed is admissible to show circumstances then existing

An unregistered gift deed can be received in evidence, not to prove any definite gift, but to prove

that there was talk of making some assignment at that date. The Court cannot receive the document in evidence to prove a gift and then infer that the possession of the donee was adverse, and then justify its acceptance of the document on the ground that it confined itself to the inference, and was not concerned with the fact of the gift AIR (Vol 13) 1926 Mad 191 : 1926 M W N 44: 49 M L J 756: 92 Ind Cas 470.

(ii) Nature of possession.

——Ss. 49, 17 — Inscription on building that it was endowed to S — Admissibility to prove gift to S.

The inscriptions on a building that it was "built and endowed to S" which do not comply with the provisions of S. 123, T. P. Act, or of S. 17, Registration Act, cannot be, for that reason, admitted in evidence to prove the gifts in favour of S but may be referred to for the collateral purpose of ascertaining the nature of his possession. AIR (Vol 30) 1943 Mad 15 : 55 L W 578 : 1942-2 M L J 431: 208 Ind Cas 38 (DB).

——S. 49—Unregistered gift deed can be admitted to show continuous possession of donee. AIR (Vol 13) 1926 Oudh 98 : 1 Luck 33 : 3 O W N 45 : 13 O L J 115 : 91 Ind Cas 927.

——S. 49 — Unregistered deed of gift though invalid may be considered for the purpose of ascertaining the nature and character of the donee's possession. AIR (Vol 11) 1924 Mad 800 : 1924 M W N 571 : 82 Ind Cas 67.

—— S. 49—A document inadmissible for the purposes mentioned in S. 49, may nevertheless be admitted for collateral purpose, as for example, to explain why a donee (in this case a tenant) under a deed imperfect through lack of registration was in possession, or to prove the nature of that possession. AIR (Vol 11) 1924 Pat 641 : 3 Pat 349: 1924 P H C C 185: 5 P L T 541 : 79 Ind Cas 26 (DB).

——S. 49—Collateral fact — Nature of possession — Unregistered gift.

An unregistered deed or gift which is inadmissible in evidence for want of registration is inadmissible even for a collateral purpose, e.g., for the purposes of proving that the donee took possession and held adversely the property from the date of gift. AIR (Vol 5) 1918 Lah 359 : 13 P W R 1918 : 44 Ind Cas 889.

——Ss. 49 (c) and 17 (1) (a)—Collateral fact—Nature of possession—Unregistered gift

An unregistered instrument of gift requiring registration under S. 17 (1) (a) is inadmissible in evidence to prove the gift or to prove the adverse possession of the donee from the date of gift. No secondary evidence of such gift could be produced. 69 P W R 1913 : 196 P L R 1913 : 48 P R 1913 : 18 Ind Cas 918 (DB).

(g) Grant.

——S. 49—Permanent grant of land to defendant by predecessor of plaintiff – No rent payable for first years but Rs. 19-12-0 annually payable for ever subsequently — Document does not require registration under S. 107, Transfer of Property Act and is not affected by S. 49, Registration Act. AIR (Vol 25) 1938 Mad 769 : 183 Ind Cas 43.

——S. 49—Admissibility—Agreement.

An unregistered agreement by which a person was entitled to occupy a house on condition of his keeping the same in proper repairs is admissible to prove the assertion of title made by the grantee in entering upon the house. (1929) 115 Ind Cas 141 (All.).

——S. 49 (c)—Collateral fact—Maintenance arrangement — Unregistered document – Grant of land

An unregistered document containing a transaction concerning land is admissible to prove a separate transaction not affecting land. Where lands were allotted in lieu of maintenance by an unregistered document and subsequently the grantee sued for maintenance, it is open to the grantor to show by the unregistered agreement, the actual occupation of lands and the actual receipt of profits that the claim was discharged. (1910) 7 M L T 278 : (1910) M W N 485 : 5 Ind Cas 615 (DB).

(h) Lease.

(i) General.
(ii) Agreement of lease.
(iii) Proof of lease terms.
(iv) Relations of landlord and tenant.
(v) Nature of possession.

(i) General.

——S. 49—Agricultural land settled under unregistered hukumnama—Tenancy can be proved otherwise.

It is open to a landlord to create a tenancy by giving possession and accepting rent, and clearly, therefore, such a tenancy can be proved by evidence other than the production of the unregistered hukumnama by which the tenant takes settlement of an agricultural land from the landlord. AIR (Vol 33) 1946 Pat 407 (DB).

——S. 49—Unregistered lease for unspecified period—Admissibility in evidence.

A lease for an unspecified period as long as the house is not sold in execution of the decree is inadmissible in evidence in the absence of registration. AIR (Vol 32) 1945 Nag 102 : 1945 N L J 89 : I L R (1945) Nag 510.

——S. 49—Lease agreement reduced to writing but not registered Parties acting on it for a long time—Deed, if admissible in evidence.

Equity will support a transaction, though clothed imperfectly in legal forms, to which finality attaches especially if it had been acted upon by the parties for a long time. Where a property is transferred by lease and the agreement is reduced to writing, and the parties had been acting upon it for a long time the fact that the agreement is not registered will not make the deed inadmissible in evidence. AIR (Vol 24) 1937 Oudh 505 : 1937 O W N 1030 : 171 Ind Cas 84.

——Ss. 49, 17 — Unregistered lease-deed—Suit for specific performance of agreement to lease.

A lease deed which is unregistered and is inadmissible in evidence under the provisions of Ss. 17 and 49, cannot be used as evidence of the agreement to lease or as a foundation for a suit for specific performance of the agreement. AIR (Vol 20) 1933 Pat 544: 14 P L T 628 : 147 Ind Cas 1057.

—— Ss. 49, 17 (d) — Lease or agreement to lease—Permission to erect structures, whether collateral fact or term of lease.

In a suit to restrain the defendants from erecting a pucca wall on a plot of land demised to them, the defendants produced an unregistered amalnama permitting them to erect structures :

Held, (i) on construction that the amalnama was a lease.

(ii) that the permission granted or authority conferred by the document to erect pucca structures was nothing less than a transaction affecting the property on which the structures were to be erected, within the meaning of cl (c) of S. 49 and not a collateral fact and the document was not, therefore, admissible to prove the permission to erect structures. AIR (19) 1932 Cal 83 (2) : 59 C 396 : 54 C L J 220 : [illegible] Ind Cas 725 (DB).

——Ss. 49, 17—Unregistered lease deed—Admissibility in suit for damages for breach of agreement to lease—'Collateral purpose,' meaning of.

A suit to recover damages for breach of an agreement relating to immovable property, which agreement is compulsorily registrable under S. 17 is a suit which affects immovable property and is not covered by the exception that such a document can be used for collateral purposes.

A 'collateral purpose' means a purpose which excludes all reference to the contract relating to immovable property.

A lease deed which is compulsorily registrable but not registered cannot be used for the purpose of deciding whether there has been a breach of an agreement to lease immovable property to the respondent. AIR (Vol 19) 1932 Lah 655 : 34 P L R 354 : 142 Ind Cas 424.

—— S. 49 — Letter of instruction by one party to another's solicitor asking him to draw up lease is admissible, though unregistered. 93 Ind Cas 81 : 43 C L J 94 : AIR (Vol 13) 1926 Cal 546.

——S. 49—Where a so called lease is inadmissible in evidence, compensation for use and occupation can be granted in a suit for rent based on the so-called lease. 92 Ind Cas 853 : AIR (Vol 13) 1926 Nag 238.

—— S. 49 — A registered Thekanama which is not effective as a registered document by reason of its having been registered in a wrong district cannot be used as evidence of the value of the property comprised therein. 74 Ind Cas 582 : AIR (Vol 11) 1924 Oudh 97.

——S. 49—Where in a lease there is an express term that the lessee shall vacate the land in case he fails to pay the rent or whenever the lessor requires him to do so, the lease is not a lease for term exceeding one year though a longer period (e.g., 30 years) is mentioned in the lease and the lessee is liable to ejectment. 75 Ind Cas 603 : AIR (Vol 10) 1923 All 382.

—— S. 49—Unregistered lease could be accepted as evidence that the parties had come to an agreement that a lease was to be given. 84 Ind Cas 670 : AIR (Vol 10) 1923 Nag 73.

—— S. 49—Unregistered document creating present demise Suit for specific performance of agreement to lease Document is not admissible in evidence and the suit will fail.

An unregistered instrument purporting to create a lease for 5 years was drawn up under which the lessee (plaintiff) could not be asked to quit without 6 months' notice. While the property was in possession of the tenant (plaintiff) it was transferred by the lessor. The transferee in his suit obtained a decree for ejectment Plaintiff then brought a suit for specific performance of an agreement to lease and wanted to put the unregistered document in evidence. Held, it is impossible to hold that the document can be put in evidence or that its terms can be specifically enforced. If the document is admitted at all, it would be received as evidence of a transaction affecting the property. If upon its true construction it is meant to take effect as a present demise, it cannot be treated as something else or as evidence of a transaction different from this in nature and so avoid the statute. And apart from the document plaintiff could not prove the duration or the conditions of the tenancy. Against the prohibition of the statute no estoppel avails and there is nothing in (1882) 21 Ch D 9 or the cases under the Statute of Frauds to cover the plaintiff in this case. 69 Ind Cas 877 : 49 Cal 507 : 26 C W N 329 : AIR (Vol 9) 1922 Cal 436.

—— S. 49 — Hukumnama creating perpetual lease, but unregistered, is not admissible in evidence for any purpose.

An unregistered document, with a stamp of one anna affixed thereon and purporting to create a lease without fixed terms is of the nature of a perpetual lease. Such a document comes well within cl. (d) of S. 17 of the Registration Act under which it is compulsorily registrable. Such document is inadmissible in evidence under S. 49 (c) of the Act. If the whole decision as to the right of the complainant in the land in question is decided on the basis of such Hukumnama which is improperly admitted in evidence, the conviction on this ground is liable to be set aside. 1922 PHCC 10 : AIR (Vol 9) 1922 Pat 265.

—— S. 49—Compromise petition to Court — Document referred to in a compromise deed.

A Solehnama was entered into in favour of the appellant and filed in Court as a compromise of an ejectment suit. A perpetual lease was executed on the same date giving particulars upon which the tenancy was to be held. The solehnama mentioned the putta but the terms of the latter were not embodied in it. Held, that putta or lease not being registered is inadmissible in evidence in a subsequent suit for ejectment. (1915) 31 Ind Cas 449 (U P B R).

——S. 49 (c) and S. 2 (7)—Collateral facts—Agreement to lease, proof of.

An agreement to lease is a transaction affecting immovable property and therefore it should be registered. An unregistered lease-deed cannot also be used as evidence of an agreement to lease. 15 M L T 220 : 1 L W 296 : 23 Ind Cas 335 : AIR (Vol 1) 1914 Mad 359 (DB).

——Ss. 49 and 17 — Affecting such property—Unregistred lease—Possession.

A lease for more than 1 year being compulsorily registrable under S. 17 it cannot be admitted in evidence of any transaction affecting the property and therefore, it is inadmissible even for proving the demise. (1911) 10 Ind Cas 892 (DB) (Cal).

(ii) Agreement of lease.

——S. 49 — The object of the amendment of S. 49, Registration Act, made in 1929 was to make unregistered agreement to lease admissible in evidence in a suit for specific performance of the contract to lease. Section 49, as it stands after its amendment does not, therefore, prevent the plaintiff from proving the terms embodied in the contract. A I R (Vol 30) 1943 Cal 586 : I L R (1943) 1 Cal 138 : 47 C W N 123 : 209 Ind Cas 566 (DB).

——S. 49—Unregistered agreement to lease.

Correspondence amounting to an unregistered agreement to lease may be looked at as evidence of any collateral purpose for determining whether an attachment of lease property is legal. A I R (Vol 28) 1941 Bom 337 : 43 Bom L R 576 : 197 Ind Cas 253.

——S. 49, Proviso — District Board advertising in District Gazette that lease for cultivation of certain land for certain period would be auctioned — Terms of lease also notified — Lease granted to defendant who executing document in pursuance of contract and presenting it to Board—Document not registered —Failure of defendant to pay rent — Suit by Board for specific performance :

Held, that the suit for specific performance was maintainable The terms of the contract were advertised by the Board in the District Gazette before the auction took place and the bidder must be taken to have agreed to the terms which were advertised on behalf of the Board before he gave the bid. The agreement to lease was separate and was entered into on the date on which the auction was confirmed by the Board as a result of the bid given by the defendant. In the circumstances of the case, therefore, the agreement could be proved by the Board without the necessity of spelling it out of the lease itself. A I R (Vol 26) 1939 Mad 391 : (1939) 1 M L J 82 : 1939 M W N 165 : 184 Ind Cas 465.

——S. 49—A letter which is clearly in the nature of a memorandum and which does not include all the terms but shows that a lease embodying all the terms was to be executed later, cannot attract provisions of S. 49, Registration Act. AIR (Vol 20) 1933 Lah 61: 33 P L R 323 : 14 Lah 137 : 142 Ind Cas 754 (DB).

——S. 49—An agreement which only operates to renew a lease and does not operate as a present demise, is admissible in evidence though unregistered. A I R

(Vol 19) 1932 Mad 3 5 : 1932 M W N 193 : 35 L W 307 : 62 M L J 5_5 : 55 Mad 519 : 158 Ind Cas 78 (DB).

——S. 49—Admissibility — Contract—Unregistered document — Proof of contract by conduct in pursuance of it.

While S. 49 precludes the use of document for the purpose of proving a binding contract between the parties creating an interest in the property; nor can it be received as evidence of any transaction affecting the property; yet it is not necessary to rely upon such a transaction if the acts of the parties themselves are consistent only with the recognition on the one hand and the exercise on the other, of those rights which the document although not finally binding as a contract purported to confer. AIR (Vol 17) 1930 Pat 530 : 122 Ind Cas 158 (DB).

——S. 49 — An agreement of lease for three years was unregistered.

Held, that it was admissible not as a contract of lease or other transaction affecting the immovable property in suit, but as an item of evidence bearing on the question of the date on which certain persons, the predecessors in title of the defendants, the lessees, entered into possession of certain premises. AIR (Vol 10) 1923 All 603 : 45 All 565 · 21 A L J 538 : 4 L R A Civ 260 : 74 Ind Cas 822 (DB).

——S. 49 — An agreement to lease which does not effect an immediate demise is admissible in evidence, although it is unregistered, in a claim for damages for failure to give the lease as promised. AIR (Vol 8) 1921 Mad 72 : 40 M L J 161 : 44 Mad 399 : 13 M L W 327 : 1921 M W N 145: 62 Ind Cas 354 (DB).

——S. 49 (c) - Collateral fact—Personal liabilities—Unregistered agreement to lease.

Although an unregistered agreement for the permanent demise of a land cannot be used in evidence for the purpose of affecting the land it is not inadmissible in evidence for any purpose whatever. It can be looked at for adjusting the personal liabilities of the parties in a suit for its specific performance. A I R (Vol 5) 1918 Cal 222 : 42 Ind Cas 633 (DB).

(iii) Relations of landlord and tenant.

——S. 49—A lease deed though inadmissible because of want of registration may become admissible for collateral purposes; for instance, to show the position of landlord and tenant. AIR (Vol 11) 1924 Nag 199 : 75 Ind Cas 622.

— S 49 (c) - Collateral fact—Unregistered lease—Relationship of landlord and tenant.

Though a lease may be inadmissible in proof of its terms, it may still be used to prove the relationship of landlord and tenant. (1918) 45 Ind Cas 217 (Nag).

——S. 49 (c) - Collateral fact—Relationship of landlord and tenant - An unregistered lease.

An unregistered deed of lease is inadmissible to prove the terms governing the relationship of landlord and tenant; but such relationship may be shown by other evidence. (1913) 9 N L R 179 : 22 Ind Cas 65.

(iv) Proof of lease—Terms.

——S. 49 — Admissibility for collateral purposes — Limits.

Obiter. — When a Court comes to the conclusion that certain document (lease-deed) is inadmissible as not being registered, it cannot, under the guise of treating the document as inadmissible to show the character of the possession, in fact use it to prove the transaction itself, the letting and the terms upon which that letting took place. AIR (Vol 28) 1941 Mad 602 : 53 L W 634 : (1941) 1 M L J 759 : 1941 M W N 518 : 198 Ind Cas 606.

——S. 49—An unregistered kabuliyat or patta cannot be considered by virtue of S. 49, to determine the terms upon which the tenancy was created. A I R (Vol 27) 1940 Pat 37 : 6 B R 860 : 189 Ind Cas 745 (DB).

— S. 49—Document, if can be referred to for collateral purposes.

Where the terms of a lease are contained in a letter by reference to an earlier lease and if the new lease is a fresh lease altogether, the old one can be referred to for a collateral purpose such as to show that the new arrangement was subject to the same period of notice as the old one. Want of registration of the original lease does not prevent this. A I R (Vol 20) 1933 Cal 440 : 146 Ind Cas 884 (DB).

——S. 49 — Lease — When not admissible—Deed — Construction — Unregistered lease is admissible to prove amount of compensation for use and occupation.

A sarkhat provided that K had taken the shop on rent for a period of two years, and that if K vacated the shop before the expiry of two years he would be liable to pay the rent, water rate and house tax in respect of the unexpired portion of the term for which the shop had been let. K vacated the shop before expiry of two years and N brought a suit claiming rent, water tax and house tax for the unexpired period. The sarkhat in question was not registered :

Held, that sarkhat was a lease as defined by Registration Act and it being not registered although the lease was for more than one year it was not admissible in evidence to prove N's claim which was based essentially on the terms of the contract embodied in the sarkhat and so K was at liberty to leave the shop at any time he liked and N could not make K liable as he could not prove the contract :

Held, further, that if N's claim had been for compensation for the use and occupation by K of N's shop the sarkhat would have been admissible in evidence for determining the amount for which the shop could be let. AIR (Vol 16) 1929 All 831 : 1929 A L J 1134 (DB).

——S. 49—Though an unregistered lease deed which requires compulsory registration should be excluded so far as it is evidence of the lease, other evidence indicative of the creation of tenancy can be considered in establishing the tenancy. AIR (Vol 15) 1928 Nag 338 : 111 Ind Cas 358.

——S. 49—Unregistered lease of immovable property requiring registration is admissible to prove collateral transaction transferring arrears of rent to lessee. AIR (Vol 14) 1927 All 763 : 8 L R A Rev 89 : 101 Ind Cas 773

——S. 49 — An unregistered lease cannot be given in evidence in proof of the terms of the lease and its admitted existence excludes all oral evidence on the point. But oral evidence of an agreement prior to a compulsorily registrable but unregistered document can be given to support a claim for specific performance. AIR (Vol 10) 1923 Nag 76 : 71 Ind Cas 33.

——S. 49 — An unregistered deed of lease is not admissible to prove that the property to which it relates was let for a term of three years, nor can oral evidence of the terms of the lease be tendered in such a case. (1921) 63 Ind Cas 90 (Lah) (DB).

——Ss. 49 (c) and 17—Collateral fact.

For determining what would be a fair occupation rent of the property demised, an unregistered lease, compulsorily registrable, is not admissible. A I R (Vol 3) 1916 Mad 534 : 2 L W 1016 : (1916) 1 M W N 5 : 31 Ind Cas 279.

——S 49'— Essential terms — Unregistered lease — Evidence.

An essential term of a tenancy cannot be proved by an unregistered lease deed which is inadmissible for want of registration, nor by any secondary evidence. AIR (Vol 2) 1915 Mad 76 : 25 Ind Cas 661 (DB).

(v) Nature of possession.

——S. 49—Proviso— Tenant entering into possession under unregistered document purporting to create

perpetual lease — Admissibility of deed for ascertaining nature and character of possession.

The inamdar of a village executed a document by which he purported to grant to one D, the father of the plaintiffs, a perpetual tenancy of certain land in the village. This deed which was not registered ran as follows : "We have given you this property for cultivation for an assessment of Rs. 3-3 0. You will enjoy the same perpetually on payment of Rs. 3-3-0 local fund. If there is a survey settlement of the village, you will pay such assessment as is fixed then. You can improve the land and enjoy it." D entered into possession of the land under the deed and continued in possession until his death whereafter the plaintiffs continued in possession until they were forcibly dispossessed by the inamdar. During the period the plaintiffs had consistently regarded themselves as mirasdars and treated the land as theirs :

Held, that the deed was compulsorily registrable. It could, however, be admitted for collateral purpose, namely of ascertaining the nature and character of the plaintiffs' possession. A I R (Vol 29) 1942 Bom 268 : ILR (1942) Bom 595 : 44 Bom LR 534 : 203 Ind Cas 238 (DB).

——S 49 — Where a person, relying on the unregistered patta is in possession, he is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, that is, he was let into possession as a tenant. A I R (Vol 27) 1940 Pat 498 : 6 BR 502 : 187 Ind Cas 583.

——Ss 49, 17 — Unregistered kobala purporting to transfer immovable property of a value less than Rs. 100.

The reference in S. 49 cannot be deemed to be applicable to the provisions of S. 54, Transfer of Property Act where a document purports to transfer tangible immovable property of value of less than Rs 100. Section 49 does not make it admissible in evidence.

An unregistered kobala purporting to transfer immovable property of value less than Rs. 100 is not incorporated into S. 17 and S. 49 does not apply to the case. It does not confer title but is admissible for the collateral purpose of showing the nature of possession. A I R (Vol 23) 1936 Cal 130 : 61 CLJ 590 : 161 Ind Cas 734.

——S. 49 —Proof of nature of possession.

Apart from the provisions of the T. P. (Amendment) Supplementary Act of 1929, unregistered lease, which requires registration under S. 107, Transfer of Property Act but not under S. 17 of the Registration Act is admissible in evidence to prove the nature of the possession under the instrument. A I R (Vol 18) 1931 Lah 501 : 32 PLR 361: 134 Ind Cas 289 (DB).

——S 49—Possession under unregistered deed.

Tenancy by document unregistered—Tenant in undisputed possession of land—Recognition by his landlord of tenancy—Unregistered document followed by possession proves title of tenant and the document is admissible to prove nature and character of possession. A I R (Vol 17) 1930 Pat 20 : 124 Ind Cas 634 (DB).

——S. 49 — Unregistered lease is admissible to prove nature of tenants' possession.

The document which embodies the terms of a lease of immovable property from year to year in which yearly rent is reserved, is compulsorily registrable and cannot be referred to in order to find out the terms of the tenancy but the document can be looked at to ascertain the nature of the possession of the tenant. (1928) 108 Ind Cas 161 (Lah).

——S. 49— Compulsorily registrable but unregistered lease cannot be admitted to prove tenancy though collateral facts of payment of premium or character of possession may be proved by it. AIR (Vol 13) 1926 Nag 255 : 91 Ind Cas 1044.

——S. 49—Unregistered lease deed can be referred to in order to ascertain nature of possession sought to be disturbed. If the possession of the defendant is found to be that of a tenant under the plaintiff, the defendant cannot question the plaintiff's title, having regard to S. 116 of the Evidence Act. A I R (Vol 12) 1925 Lah 491 : 6 Lah 319 : 7 LLJ 504 : 26 PLR 483: 88 Ind Cas 872 (DB).

——S. 49 (c)—Collateral fact — Nature of possession —Lease for less than a year — Admissibility to prove character of possession.

An unregistered lease for less than a year can be admitted in evidence for proving that the occupation of the lease premises was permissive and not adverse. Section 4 of the T. P. Act would not make S. 107 of the Act, part of S. 17 of the Registration Act so as to make a lease for less than a year compulsorily registrable if it is to be used as evidence of the permissive character of the lessee's possession. AIR (Vol 8) 1921 Mad 337 : 39 MLJ 639 : 12 L W 649 : (1920) M W N 711 : 59 Ind Cas 350 (FB).

——S 49 (c)—Collateral fact — Nature of possession —Unregistered lease.

An unregistered lease is inadmissiable in evidence to prove the permanent nature of the tenant's possession. AIR (Vol 4) 1917 L R 67 : 42 Ind Cas 375.

——S. 49 (c)—Collateral fact — Nature of possession —Admissibility of unregistered lease.

A lease compulsorily registrable is inadmissible without registration to prove the nature of the possession. A I R (Vol 1) 1914 Mad 638 : 15 M L T 192 : 23 Ind Cas 376 (DB).

——S. 49 — Collateral fact — Nature of possession— Unregistered document.

An unregistered document by plaintiff's father giving a rent-free pattah to the defendant may be produced in evidence in a suit to enforce the acceptance of a pattah to show the nature of the defendant's possession. (1909) 6 M L T 192 : 3 Ind Cas 223 (DB).

——S. 49 — Suit for specific performance — Agreement to grant lease—Unregistered—Evidence — Admissibility.

In a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence for the purpose of proving the contract for the breach of which the suit is brought. (1907) 17 M L J 218 (218) (DB). *Also* 10 B 101, Not approved. (1910) 14 C W N 65 (67, 68) : 5 Ind Cas 38.

——S. 49—Of limited interest—Rights of permanent lessee—Registration—Admissibility in evidence.

A limited interest such as the interest of a permanent lessee, can be acquired in law by adverse possession. An unregistesed permanent lease is inadmissible in evidence to prove the nature of the possession which the lessee had. (1907) 17 M L J 469 (470) : 3 M L T 187 (DB).

(i) Mortgage.

(i) General.
(ii) Equitable mortgage.
(iii) Nature of possession.

(i) General.

——S. 49 —Redemption suit — Defendant admitting position as mortgagee — Question of admissibilty of mortgage-deed —Whether relevant.

Where the pleadings show that the defendant admits his position as mortgagee and the terms of the mortgage, it does not matter whether the document itself is admissible or not, and when the relation between the parties is that of mortgagor and mortgagee a suit for redemption will lie. A I R (Vol 34) 1947 Lah 335 : 49 P L R 79.

——Ss. 49 and 17 — Unregistered mortgage deed— Amissibility of, to obtain money decree.

The personal covenant to pay is distinctly divisible or separable in a simple mortgage from its hypothecation clauses and the bond so regarded, is clear evidence of the debt. Therefore, though a simple mortgage deed creating charge on immovable property over Rs. 100 is unregistered, the deed is admissible in evidence to support the mortgagee's claim for a money-decree. AIR (Vol 27) 1940 Lah 486 : 42 P L R 660 : ILR (1941) Lah 601 : 193 Ind Cas 789.

——Ss. 49 and 17 (b)—When the possessory mortgage is not registered, no suit can be based upon it against the third parties even if the mortgagee is placed in possession of the property. 1938 N L J 123.

——Ss. 49 and 17 — Agreement to reduce rate of interest.

A document reducing the mortgagees' right to receive interest at the rate given affects their "Interest in immovable property." The agreement to reduce the rate of interest is compulsorily registrable under S. 17, and where it is not registered, it cannot be received in evidence. A I R (Vol 25) 1938 Rang 285 : 1938 Rang L R 293 : 177 Ind Cas 437 (DB).

——S. 49 — When a mortgage is registered in a district in which no part of the mortgaged property is situate, its registration is invalid and the document cannot be received in evidence under S. 49. AIR (Vol 24) 1937 All 711 : 1937 A L J 815 : 1937 A W R 731: 171 Ind Cas 825.

——S. 49—Mortgagors basing their claim for possession, on redemption of sub-mortgage.

In order that the ruling in Maung Sin v. Maung So Min [A I R 1931 Rang. 40 : 129 Ind Cas. 511] should be applicable, there must be privity of contract between the real owner and the person in possession, under which contract the person in possession has been allowed to obtain possession. When the plaintiffs-mortgagors do not suggest that the mortgagees are in possession of property by their leave and license, but they base their claim on the fact that they have redeemed the mortgages in favour of the sub-mortgagees and assert that because they have redeemed these mortgages from the sub-morgagee, they are entitled to possession of the lands, their suit is a suit for possession of lands which have been redeemed and of which the person in possession has failed to deliver possession after the redemption, and, therefore, it depends entirely upon proof of the mortgages. If the mortgages are incaple of proof for want of registration, the suit of the plaintiffs must, of necessity, fail. A I R (Vol 22) 1935 Rang 15 : 155 Ind Cas 204.

——S. 49 — Suit for money on unregistered mortgage bond.

Section 49 does not operate as bar to the institution of a suit for money on an unregistered mortgage bond. A I R (Vol 20) 1933 Cal 786 : 37 C W N 915 : 56 C L J 403 : 146 Ind Cas 476.

——S. 49—Mortgage.

Ostensible mortgagee without consideration cannot sue for possession, person having interest in property as purchaser even under unregistered sale-deed. AIR (Vol 17) 1930 Lah 976.

——S. 49—If a document does not refer to a mortgage debt or purport to create a mortgage or charge on the mortgage debt itself, but points to something being done in the future concerning the immovable property, the document is not inadmissible in evidence for want of registration. AIR (Vol 17) 1930 Sind 77 : 123 Ind Cas 297.

——S. 49—Suit for redemption must fail if mortgage cannot be proved being unregistered.

The basis of suit for redemption of a mortgage is the mortgage alleged and if by reason of some provision of law the mortgage cannot be proved the suit must fail.

Where it was clear that the mortgage which was alleged to be possessory could not be proved because there was no registered instrument, but the mortgagee who never obtained possession and had no interest in the property admitted it.

Held : that the mortgagor's suit for redemption of a possessory mortgage and for possession of the mortgaged property on the footing of redemption of that mortgage was bound to fail because they could not prove the mortgage. The admission of the mortgagee could not bind the other claimants and it was no admission of the alleged possessory mortgage. A I R (Vol 16) 1929 Rang 179 : 117 Ind Cas 577 : 7 Rang 140.

——S. 49 — Unregistered deeds are admissible in proof of collateral matters—But unregistered mortgage deed cannot be used to prove the terms of mortgage.

If one party to a suit sets up a title based on adverse possession, his opponent may show by means of an unregistered mortgage deed that the nature of the possession was permissive. An unregistered doument which cannot be used as evidence of a transaction requiring registration, such as a gift, may yet be looked at as explaining the nature and the character of a person's possession. But a plaintiff who sues for redemption on strength of an unregistered mortgage deed can never succeed, because for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. This is the effect of the Ss. 17 and 49 of the Registration Act read with S. 91 of the Evidence Act. Even if the defendants were to admit in their written statements that the relations between themselves were those of the mortgagors and the mortgagees the plaintiffs could not on the strength of that admission be given a decree for redemption, as for redemption they must prove what sum is due. AIR (Vol 11) 1924 Mad 292 : 45 M L J 667 : 47 Mad 203 : 1923 M W N 825 : 19 M L W 37 : 33 M L T 146 : 79 Ind Cas 510.

——S. 49—Mortgage deed unregistered—Mortgage is invalid but recitals in the deed are admissible to show nature of mortgagee's possession. AIR (Vol 14) 1927 All 311 : 100 Ind Cas 346.

——S. 49—Registration of mortgage invalid for want of jurisdiction in Sub-Registrar to register—Deed can be used as registered money bond. 21 O. C. 341, Diss. from. AIR (Vol 14) 1927 Oudh 214: 1 L C 34: 102 Ind Cas 326 (DB).

——S. 49 — Unregistered agreement to effect mortgage is admissible if it does not create charge.

As an agreement to effect a mortgage an unregistered deed would be admissible in evidence; but if it is relied upon as justifying a declaration as to charge then it ceases to be a document merely creating a right to obtain another document but becomes in effect a document operating to create a charge and is inadmissible. AIR (Vol 10) 1923 Bom 287 : 73 Ind Cas 296 : 25 Bom L R 313.

(ii) Equitable mortgage.

——Ss. 49 and 17—Quaere. — Whether the document which does not merely contain a recital of a completed past transaction but is executed contemporaneously with the taking of the money and the deposit of the title-deeds, and is the sole repository of the terms of the contract between the parties is inadmissible in evidence without registration. AIR (Vol 24) 1937 Lah 35 : 17 Lah 659 : 36 PLR 1078 : 164 Ind Cas 381 (DB).

——S. 49—Document in correspondence constituting equitable mortgage is not admissible to prove mortgage unless registered.

Where, in the correspondence between the mortgagors and the mortgagee Bank in respect of an equitable mortgage, a document addressed to the manager

of the mortgagee Bank contains a statement that the title deeds are "hereby handed" to the mortgagee in consideration of which the borrowers ask that the mortgagee should oblige them by advancing the loan sanctioned by the Directors, on a pro-note at nine per cent per annum, on the security of the deposit of the title deeds, a list of which is alleged to be attached, and there is also a declaration that the properties, of which the title-deeds are handed over, were free from encumbrance, the document constitutes a bargain between the parties and is not admissible in evidence to prove the mortgage unless it is registered under the Registration Act. AIR (Vol 22) 1935 Lah 889 : 160 Ind Cas 897 (DB).

——S. 49—If the parties to an equitable mortgage choose to put their agreement with respect to transaction in writing, that document will exclude all other evidence of the transaction. Further, if the document falls within the purview of S. 17, Registration Act, and is not registered, it will not be admissible in evidence by virtue of S. 49 of the same Act. The result in such circumstances will be that there will be no legal evidence of the transaction available. AIR (Vol 22) 1935 Lah 821 : 160 Ind Cas 773 (DB).

——S. 49 — Applicability — Equitable mortgage — Letter recording transaction and giving a list of deeds deposited — Non-registration — Admissibility—Oral evidence — If excluded. See AIR (Vol 13) 1926 Pat 251 : 26 Pat 260.

——S. 49—Admissibility — Memorandum.

Where a memorandum amounting to a creation of an equitable mortgage, was not registered as required by law, held that the memorandum was inadmissible in evidence. AIR (Vol 10) 1923 P C 50 : 44 MLJ 602: 50 I A 77 : 32 MLT 184 : 2 Bur LJ 25 : 25 Bom LR 582 : 1 Rang 66 : 50 Cal 338 : 38 CLJ 41 : 18 MLW 446 : 28 CWN 1 : 1923 MWN 762: 71 Ind Cas 650.

——S. 49 — Equitable mortgage by deposit of title deeds—Writing evidencing the charge is not admissible without registration.

Defendant borrowed in Bombay a sum from plaintiff on depositing with him the title-deeds of his house outside Bombay. The transaction was recorded in a writing which recited the loan and the deposit and proceeded as follows. "In security of that we have given our one house in Godhra. . . . . In mortgage, for the above amount. And we have also given to you the copy of the record. We shall execute a pacca document in respect of the same whenever you may ask us. Its interest is settled at 8 annas. It is agreed that you should return to us the copy of the record on paying the above amount . . . ."

Held, that this writing required registration, as it is a complete transaction and is itself nothing less than a mortgage. The plaintiff, therefore, was not entitled to a declaration that he had a charge on the property mentioned in the title-deeds deposited with him or to an order for sale thereof or to obtain a mortgage deed from the defendant. AIR (Vol 9) 1922 Bom 440: 24 Bom LR 502 : 68 Ind Cas 1005 (DB).

——S 49—Narrative of facts.

A document purporting to create an equitable mortgage is admissible though not registered, if it is only a narrative of the facts constituting the mortgage : It is an agreement to mortgage when something remains to be done by the parties to complete the transaction. When however a document sets forth the time of a contract in such a way that the terms can be said to have been reduced to the form of a document it is compulsorily registrable and inadmissible if unregistered : 20 W R 150, Dist. AIR (Vol 4) 1917 Mad 773 : 40 Mad 547 : 3 LW 585 : (1916) 2 M WN 84 : 34 Ind Cas 853 (DB).

(iii) Nature of possession.

——S. 49 — An unregistered mortgage deed, if duly proved, can be used to prove the nature of possession held by the mortgagees. AIR (Vol 22) 1935 All 155 (1) : 18 RD 90 : 154 Ind Cas 386.

(j) Partition.

(i) General.

(ii) Agreement of partition.

(iii) Divided status—Proof.

(iv) Nature of possession.

(i) General.

——S. 49 — Unregistered partition deed — Admissibility.

An unregistered deed by which parties purport to effect a partition of their joint properties, falls within the purview of S 49 (a), Registration Act. The deed may be admissible in evidence for the purpose of proving the factum of partition, but it cannot be used for the purpose of proving that a particular property was allotted to a particular party upon partition as his share. AIR (Vol 37) 1950 Assam 129 (DB).

——S. 49 — Scope — Partition — Deed reciting that partition had been effected — Parties intending it to be binding and to be sole evidence of partition—Admissibility without registration.

Though there is no provision in the Registration Act which requires that a partition should be effected by a deed, if the parties execute a deed of partition affecting immoveable property, such deed is compulsorily registrable under S. 17 of the Act. If not registered it cannot be admitted in evidence under S 49 of the Act to prove the fact of possession. If the deed is a mere memorandum of a partition already effected, its non-registration would not render it inadmissible in evidence for a collateral purpose. Where the parties intend that the written memorandum should be binding on them as a deed of partition, and that it should be the sole evidence of the terms of such partition, it would be inadmissible in evidence to prove partition so far as the immoveable properties dealt with by it are concerned, if the value thereof exceeds Rs. 100. AIR (Vol 33) 1946 All 476 : 1946 A L W 225 : 1946 A W R (H C) 607 : 224 Ind Cas 391 (DB).

——S. 49—Scope — Partition—Subsequent execution of deed giving details and allotting outstandings — Description as deed of partition—Non-registration — Admissibility of evidence — Deed — If partition or record of partition. See AIR (Vol 33) 1946 Bom 126 : 227 Ind Cas 622.

——Ss. 49, 17—Deed not registered — Value in evidence.

A document connected with a partition is not admissible in evidence in the absence of registration, to prove actual partition and to prove what was allotted to any person by that partition. It is, however, clearly admissible to establish the status of a party to the document or to establish separation in the family and to rebut any case that such party died in a state of jointness. AIR (Vol 28) 1941 Pat 167 : 7 BR 557 : 21 PLT 1063 : 193 Ind Cas 538 (DB).

——Ss. 49, 17—Partition of movables between uncle and minor nephews—Terms of partition that to equalize shares, uncle to pay debts and minor to execute pro-note for certain amount in favour of uncle—Pro-note executed by another as guardian of minor — Partition lists prepared but not registered — Suit on pro-note :

Held, that the partition lists not being registered as required under S. 17, were not admissible in evidence by virtue of S 49 of the Act and the plaintiff, therefore, could not put them in evidence to prove necessity for the execution of the pro-note.

Held, also that the plaintiff could not adduce oral evidence to prove the terms of the partition under S. 91, Evidence Act, as the partition lists could not be tendered in evidence not being registered. AIR (Vol 24) 1937 Mad 633 : 45 LW 639 : (1937) 1 MLJ 676 : 175 Ind Cas 246.

——S. 49—Partition deed — Admissibility — "Share list" signed by parties — Is an instrument of partition If unregistered is admissible to evidence division of status.

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fac to be decided on perusal of the actual document. A partition document which was described as "share list" was headed as "particulars of the immovable properties which fall" to the share of a member in the divisions of family properties. The item then enumerated the several properties falling to the share of the member. It was signed by both the members between whom the properties were divided and was duly attested but was not registered.

Held, that the document could not be said to be merely the minutes of a previous oral agreement to divide. It was a document such as is described in S. 17 (b), Registration Act, and so, being unregistered, was to be excluded in so far as it was evidence of a transaction affecting immovable property.

Held further, that although inadmissible to prove partition it could be used in evidence as evidence of a division in status, for a partition deed otherwise inadmissible, may be received in evidence of a division of status. AIR (Vol 17) 1930 Mad 883 (DB).

——S 49 Family arrangement — Bahi entries relating to a family partition and consent to adoption by a female member.

Entries can be used in evidence for a collateral purpose for proving consent to adoption though not for proving partition. AIR (Vol 16) 1929 Lah 16 : 114 Ind Cas 711.

——S. 49—Partition list and other document, declaing parties' desire to execute and register fresh partition-deed as per list, are admissible though unregistered. A I R (Vol 16) 1929 Mad 291 : 116 Ind Cas 137 (DB).

——S. 49—Partition Deed—Registration of.

Partition between parties 50 years ago—Parties in possession of their shares accordingly — Document which decided nothing but simply maintained status quo ante, need not be registered as it was neither a partition nor a relinquishment deed. A I R (Vol 16) 1929 Nag 131 (DB).

——S. 49—Partition Deed—Evidence.

The writing which sets forth the details of property allotted to a share of a co-parcener must be treated as a partition deed and being not registered is under the terms of the Registration Act not available as evidence of the transaction. (1929) 12 N L J 108 : 118 Ind Cas 59 (DB).

——S. 49 — Deed of partition inadmissible for want of registration—Fact of partition can be found from other evidence and conduct of parties can be considered—Court can consider evidence of character of a particular member's possession.

If there is unimpeachable evidence to show that the family lived as divided, there is no reason why a division in status cannot be inferred from such conduct merely because the deed of partition is inadmissible in evidence.

Again though the deed of partition itself being inadmissible, no secondary evidence can be given as to the terms of the partition, and, therefore, it is not open to the Courts to consider what were the properties that fell to the share of a particular member of the partition, this does not prevent the Court from finding whether or not all the suit properties were being enjoyed by that member as separate properties at the time of his death.

Further, the unregistered deed of partition is certainly evidence that there was a talk of partition on the date of the document. AIR (Vol 14) 1927 Mad 30 : 39 M L T 276 : 103 Ind Cas 281.

——S. 49—Admissibility—Partition-deed.

Document not itself creating but merely reciting a previous arrangement as to partition, is admissible without registration to prove that partition. A I R (Vol 14) 1927 Rang 40 : 4 Rang 412 : 5 Bur L J 193 : 99 Ind Cas 387.

——S. 49—Where the very fundamentals on which a party rests his case have to be established on recitals contained in a deed of partition, the purpose for which he desires to be allowed to make use of that deed cannot by any process of verbiage be called a collateral one, and the deed cannot be admitted without registration to prove that purpose. AIR (Vol 13) 1926 Nag 329 : 9 N L J 65 : 96 Ind Cas 367.

——S. 49 — Deed not merely acknowledgment of partition but part of partition transaction is inadmissible without registration.

Where a deed was described on the face of it as a partition deed and it was implied therein that the partition took place on the day of the execution of the deed, where it stated that it would be registered and where there was no agreement to execute another document.

Held, that it was not admissible in evidence without registration. AIR (Vol 11) 1924 Nag 395 : 76 Ind Cas 158.

——S. 49 — Where the use of words "zabani" (oral) agreement in the document, repeatedly, showed that the writer was adopting the device in order to save expenses of registration and stamp, but as a matter of fact the parties were executing a deed of partition:

Held, the entry in bahi cannot be admitted in evidence without being properly stamped and registered. AIR (Vol 10) 1923 Lah 135: 71 Ind Cas 737 (DB).

——S. 49 — Properties situate in Tinnevely and Travancore—In suit for partition of Tinnevelly property, partition of Travancore property already effected, cannot be interfered with.

Where there was a memorandum regarding the cessor of jointness which amounted to a declaration that from that time forth, the parties became entitled to the possession and enjoyment of their properties in Tinnevelly and Travancore in separate shares; and which provided for the execution of a further deed effectuating the partition, and in accordance with the provision of the agreement, a formal deed of partition was executed and registered in Travancore, relating to the Travancore properties.

Held, in a suit for partition of the Tinnevelly properties that the partition of the Travancore properties cannot be upset by the Court but that the decision in the suit should be confined to the family properties situated in Tinnevelly. AIR (Vol 9) 1922 P C 266 : 37 C L J 435 : 21 A L J 460 : 27 C W N 561 : 46 Mad 373 : 50 I A 134 : 31 M L T 136 : 16 M L W 615 : 44 M L J 745 : 69 Ind Cas 123.

——S. 49 — Where the case was based really on a Kararnama, which was virtually a deed of partition affecting the property valued at over Rs. 100.

Held, without registration it was inadmissible in evidence. AIR (Vol 9) 1922 Nag 236: 68 Ind Cas 712.

——S. 49—Deed unregistered—Fact of partition can be proved independently.

The fact of partition can be proved by oral evidence, although the deed embodying the terms of partition cannot be proved for want of registration. In any case, the nature of a person's possession over the property in dispute can be proved, though the document evidencing the partition is unregistered. AIR (Vol 8) 1921 Nag 144 : 64 Ind Cas 906.

——Ss. 49 (c) and S. 17 — Unilateral declaration of intention.

An unilateral declaration of intention by a member of an undivided family to get divided is sufficient to affect a partition. Such a declaration embodied in an instrument in writing prior to the division by metes

and bounds does not amount to a transaction within the meaning of S. 49 of the Registration Act and is hence admissible in evidence without registration. AIR (Vol 5) 1918 Mad 708 : 40 Ind Cas 36 (DB).

——Ss. 49 and 17 (1) (b)—Affecting such property — Document partitioning immovable property above Rs. 100—Non-registration.

Where a document which purported to convey property more than Rs. 100 in value was not registered.

Held, that the document was inadmissible in evidence for any purpose tending to indicate the ownership or possession of it. AIR (Vol 3) 1916 Lah 254 : 35 P R 1916 : 52 P W R 1916 : 33 Ind Cas 948 (DB).

(ii) Agreement of partition.

——Ss. 49 and 17 — Unregistered deed — Proof of agreement aliunde — Possession, evidence of.

There is no authority for the proposition that agreement which cannot be proved by reason of the fact of its being unregistered can be proved by other evidence. All that is permissible is that an unregistered document can be examined to see under what circumstances a person came into possession. A I R (Vol 31) 1944 Mad 550 : (1944) 2 M L J 164 : 57 L W 472 : 1944 M W N 612 : ILR (1945) Mad 160 : 216 Ind Cas 255 (FB).

——Ss. 49, 17 (1) (b)—Common desire of parties to act on unregistered partition deed.

The common desire of the parties to act upon an unregistered partition deed and their action in doing so springs from a continuation of the original intention, and amounts to a confirmation of the original agreement; such confirmation in itself constitutes fresh and subsequent agreement which is enough in itself to effect complete partition; and that agreement is provable in any of the usual ways. The subsequent agreement being a collateral transaction within the meaning of S. 49, the unregistered document can be used as material in proof of it. Of course, it cannot prove such agreement in itself because no such agreement can be deemed to have been in existence at the date of its execution. But it can be used to corroborate other evidence or fact. It can be used in conjunction with other evidence to show that such subsequent agreement was likely and to elucidate the intention of the parties in effecting such subsequent agreement. It can be used to show the character of the possession and the nature of the title provided there is other evidence to establish separate possession. A I R (Vol 28) 1941 Nag 209 : 1941 N L J 266 : ILR (1942) Nag 73 : 196 Ind Cas 278 (DB).

——S. 49—Partition arrangement reduced to writing but not registered is admissible for proving the terms of the partition, though affording evidence of a division of status. AIR (Vol 24) 1937 Mad 843 : 46 L W 375 : 1937 M W N 1001 : (1937) 2 M L J 728 : I L R (1937) Mad 970 : 176 Ind Cas 218 (DB).

——S. 49—An agreement in writing whereby a partition is arranged between parties, being not registered, is under the terms of the Registration Act not available as evidence of the transaction. AIR (Vol 16) 1929 P C 13 : 31 Bom L R 264 : 56 Ind App 6 : 33 C W N 233 : 49 C L J 98 : 29 M L W 86 : 52 Mad 83 : 1929 M W N 43 : 56 M L J 165 : 114 Ind Cas 5.

(iii) Divided status—Proof.

——S. 49—Use for collateral purposes showing severance in interest.

Per Wassodew J.—Co-parceners of a joint Hindu family continue to remain united so long as there is no declaration of their will to sever. It has been well-recognized that that declaration of will could be made even by a unilateral act and a fortiori, if such declaration were manifested by a joint reference to arbitration by all the adult coparceners calling upon the arbitrators to effect a division of the family property and apportion it to the respective shares, the partition memo, if unregistered, could be made use of in proof of the change of status or the declaration of will in question.

Per Thakor J.—Severance in interest, which is another expression for partition under the Hindu Law, being itself the object of the documents of partition, cannot be stated to be a purpose which is collateral to the main purpose and object of the document in any sense of the expression. AIR (Vol 25) 1938 Bom 257 : 40 Bom L R 202 : 175 Ind Cas 361 (DB).

——S. 49 Though a partition deed is inadmissible for want of registration to prove the terms thereof, yet it is admissible to prove the fact of partition in strict legal sense of the term. AIR (Vol 25) 1938 Bom 69 : 39 Bom L R 1102 : 173 Ind Cas 403 (DB).

——S. 49 — Admissibility to prove that particular properties were not joint.

Though an unregistered deed of partition can be used to prove mere separation in status, it cannot be admitted to prove that the properties had been partitioned and that certain debt realised by one of the parties was not a joint debt. AIR (Vol 20) 1933 Lah 574 : 34 P L R 194 : 141 Ind Cas 487.

——S. 49 — Partition Deed — Division of status — Unregistered deed of partition — Admissibility to show divided status.

Though an unregistered deed of partition is not admissible in evidence to prove partition in so far as it affects immovable properties, it may nevertheless be admissible for the purpose of explaining the nature and character of the possession held by a party, or as evidence of a divided status, which can be dissociated from and does not necessarily imply a division of property. Case-law reviewed. AIR (Vol 17) 1930 Mad 883 : 59 M L J 558 : 32 M L W 233 (DB).

——S. 49 — Part performance — Partition-deed not registered — Parties separately enjoying their shares —Partition will be upheld, applying doctrine of part performance. AIR (Vol 16) 1929 Mad 291 : 116 Ind Cas 137 (DB).

——S. 49—Unregistered partition deed can be used to prove division in status.

Although an unregistered deed of partition among several members of joint Hindu family cannot be used to prove the actual distribution of the property, it can be used as proof that the family intended at the date of the deed to separate completely from each other. 10 L L J 75 : 29 P L R 413 : (1928) 109 Ind Cas 533.

——S. 49—Division of status can be proved by an unregistered partition deed but status of reunion cannot be proved by unregistered deed of reunion where deed of partition is registered. AIR (Vol 15) 1928 Mad 1113 : 51 Mad 977 : 28 M L W 919 : 55 M L J 733 : 117 Ind Cas 113 (DB).

——S. 49—List of partition though unregistered is admissible to prove division of status. AIR (Vol 15) 1928 Mad 865 : 117 Ind Cas 720 (DB).

——S. 49—An unregistered partition deed, though inadmissible to prove its terms, is admissible to prove factum of partition; but separate possession is always provable by independent evidence.

Though a deed of partition is unregistered, the fact of partition and the fact of separate status and separate possession are provable, the reason being that these facts are not part of the "transaction" as contemplated by S. 49 of the Registration Act or of the "disposition" as contemplated in S. 91 of the Evidence Act. AIR (Vol 14) 1927 Nag 113 : 99 Ind Cas 448 (DB).

——S. 49—Unregistered partition deed is admissible in evidence to prove status of parties at date of suit. AIR (Vol 11) 1924 Nag 395 : 76 Ind Cas 158.

——S. 49—Unregistered deed of partition can be evidence of divided status.

To effect a severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a de facto actual division of the subject-matter may operate to effect a separation in interest and in right. A document which operates to convert a change in the status of the family and effect a division of right, when it is unregistered, is admissible in evidence to prove divided status. What is prohibited by the section is receiving a document as evidence of a transaction not merely receiving it in evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided. AIR (Vol 10) 1923 Mad 297 : 46 Mad 349 : 18 M L W 418 : 44 M L J 45 : 71 Ind Cas 274 (DB).

——S. 49 (c)—Collateral fact—Partition.

An unregistered deed of partition may be used to evidence the fact of partition but not its terms. AIR (Vol 4) 1917 Bom 206: 41 Bom 466: 19 Bom L R 322 : 40 Ind Cas 83 (DB).

——Ss. 49 (c) and 17 (b) — Collateral fact—Division of status.

Where a document of partition that ought to be registered is not registered, it is inadmissible in evidence to prove even the divided status of the members of the family. A I R (Vol 3) 1916 Mad 709 (1) : 30 M L J 404 : 2 L W 1184 : 31 Ind Cas 615 (DB).

(iv) Nature of possession.

——S. 49, Proviso and S. 17 (1) (b) — Document effecting partition inadmissible for want of registration—It can be used for collateral purpose of explaining nature and character of possession thenceforth held by parties.

A document effecting a partition which is inadmissible in evidence for want of registration can in view of the proviso to S. 49 be used as evidence of a collateral transaction not required to be effected by registered instrument. It can, therefore, be referred to for the purpose of explaining the nature and character of the possession thenceforth held by the parties under it. A I R (Vol 33) 1946 All 200 : I L R (1945) All 921 : 1945 A L J 452 (DB).

——S. 49—Nature of possession.

Where it is admitted that partition between two persons had taken place and it is proved by oral evidence that one of them has been in possession for 10 years or so, the unregistered deed of partition can be referred to explain the nature of the possession. (1939) 41 P L R 123.

——S. 49—Partition Deed—Collateral purpose.

Unregistered partition deed, though inadmissible to prove its terms, is still admissible to prove nature of possession of property comprised in the deed. A I R (Vol 14) 1927 Lah 842 : 100 Ind Cas 153.

——S. 49 — A document which does not of itself create a partition of property, but which merely recites a previous arrangement can always be admitted in evidence to prove the arrangement. Further an unregistered deed of partition though inadmissible to affect property is admissible for the purpose of showing the nature of possession. AIR (Vol 13) 1926 Rang 172 : 4 Rang 110 : 97 Ind Cas 876.

(k) Partnership.

——S. 49—Collateral transaction, what is—Unregistered partnership deed.

A collateral transaction means a transaction other than the transaction affecting the immovable property but which is in some way connected with it.

Hence, an unregistered partnership deed can be brought upon the record to prove a collateral transaction, that is, not a transaction creating, declaring, assigning, limiting or extinguishing a right to immovable property, but to prove the partnership and profits and losses arising from the same. It cannot be brought on record to prove a transaction affecting immovable property. AIR (Vol 29) 1942 Sind 27:ILR (1941) Kar 483 : 198 Ind Cas 720 (DB).

——S. 49 — Declaration in document made on dissolution of partnership that partners had equal rights in properties which had been purchased out of profits of business — Instrument requires registration.

The word 'declare' in S. 17 implies a declaration of will and not a mere statement of fact.

Where there is a declaration in a document made on the dissolution of the partnership, that the persons who had constituted the partnership had equal rights in the properties which had been purchased out of the profits, the instrument is one which declares the rights in the properties from the date of dissolution of the partnership and therefore should be registered. A I R 1938 Mad 133, Reversed. A I R (Vol 26) 1939 Mad 884 : I L R 1939 Mad 971 : 188 Ind Cas 831 (DB).

——S. 49—Agreement to dissolve partnership.

There were two firms in which the plaintiff and defendant were partners. With the intention of dissolving their partnership, the plaintiff and the defendant executed an agreement by which each of them assigned his interest in the partnership property in favour of the other so that each acquired exclusive interests in the immovable property of the firms originally held by them jointly. By the same agreement the defendant also undertook to pay the plaintiff a debt due from one of the firms to the other. The agreement was not registered. In a suit by the plaintiff to realise the debt :

Held, that as the dissolution of partnership operates as a transfer of the partner's interest in the immovable property, the agreement so far as it affected immovable property of more than Rs. 100 in value was inadmissible in evidence. A I R (Vol 18) 1931 Mad 580 : 60 M L J 527 : 33 L W 576 : 55 Mad 72 : 132 Ind Cas 305 (DB).

——S. 49—Ceylon Ordinance 7 of 1840—Document though ineffective to pass interest in the land, can be used for collateral purposes.

Ordinance 7 of 1840 provided that "No promise, contract, bargain or agreement unless it be in writing and signed by the party making the same or by some person thereto lawfully authorized by him or her shall be of force or avail in law for establishing a partnership where the capital exceeds £100." It further provided that nothing in the clause shall be construed to exempt any deed or instrument in any manner affecting land or other immovable property from being required for that purpose to be executed and attested in manner declared by the second clause of this ordinance. An agreement of partnership for working a mine was reduced to writing and signed by the parties, but was not executed and attested in presence of a notary public.

Held, that the instrument, although ineffective to pass any interest in the land, may yet be referred to as showing the other terms of the partnership. A I R (Vol 15) 1928 P C 273 : 1929 M W N 1 : 111 Ind Cas 351.

(l) Receipt.

——S. 49 — Receipt intended to directly prove redemption of mortgage.

Section 49, proviso cannot apply to a receipt which is intended to directly prove the redemption of the mortgage in dispute and hence the receipt cannot be taken into consideration unless it is registered. A I R (Vol 30) 1943 Pesh 82 : 211 Ind Cas 68 (DB).

——Ss. 49, 17 (1) (c)—Receipt for consideration of mortgage—Collateral purpose, what is.

A receipt recording the receipt of consideration for a mortgage on the date of the execution of the document should be registered under S. 17 (1) (c) to be admissible in evidence as a receipt.

Where the sole purpose for which an unregistered receipt was executed was to furnish evidence in writing of the payment of the "consideration on on account of the creation of an interest in immovable property" exceeding Rs. 100 in value, the claim for the refund of the amount cannot possibly be treated as a "collateral" purpose, within the meaning of S. 49. In this view, the deed is clearly inadmissible. If however, the "receipt" is the document embodying the terms of the mortgage transaction, entered into at the time of its execution, it would be admissible to support a claim for the refund of the amount advanced, if the mortgage transaction implied a personal liability of the mortgagor to re-pay the amount. If, however, the mortgage is "usufructuary" or is one by way of conditional sale, and the mortgagee has taken possession of the property, the mortgagor does not, in the absence of an express or implied stipulation to the contrary, incur any personal liability and hence the receipt is inadmissible in evidence for a collateral purpose in a suit for the refund of the consideration. AIR (Vol 25) 1938 Lah 497 : 40 P L R 833 : 181 Ind Cas 456.

——Ss. 49, 17 (1)—Receipts purporting to put an end to mortgage rights.

Receipts purporting to put an end to the mortgage rights do not come within the exception embodied in S. 17 (2) (xi), and are compulsorily registrable. A I R (Vol 25) 1938 Mad 533 : 1938 M W N 296 : (1938) 1 M L J 586 : 178 Ind Cas 208 (DB).

——Ss. 49 and 17—Agreement to pay Rs. 1,500 for discharge of both decretal debt and a mortgage debt — Rs. 1,100 paid and pro-note executed for the balance — Document further reciting that petition would be filed to get decree debt cancelled and then mortgage debt should be satisfied on payment of Rs. 400 :

Held, that the document was admissible without registration for evidencing discharge of decree but not for discharge of mortgage debt. 1936 M W N 918.

——S. 49—Co-mortgagees—Receipt granted by one to the other authorising latter to recover entire debt.

A mortgage debt as such can be dissociated from the security for the repayment of the debt and if there is no bar to the admissibility of a document for the purpose of showing the transfer of the debt itself, apart from the security, the appropriate relief which ought to be given to the transferee should not be denied to him.

A and B advanced a certain sum of money to C on a mortgage. B subsequently passed a receipt to A recognising A's right to recover the whole of the mortgage amount.

Held, that though the receipt, being unregistered, could not be admitted in evidence to prove the extinguishment of B's right in the mortgage security, A can be given a declaration of his sole right to the mortgage debt itself apart from the security, and if the sale proceeds of the mortgage property are in Court, A may be allowed to withdraw the entire mortgage amount. A I R (Vol 21) 1934 Mad 178 : 39 L W 153 : 66 M L J 380 : 150 Ind Cas 18 (DB).

——S. 49—Receipt granted to one of two mortgagors providing that money was received in full discharge of the mortgage, and mortgagee was to execute relinquishment, is not admissible when unregistered, to prove mortgage was fully discharged. A I R (Vol 12) 1925 Mad 302 : 20 M L W 801 : 85 Ind Cas 392.

(m) Relinquishment.

——S. 49 — An unregistered ekrarnama effecting a surrender may be taken in evidence in proof of the surrender. A deed of surrender need not be registered if there are facts de hors and apart from the deed itself from which the inference can be drawn that there was an implied surrender in fact. AIR (Vol 28) 1941 Pat 142 : 7 B R 117 : 190 Ind Cas 756.

——S. 49 — Subject-matter valued at more than Rs. 100.

Where, in a deed of relinquishment, the property which was the subject-matter of relinquishment was valued at more than Rs. 100, the document ought to be properly stamped and registered and unless it is registered, it is not admissible in evidence. AIR (Vol 23) 1936 Lah 109 : 162 Ind Cas 733.

——S. 49—An unregistered agreement relinquishing immovable property and requiring registration under S. 17 cannot be received in evidence. AIR (Vol 14) 1927 Lah 907 : 28 P L R 258 : 103 Ind Cas 369.

——S. 49 — Deed of relinquishment requiring registration not registered — Secondary evidence of the document is not admissible. AIR (Vol 14) 1927 Nag 214 : 101 Ind Cas 839.

(n) Rent note.

——Ss. 49, 17 — Rent note — Non-registration — Effect of.

Where a rent-note of February 17, 1865, appears to create or purports to create a permanent tenancy, it requires registratration under S. 13, Regis. Act, 1864 which was in force at the time when the document was executed. The effect of an omission to register under that section is that it cannot affect immovable property comprised therein, and the document cannot be received in evidence in any civil proceeding in any Court or be acted upon by any public officer. AIR (Vol 21) 1934 Bom 194 : 36 Bom L R 359 : 58 B 419 : 150 Ind Cas 555 (DB).

——S. 49 — A rent deed though unregistered, could be looked at to see the nature of the possession. 32 P L R 637 (1) : (1932) 134 Ind Cas 1106 (1).

(o) Sale.

(i) General.
(ii) Agreement of sale.
(iii) Nature of possession.

(i) General.

——S. 49—Fraud on law of registration — Property not intended to be transferred included to get deed registered in particular place—Effect.

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. Where by a sale deed, registered in district A, a share in a village situate in District B was sold and the deed also included a small item of land and a tree situate in district A and the latter property was purchased by the vendee to acquire the status of a cosharer :

Held that the small item of land and the tree were intended to be transferred by the vendor to the vendee and having been actually transferred, the registration of the sale-deed was not void and ineffective on account of its having been registered in district A. AIR (Vol 33) 1946 Oudh 92: 1945 O W N 30: 1945 A W R C C 9 (DB).

——S. 49 — Sale of trees to be cut and removed — Registration not necessary.

Where the object of the sale of trees is to convert them into moveables by getting them cut and remov-

ed, and the parties to the transaction do not contemplate that the trees should continue to stand and be enjoyed as such, the documents relating to the transaction do not create any interest in immovable property and are admissible in evidence even though unregistered. AIR (Vol 16) 1929 Oudh 93 : 112 Ind Cas 156 (DB).

——S. 49 — Admissibility — Subsequent letter.

Sale and mortgage previously executed — Subsequent letter reciting that previous deeds were without consideration and inoperative is not admissible without registration. AIR 1926 Mad 362, Diss. from. AIR (Vol 14) 1927 Lah 626 : 103 Ind Cas 421 (DB).

——S. 49 — Document evidencing payment of over Rs. 100 as earnest money for a sale requires registration where buyer has not improperly refused to accept delivery as the document created an interest in immovable property under S. 55 (b), T. P. Act. 72 I. C. 1032, Overruled. AIR (Vol 13) 1926 P C 94 : 53 I A 214 : 3 O W N 634 : 1926 M W N 602 : 24 A L J 807 : 44 C L J 97: 24 M L W 396: 28 Bom L R 1372: 31 C W N 125 : 28 P L R 10 : 7 P L T 661: 51 M L J 788 : 98 Ind Cas 508.

——S. 49—Unregistered document seeking to prove previous sale-deed to be nominal, is admissible. AIR (Vol 13) 1926 Mad 362 : 23 M L W 19 : 1926 M W N 135 : 91 Ind Cas 452.

——S. 49 — Though sale is effected by unregistered deed, of property below Rs. 100 worth, delivery of possession is necessary.

The written agreement is not compulsorily registrable and there is therefore nothing to prevent its admission in evidence to prove the nature of the transaction between the parties. AIR (Vol 11) 1924 Rang 267 : 3 Bur L J 63 : 83 Ind Cas 270.

——S. 49—An invalid sale can be used as a contract of sale, which does not require registration and can be provided apart from whether there is registration or even a document referring to it. AIR (Vol 11) 1924 Rang 89 : 2 Bur L J 233 : 77 Ind Cas 877.

——S. 49 — Unregistered sale-deed for Rs. 20 is admissible in evidence but does not create any title.

An unregistered sale-deed for Rs. 20 is admissible in evidence so far as the provisions of the Registration Act are concerned, but under the Transfer of Property Act it does not create a little. There is nothing to prevent the vendee from proving a title by delivery of possession as required by S. 54 of the Transfer of Property Act.

A document which purported to be a sale-deed for the validity of which registration is not essential, may be regarded as an agreement to sell on the principle laid down in 5 Bom 143. AIR (Vol 9) 1922 Nag 58 : 18 N L R 8.

——S. 49 (c) — Affecting such property — Unregistered sale of equity of redemption.

An registered sale of an equity of redemption is inadmissible in evidence to prove the sale or the satisfaction of the debt. AIR (Vol 6) 1919 Cal 325 : 23 C W N 513 : 52 Ind Cas 558 (DB).

——S. 49 — Possession under unregistered document — Sale unregistered — Rights of vendor — Ejectment by vendor.

The possession of a vendee who claims title under a sale deed which for want of registration is inadmissible in evidence, is that of a trespasser and he is to be liable ejected from the property by a subsequent vendee under a registered deed of sale. AIR (Vol 6) 1919 Lah 296 : 111 P R 1918 : 24 P L R 1919: 43 Ind Cas 390.

——S. 49 (c)—Collateral fact—Possession.

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence under S. 91 of the Evidence Act to show the nature and terms of the transaction; though it confers no title to the property. AIR (Vol 5) 1918 Cal 828: 21 C W N 1149 : 41 Ind Cas 779 (DB).

——Ss. 49 and 17 Essential terms — Proof — Sale of land under Rs. 100 in value — Secondary evidence, if admissible.

Per Beaman, J. (Macleod J. Contra)—Neither the original unregistered sale deed of sale of property for less than Rs. 100 nor secondary evidence of it is admissible to prove the sale which however could be proved by proving delivery of possession. AIR (Vol 4) 1917 Bom 229 : 41 Bom 550 : 19 Bom L R 622 : 41 Ind Cas 277 (DB).

——Ss. 49 (c) and 17—Affecting such property—Immoveable property—Unregistered deed.

An unregistered sale deed of immoveable property of the value of Rs. 100 or more is not admissible in evidence to affect the interest of a person who is not a party to the deed. AIR (Vol 3) 1916 Lah 88 : 110 P W R 1916 : 78 P L R 1917 : 36 Ind Cas 374.

——S. 49—Collateral facts—Unregistered sale—Contract of sale—Unregistered sale deed in evidence of contract affecting property.

Where there is a contract in itself affecting property, an unregistered sale-deed is inadmissible in evidence to prove the contract. AIR (Vol 3) 1916 Pat 212 : 1 Pat L J 455 : 2 Pat L W 441 : 37 Ind Cas 994 (DB).

——Ss. 49 (a) and 50—Affecting such property—Unregistered sale-deed.

An unregistered sale deed with respect to immoveable property creates no interest in the purchaser and cannot prevail against a subsequent registered sale deed even with notice of the minor unregistered deed. (1911) 9 M L T 270 : 9 Ind Cas 55 (DB).

(ii) Agreement of Sale.

——S. 49—Oral agreement to sell preceding execution of written instrument of transfer is separate transaction.

An oral agreement to sell, preceding the execution of a written instrument of transfer by way of conveyance not purporting to incorporate the preceding agreement is a separate transaction which does not require to be in writing or registered and is in itself quite legal. AIR (Vol 28) 1941 Lah 407 : 43 P L R 656 : I L R (1942) Lah 79 : 197 Ind Cas 282 (FB).

——S. 49 — Suit for specific performance of agreement to transfer.

It is well-settled law in the Madras Presidency that an unregistered document of transfer is not of itself sufficient to support a suit for specific performance of an agreement to transfer. If an instrument is executed in a person's favour, which is, in terms, and is intended to be a transfer of immovable property, then provided it is a document which is required to be registered, the transferee must, in order to give it validity, get it registered by employing the procedure laid down in the Registration Act. It is not open to the transferee to ignore the provisions of the Registration Act and, treating the instrument as a contract to transfer — which it is not — compel the transferor to execute a formal transfer—which he has already done. AIR (Vol 25) 1938 Mad 801 : 1938 M W N 291 : (1938) 2 M L J 362 : 48 L W 522:179 Ind Cas 240 (DB).

——S. 49 — Agreement for sale containing receipt clause.

Where the document is a contract for sale merely and not a conveyance, it does not come within the mischief of S. 49 by reason of the fact that there is a receipt clause contained in the document. AIR (Vol 22) 1935 Pat 237 : 1 B R 747 : 157 Ind Cas 327.

——Ss. 49, 17 — In the absence of reliable evidence on the record to show that the value of the property

covered by an agreement executed in 1879 was more than Rs. 99, it is very difficult to hold that, in those days when the value of the property was very small, the property covered by the agreement was worth more than Rs. 99. AIR (Vol 21) 1934 Lah 885 : 16 Lah 313 : 37 P L R 592 : 155 Ind Cas 1064 (DB).

——Ss. 49, 17—T. P. Act, S. 35.

An unregistered agreement for sale of immovable property of value of more than one hundred rupees but not operating as a transfer of any interest in the property can be used in evidence in an action for obtaining specific performance of the contract. AIR (Vol 21) 1934 Pat 495 : 15 P L T 443 : 13 Pat 620 : 1 B R 375 : 155 Ind Cas 47 (DB).

——S. 49—Agreement to sell — Sale-deed in custody of stranger — Vendee unable to present deed for registration — Suit for specific performance, competency of.

The vendee can enforce specific performance of an agreement to sell, even though owing to the fact of the sale-deed being in the custody of a third person, he could not get the deed registered in time, provided he is able to prove the terms of the agreement. AIR (Vol 19) 1932 Lah 276 : 33 P L R 227:137 Ind Cas 41 (DB).

——S. 49 — Agreement for sale cannot be let in evidence unless registered.

An agreement for the sale of immovable property is a transaction "affecting," the property within the meaning of S. 49, inasmuch as, if carried out, it will bring about a change of ownership: and to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance is an evasion of the Registration Act. AIR (Vol 16) 1929 P C 269 : 33 C W N 1150 : 30 M L W 451 : 1929 A L J 1060 : 6 O W N 835 : 56 I A 363:32 Bom L R 1 : 50 C L J 487 : 1929 M W N 937 : 11 P L T 1 : 51 All 771 : 57 M L J 765 : 119 Ind Cas 633.

——S. 49 — Agreement for sale proved by parol evidence — This evidence reinforced by the fact of possession and payment of revenue — Making use of the document of the agreement is not illegal. AIR (Vol 15) 1928 Cal 754 : 116 Ind Cas 370 (DB).

——S. 49 — Agreement for sale of immovable property — Earnest money over Rs. 100 paid — Buyer pressing for specific performance — Registration is necessary. AIR (Vol 14) 1927 Bom 157 : 51 Bom 231 : 29 Bom L R 269 : 101 Ind Cas 155 (DB).

——S. 49 — Agreement to convey immovable property contemplating another document is admissible without registration. (1926) 98 Ind Cas 691 (DB) (Mad).

——S. 49—An agreement for reconveyance executed along with the deed of sale, is admissible in evidence without registration. AIR (Vol 11) 1924 Rang 57 : 1 Rang 472 : 2 Bur L J 188 : 82 Ind Cas 610 (DB).

(iii) Nature of possession.

——S. 49 — Though an unregistered deed of sale is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It may operate as starting point for adverse possession of vendee, if he has set up independent title in himself. AIR (Vol 28) 1941 Nag 72 : 1940 N L J 509 : I L R (1942) Nag 145 : 193 Ind Cas 306 (DB).

——S. 49—Invalid sale-deed—Adverse possession.

A purchaser taking possession under a sale-deed which is invalid due to want of registration and holding it for more than 12 years can acquire title by prescription, and the sale-deed, though invalid, can be referred to in order to determine the nature of his possession. AIR (Vol 28) 1941 Oudh 41 : 1940 O W N 753 : 1940 A W R 402 : 16 Luck 99 : 190 Ind Cas 85 (DB).

——S. 49 — Although an unregistered sale-deed of property is not admissible in evidence to prove title, it can nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the party. AIR (Vol 26) 1939 Pat 488 : 20 P L T 399 : 6 B R 51 : 184 Ind Cas 504 (DB).

——S. 49 — Unregistered sale-deed is admissible to show the character of possession. 1934 M W N 680.

——S. 49—When property has been sold by delivery of possession, a document of sale or lease, is admissible in evidence to show the character of the possession, though it is not registered. 1934 M W N 290.

——S. 49—Sale.

A sale-deed, though unregistered, can be admitted to show the nature of possession. A I R (Vol 16) 1929 Mad 16 : 109 Ind Cas 795 (DB).

——S. 49 — An unregistered sale-deed, although not admissible to prove the function of sale, is admissible to prove the nature or quality of vendee's possession. AIR (Vol 14) 1927 Nag 342 : 104 Ind Cas 353.

——S. 49—Sale of property worth less than Rs. 100—Possession delivered—Sale is complete—Unregistered sale-deed executed at the same time does not destroy sale but is admissible to prove nature of possession. AIR (Vol 12) 1925 All 206 : 5 L R A Civ 317 : 79 Ind Cas 394.

——S. 49 — Unregistered sale is admissible to prove nature of transferee's possession.

An unregistered sale cannot be set up as a transaction having effect of itself to transfer any interest in the property; but it is permissible to consider it, as showing the nature of transferee's subsequent possession, e. g., when the sale is of mortgaged property to the mortgagee that it was not as a mortgagee, but as full owner. That being established it would after the expiry of 12 years ripen into a full title and bar mortgagor's right of redemption. 38 Mad 1158 held overruled by 43 Mad 244 (PC); 37 Mad 423 held overruled by L. P. A. No. 207 of 1915. A I R (Vol 8) 1921 Mad 82 : 44 Mad 253 : 13 M L W 423 : 1921 M W N 1 : 40 M L J 105 : 62 Ind Cas 603 (DB).

——S. 49 (c)—Collateral fact—Nature of property — Unregistered deed.

A deed of sale which is inadmissible in evidence for want of registration cannot be referred to for the collateral purpose of ascertaining the nature of the property sold. 1919 P L R 61.

——S. 49—Collateral fact — Nature of possession — Unregistered sale deed.

An unregistered sale deed is not admissible even for showing the nature of possession of the vendee. A I R (Vol 2) 1915 Mad 573 : 38 Mad 1158 : 1 L W 754 : 16 M L T 344 : (1914) M W N 768 : 27 M L J 497 : 25 Ind Cas 772 (DB).

(p) Wakf.

——S. 49 — Where the wakf is made by a deed, Ss. 17 (1) (b) and 49 come into play. A I R (Vol 26) 1939 Rang 365 : 1940 Rang L R 136 : 186 Ind Cas 210 (DB).

(q) Miscellaneous.

——S. 49 — Right to hold market — Agreement regarding same—Need for registration.

The right to hold a market is an incident to the ownership of the land. The allocation of particular days for holding the bazaar coupled with the condition that the parties are not to be allowed to hold the bazaar on certain other days is a restriction on the general right possessed by the owner to hold the market and so where an agreement deals with such a right and the value of the same is more than Rs. 100, the document requires registration. A I R (Vol 18) 1931 Oudh 110 : 5 Luck 504 (DB).

——S. 49 — Where the first part of an agreement is of a testamentary character and the second part merely provides for a possibility, such as the transfer of certain land to certain persons if the widowed daughter remarries, the agreement does not require registration and is admissible in evidence. A I R (Vol 16) 1929 Lah 886.

——S. 49 — Deed acted upon but not registered binding on parties acting up to it.

Transactions which do not purport to comply with statutory requirements, e g., the formality of Registration law, although in every other way the object to be achieved by the transfer or exchange has been executed can be recognized in law or rather at equity, so as to bind the parties by their conduct so irrevocably as to make it impossible for them to reopen the transactions or retrace their steps. A I R (Vol 11) 1924 All 772 : 46 All 759 : 22 A L J 719 : 5 L R A Civ 518 : 81 Ind Cas 508 (DB).

——S. 49—Misrepresentation.

No misrepresentation by a party can be construed in a case where the other knowingly continues in the possession of the subject-matter of the contract, promised to be conveyed after the lapse of period evidenced by an unregistered instrument which is inadmissible in evidence. AIR (Vol 7) 1920 Bom 117 : 22 Bom L R 979 : 58 Ind Cas 406 (DB).

——S. 49— Affecting such property — Unregistered deed—Benami transactions.

A document simply proving that another document was only a benami one is admissible in evidence even if unregistered as it is not used as evidence of any transaction affecting land. A I R (Vol 2) 1915 Mad 530 : 25 Ind Cas 721 (DB).

10. Amendment, if retrospective.

——S. 49, proviso — Whether retrospective.

The proviso to S. 49 is necessarily retrospective. It is a rule of evidence and normally as it does not create or defeat substantive rights, according to the recognized canons of construction, it should be accepted as retrospective. AIR (Vol 27) 1940 Bom 193 : 42 Bom L R 382 : 189 Ind Cas 106 (DB).

— S. 49 — (As amended in 1929) — Amendment, effect of.

The amendment of S. 49, Registration Act, was only passed ex abundante cautela and was not necessary and the fact that that amendment was not made retrospective cannot have any great weight in considering whether S. 53A, T. P. Act is made retrospective. AIR (Vol 27) 1940 Bom 90 : ILR (1940) Bom 50 : 41 Bom L R 1310 : 187 Ind Cas 27 (DB).

——S. 49, proviso (as added by Act XXI of 1929), whether retrospective in effect.

The proviso to S. 49 which was added by Act XXI of 1929 does not have retrospective effect and therefore, cannot affect an agreement which was executed four years before the amending Act XXI of 1929 came into force and which, if unregistered, could not be adduced in evidence according to law in existence before 1929 :

Held, that the agreement in question undoubtedly gave the plaintiff a right in the immovable property; it gave him not only possession but security for the money which he had already paid. Hence the document created a right in immovable property. A I R (Vol 27) 1940 Pat 92 : 19 Pat 90 : 6 B R 435 : 21 P L T 1033 : 187 Ind Cas 198 (DB).

——S. 49, proviso—Retrospective effect.

Under proviso to S. 49, Registration Act, an unregistered document affecting immovable property and requiring registration may be received as evidence of a contract in a suit for specific performance.

This proviso is retrospective in its effect. 1937 M W N 440.

——S. 49—Section 49 is really one of procedure and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought. AIR (Vol 23) 1936 Lah 5 : 37 PLR 658 : 157 Ind Cas 839.

——S 49, proviso, first part—Effect of amendment.

Section 49 is really one of procedure and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought. As amended, the first part of the proviso to S. 49 does away with the necessity of registration. AIR (Vol 20) 1933 Lah 1038 : 35 P L R 167 : 147 Ind Cas 673 (2).

11. Questions of admissibility when to be raised.

——S. 49—Court, if can go behind lease and determine validity—Plea taken by one of lessees—Effect as against other lessees.

Where the lessee admits the lease but plea is that the lease deed is inadmissible in evidence for want of registration, the Court is fully entitled to go behind the lease and determine its validity.

And where such a plea of inadmissibility is taken only by one of the lessees and the lease is found to be invalid, it is invalid against all the lessees. AIR (Vol 28) 1941 Rang 117 : 194 Ind Cas 31 (DB).

——S. 49 —Unregistered document—Effect.

Though where the admission in pleadings renders it unnecessary to produce any evidence at all, objection cannot be taken to the admissibility of the superfluous evidence when and if produced, yet a mere admission of the execution of a document, even if supported by the existence of an agreement embodied in an inadmissible document ,both admissions being answers to questi ns which should have been disallowed, does not debar a person from pleading that the document was inadmissible for want of registration and objecting to the document or any evidence as to its contents. AIR (Vol 20) 1933 Lah 9 : 33 P L R 1073 : 140 Ind Cas 430 (2).

——S. 49 — Admissibility in suit for damages for breach of contract.

There is nothing in S. 49, when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective be the foundation of a judgment affecting immovable property comprised in such document.

[As the pa ties were not agreed on the facts and there were indications of a course of conduct on the part of the appellant which was sufficient to preclude him from raising the new point, their Lordships refused to allow the appellant to raise the point of non-registration for the first time before the Board.]

Where the claim is a personal one for damages of an admitted contract, the Court of Appeal is not bound to take notice of the fact of the non-registration of the deed of agreement as the proceedings do not, in any way, affect any immovable property. AIR (Vol 19) 1932 P C 118 : 36 C W N 677 : 55 C L J 362 : 10 Rang 242 : 1932 M W N 680 : 34 Bom L R 1021 : 1932 A L J 706 : 36 L W 75 : 9 O W N 930 : 63 MLJ 131 : 59 I A 161 : 136 Ind Cas 737.

——S. 49—Admissibility—Plea as to.

Plea of registration can be raised for the first time in appeal. 101 Ind Cas 155 : 51 Bom 231 : 29 Bom L R 269 : AIR (Vol 14) 1927 Bom 157 (DB).

12. Registered document confirming another unregistered document.

——S. 49—Admissibility of—Agreement inadmissible for want of registration — Document reciting and confirming agreement how far admissible evidence of the agreement.

Where an agreement is inadmissible in evidence for want of registration, a document reciting and confirming the agreement, which is itself registered, is admissible evidence of the terms of the agreement. (1902) 4 Bom L R 893 (899, 900).

13. Proof of transaction independent of document.

——S. 49—Oral evidence, admissibility of—Independent proof of title Whether can be allowed.

In view of the imperative provision of S. 49, an unregistered document cannot be received as evidence of any transaction affecting immovable property. But a person is not debarred from proving his title to the property independently of that document.

The plaintiff sued for redemption of a mortgage. The mortgage was unregistered but the defendants admitted they were in possession as mortgagees for more than 12 years. The defendants never set up adverse possession and the plaintiff proved his title independently of the mortgage. The defendants also admitted the mortgage amount :

Held, that the defendants must be deemed to have acquired at least the mortgagee's right and that the plaintiff was entitled to recover possession of the property on payment of the mortgage money, though the deed was unregistered. AIR (Vol 19) 1932 All 259 : 1932 A L J 101 : 140 Ind Cas 42 (DB).

—— S 49—Unregistered mortgages—Loss of document—Secondary evidence.

Secondary evidence of a lost unregistered document affecting an interest in an immovable property and therefore required to be registered is not admissible in evidence of any transaction affecting such property. But such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. 44 Ind Cas 91 : AIR (Vol 5) 1918 L B 71.

——S. 49 — Transfer of hereditary trusteeship, by unregistered and unstamped documents—Secondary evidence, admissibility.

Where by a document in writing four members of a junior branch transfer their right of management of a public temple to a member of the senior branch, and such document is admittedly unstamped and unregistered, in the absence of such instrument of transfer, other evidence in proof of such transfer is inadmissible. Quaere : Whether a member can rely upon such transfer as the basis of his title. (1903) 13 M L J 341 : 27 M 192 (196) (DB).

14. Oral evidence of terms of compulsorily registrable document.

——S. 49—Where the husband agrees in writing to give his wife a house in return for her consent to allow him to marry a second wife, such consent being necessary according to the rules of the caste and delivers possession, the document, even, if it be compulsorily registrable, embodies an arrangement which need not be reduced to writing and can be proved by oral evidence by the first wife. AIR (Vol 19) 1932 Bom 602 : 34 Bom L R 1317 : 140 Ind Cas 745 (DB).

——S. 49—The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration. 111 Ind Cas 472 : 6 Rang 337 : AIR (Vol 15) 1928 Rang 196 (DB).

——S. 49—Unregistered sale-deed cannot be admitted in evidence nor oral evidence can be allowed. 110 Ind Cas 735 : 6 Rang 125 : AIR (Vol 15) 1928 Rang 124.

——S. 49 — Certain property sold omitted in sale-deed, by mutual mistake—Rectification not sought within limitation—Oral evidence can be admitted to prove sale.

Though a remedy by way of rectification of an instrument by a suit is open to a party, when through fraud or mutual mistake of the parties an instrument in writing does not truly express their intention; this does not mean that if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property can be challenged simply because the instrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It will always be open to the vendee, if his title is challenged by the vendor, to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him. In fact the vendee is entitled to lead oral evidence to show the mistake in the instrument. The mere failure of the vendee, to have the instrument rectified within three years from the date of the discovery of the mistake, cannot have the effect of extinguishing his title to the property intended to be conveyed to him, though not properly described in the sale deed. 100 Ind Cas 568: AIR (Vol 14) 1927 All 355.

——S. 49 — Secondary evidence of partition deed inadmissible—Oral evidence can be adduced to prove lawful origin of possession. 102 Ind Cas 696 : 5 Rang 154 : AIR (Vol 14) 1927 Rang 203 (DB).

——S. 49—When the existence of a sale is in question and not its terms, oral evidence is admissible.

The word "terms" in S. 91 is applicable to both classes of documents, i.e., documents which are reduced to writing and which are required by law to be written. 95 Ind Cas 584 : 1926 M W N 384 : AIR (Vol 13) 1926 Mad 812.

——S. 50.

1. Construction.
2. Priority between registered and unregistered deed.
3. Possession under unregistered deed.
4. Scope and applicability.

1. Construction.

——S. 50—Where, for the convenience of the parties, lands in which the executants had title were included in the registration it does not necessarily lead to the conclusion that the intention was that the title to the said lands should not pass to the transferee. (1934) 1934 M W N 745.

2. Priority between registered and unregistered deed.

(a) General.
(b) Mortgage deeds.

(a) General.

——S. 50—Unregistered and registered sale-deeds — Priority between—Pepsu.

Section 10 of the Transfer of Property Act (Amendment) Supplement Act of 1929, which added S. 53-A, Transfer of Property Act and the proviso to S. 49, Registration Act, has not so far been enforced in the Patiala State or in the Union. Therefore, in the Patiala State or in the Union a subsequent transferee of immovable property for consideration under a registered sale-deed has priority over a vendee who is in possession of the property under an unregistered sale-deed which is compulsorily registrable. The possession of a vendee who claims title under a sale-deed which for want of registration is inadmissible in evidence is that of a trespasser, and until such possession matures into ownership by prescription, such vendee is liable to be ejected from the property by a subsequent vendee under a registered sale-deed. AIR (Vol 37) 1950 Pepsu 34 (DB).

——S. 50—Whether applies to valid charge created by unregistered decree.

Section 50 provides for priority between documents, one of which is registered and the other is not. It can have no application to a valid charge created by a decree which, though unregistered, must have a prior operation being prior in time. AIR (Vol 29) 1942 Bom 132 : 44 Bom L R 158 : I L R (1942) Bom 183 : 200 Ind Cas 456 (DB).

——S. 50—Priority over unregistered document — Limitation.

The Registration Act provides that a registered document shall take effect, as regards the property comprised therein, against every unregistered document relating to the same property. This provision can only apply to cases in which the property conveyed by the two documents is the same or in which

the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the two documents are antagonistic, but not where effect can be given to each without infringement of the other. AIR (Vol 24) 1937 Lah 57 : 38 P L R 928 : 164 Ind Cas 577.

——S. 50—Ceylon Ordinance No. 14 of 1891—Father gifting property to son — Deed not registered — Subsequent transfer of same to another by registered deed — Priority in registration, whether gives priority.

In Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person registering of the priority conferred by law as laid down by Ceylon Ordinance No. XIV of 1891.

According to the law of Ceylon, as according to the law of England, a guardian stands in a fiduciary relation to his ward, and where a father transfers certain property to his son by a deed of gift, the father stands in such a fiduciary relation to his son. It is his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument by which a third party could destroy the interest of the son.

Where a father transferred certain property to his son by a deed of gift which is not registered, and subsequently attempts to transfer the same to another by a registered deed and where the transferee is fully aware of his intentions and for his own purposes, joins the father in the transaction, the transferee is guilty of collusion to deprive the son of his lawful rights in respect of the property under the prior instrument and will not obtain priorty by reason of prior registration. AIR (Vol 23) 1936 P C 259 : 165 Ind Cas 417 (P C).

——S. 50—Applicability.

Section 50 only applies where two documents are really antagonistic and not where effect can be given to each without infringement of the other — There must be identity of title, but not of executants.

Therefore, a registered sale-deed by a person who has only a mortgagee's interest cannot prevail over an unregistered mortgage passed by the original owner, and cannot affect the owner's right of redemption. AIR (Vol 15) 1928 Bom 269: 30 Bom L R 720 : 113 Ind Cas 523 (DB).

——S. 50—S. 50 applies only where the prior document is optionally registrable, and the transaction is not completed.

Section 50 has no application to cases where under the prior unregistered deed of transfer there has been a valid and effectuated transfer of the property, but it refers only to cases where the previous document, though valid, was only optionally registrable, that is to say, if in respect of a document relating to a transaction a person had the option to register the document, and if for some reason the transaction is not completed or does not completely take effect and subsequently another person comes to purchase the same property under a registered document without any knowledge or notice of the previous transaction, then in the conflict between these two this provision of the Act provides that effect shall be given to the latter registered document. AIR (Vol 15) 1928 Mad 546 : 28 M L W 234 : 111 Ind Cas 677 (DB).

——S. 50—Valid unregistered deed.

Unregistered deed though valid, cannot be enforced against person claiming under registered deed.

Even a person who claims under a deed which under the law does not require registration and is perfectly valid though unregistered, cannot escape the provisions of S. 50. AIR (Vol 12) 1925 Oudh 506 : 12 O L J 382 : 2 O W N 529 : 89 Ind Cas 563.

——S. 50—Priority—Notice.

A registered document is entitled to priority over an unregistered document in the absence of proof of notice of the unregistered instrument. The onus lies on the person alleging such notice. AIR (Vol 4) 1917 Nag 209 : 42 Ind Cas 393.

——S. 50—Registered and unregistered document, priority.

The purchase under a subsequent registered mortgage does not extinguish an earlier unregistered mortgage. The debt could be recovered from the money, if any, after satisfying the registered mortgage. Section 50 does not invalidate an unregistered mortgage nor extinguish the rights of such a mortgagee. (1913) 35 All 271 : 11 A L J 291 : 19 Ind Cas 783 (DB).

——S. 50—Priority—Registered and unregistered deed.

A person claiming under a registered sale deed though from a purchaser under an unregistered sale has priority over a previous purchaser under an unregistered sale. (1913) 34 All 631 : 10 A L J 222 : 17 Ind Cas 19 (DB).

——S. 50—Priority—Unregistered sale—Notice.

Of two purchasers of the same immovable property worth less than Rs. 100, the person who gets a registered sale has got a preference even though his sale may be later in date unless it is proved that he had notice of the prior unregistered sale. The rule holds good even where the second executant is a different person such as heir of the first executant. (1909) 5 N L R 82 : 3 Ind Cas 58.

——S. 50—Act No. XIX of 1843, S. 2 — Act No. XIV of 1864, S. 68 — Registration — Registered and unregistered documents—Priority.

Held that S. 50 did not give to a registered mortgage executed in 1900 priority over an unregistered mortgage executed in 1861. 1906 A W N 113 : 3 A L J 320 : 28 A 607 (609) (DB).

——S. 50 — Competition between registered and compulsorily registrable document and unregistered though optional instrument.

In a competition between a document which is compulsorily registrable and registered as one which is optionally registrable and unregistered the former will prevail, whether the unregistered document be of the same nature as the registered document or not. (1904) 9 C W N 14 (17).

——S. 50—Same vendor—Competition between two instruments.

Where an instrument which was not registered is executed by one person and another relating to the same property is executed by his heir after the former's death in favour of another party, it cannot be said that that there is no competition between both the instruments for the reason that it was executed by different persons. (1903) 27 B 408 (412): 5 Bom L R 269 (DB).

[See also (1908) A W N 42 : 30 A 130 (131, 132) : A L J 112 : 3 M L T 223].

——S. 50—S. 50 will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered mortgage not being one compulsorily registrable, if, in fact, the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed. 1903 A W N 81 : 25 A 366 (369) (DB).

(b) Mortgage deeds.

——S. 50—Notice, what is.

Where, at the time a mortgage-deed is presented for registration, a prior mortgagee appears before the Sub-Registrar and gives notice of his prior unregistered document, the subsequent mortgagee cannot claim priority. AIR (Vol 20) 1933 Lah 609 : 146 Ind Cas 40 (1)

——S 50—Award prior to Amending Act of 1929 — Award creating charge—Absence of registration.

Where a charge has been created by an award prior to the amendment to the Registration Act in

1929, though the award is not registered, it retains its seniority over a subsequent mortgage deed, albeit it be a registered instrument: AIR (Vol 20) 1933 Sind 151 (2) : 27 S L R 121 : 143 Ind Cas 863 (FB).

——S. 50 — Executory contract and mortgage deed.

A mere executory contract which has to be specifically enforced to procure the contract, and which is to be substituted for the old contract, would not supersede a registered mortgage deed, by which an interest in the property has passed. AIR (Vol 16) 1929 All 503 : 121 Ind Cas 221 : 51 All 799 : 1929 A L J 526 (DB).

——S. 50—Mortgage and sale deeds.

Prior mortgage for Rs. 99 unregistered—Subsequent sale of that property — Vendee can ignore the mortgage. AIR (Vol 12) 1925 All 325 : 86 Ind Cas 177: 47 All 338 : 23 A L J 46: 6 L R A Civ 180 (DB).

——S. 50—Registered and unregistered mortgages.

No priority can be claimed in respect of an unregistered mortgage deed when the subsequent mortgage is registered. AIR (Vol 2) 1915 Oudh 124 : 2 O L J 368 : 30 Ind Cas 388.

——S. 50 — Priority — Bona fide purchaser without notice.

An unregistered mortgage cannot be enforced against a bona fide purchaser under a registered deed without notice of the said mortgage. (1913) 18 Ind Cas 724 (All).

—— S. 50—Priority—Notice.

A subsequent registered sale will take effect against a prior unregistered mortgage if the vendee had no notice of the mortgage. (1911) 10 Ind Cas 233 (All).

——S 50—Notice of prior oral valid mortgage.

A registered mortgage does not take priority over an earlier valid oral mortgage of the same property, if the second mortgagee had actual notice of the first mortgage at the time his registered mortgage was made. (1910) 3 Bur L T 13 : 5 L B R 184 : 8 Ind Cas 597 (DB).

——S. 50 — Mortgage of movables — Registration—Priority.

In India, registration of mortgages of movables, not being compulsory, does not give priority to the incumbrancer who has his charge registered. (1909) 5 L B R 8 : 2 Ind Cas 351 (DB).

——S. 50—Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser—e.

Property was purchased which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of the execution of the sale-deed in his favour, but received notice before the sale-deed was registered.

Held, that the mortgage was binding on the purchaser. The principle of 19 A. 45, 25 A. 366 applied. 1903 A W N 99 : 30 All 238 : 5 A L J 607 (608, 609).

——S. 50 — Purchaser in execution of a prior unregistered mortgage and subsequently registered mortgage without notice.

When A claims title to property by purchase under a registered conveyance from the owner, and B claims title to the same property as purchaser at a sale held in execution of a decree obtained on a prior unregistered mortgage granted by the owner, A is entitled to priority if he took without notice of the mortgage. (1906) 4 C L J 490 (491, 492) (DB).

——S. 50 — Vendee under registered sale deed competing with auction purchaser at a sale under a decree on a prior unregistered mortgage deed.

Held, that a title resting on a registered sale-deed of the 29th August 1895, could not be defeated by a sale in execution of a decree obtained on the 20th April 1897, in a suit upon an unregistered mortgage of the same property dated the 21st July 1894, to which suit the vendee of 1895 was not a party. 7 A 858 held overruled. 1901 A W N 112 (113).

——S. 50 — Optionally registrable document—Priority of subsequent registered document over prior unregistered document — Notice of prior document —Onus of alleging and proving notice.

The holder of a registered mortgage deed has no priority over a prior unregistered mortgage, if when he got the mortgage he had notice of the latter. But the onus lies on the party alleging such knowledge or notice to over it. (1901) 25 M 1 (2, 3) (DB).

——S. 50 — Unregistered mortgage — Registered transfer—Decree on mortgage—Priority.

When a decree or order is obtained upon an unregistered mortgage deed against the mortgagor, alone, subsequent to a registered transfer of the mortgaged property, S. 50 gives priority to the registered transferee. When an unregistered mortgage is merged in a decree, a transferee under a registered deed subsequent to the mortgage is precluded from claiming priority under S. 50, only when the decree can be used as evidence against the registered transferee. (1900) 5 C W N 419 : 28 C 139 (141, 142) (FB).

3. Possession, under unregistered deed.

——S. 50—Sale by unregistered deed—Vendee taking possession — Subsequent registered mortgage in favour of another — Possession, whether notice.

A person who takes the same property by a registered deed, with full knowledge of the previous transaction, is obviously party to the vendor's fraud and consequently, in such a case, he cannot succeed merely on the strength of his registered deed. Delivery of possession may amount to notice of the previous title and the subsequent alienee may fail owing to such notice but that would depend upon the nature and circumstances of the possession under the prior title.

In pursuance of an unregistered sale in favour of a neighbour, the vendor delivered the possession of the vacant site to the vendee, who began to stack his fodder and tie his cattle there. A year afterwards the vendor mortgaged the same site to another person by a registered deed :

Held, that the possession of the vendee was not tantamount to "notice" of his right under the sale-deed so as to put the mortgagee on enquiry. AIR (Vol 26) 1939 Lah 29 : 41 PLR 19 : ILR (1939) Lah 261 : 182 Ind Cas 460.

——S. 50—Notice of prior transfer.

A subsequent registered purchaser cannot avail himself of the registration of his deed against a prior unregistered purchase of which he has notice. AIR (Vol 17) 1930 Rang 188.

——S. 50 — Subsequent registered deed — Prior unregistered deed or oral transaction — Subsequent transferee had actual notice of the prior transaction —Registered subsequent deed will not prevail—Onus of proof lies on claimant under unregistered deed or oral transaction and all duly registered documents shall take effect against an oral agreement or declaration relating to property unless where the agreement or declaration has been accompanied or followed by delivery of possession. AIR (Vol 16) 1929 Lah 500 : 119 Ind Cas 754.

——S. 50— Title by delivery of possession — S. 50 does not refer to title by delivery of possession.

S. 50 does not take into account the possession delivered under an unregistered document. It refers only to registration or non-registration of documents, and competition between a registered and unregistered document. It does not at all refer to title which passes by means of delivery of possession. AIR (Vol 16) 1929 Pat 620 : 10 PLT 449 (DB).

——S. 50—Previous owner in possession, as tenant of the previous purchaser — Subsequent purchaser shall not be fixed with notice of the earlier purchase.

The provisions of S. 50 are subject to the condition that the subsequent registered purchaser has no notice of the previous purchase. The burden of proving notice rests with the prior purchaser under unregistered deed and where the previous owner remains in possession as tenant of the previous purchaser, such possession would not be deemed to give notice to the subsequent purchaser of the earlier purchase. AIR (Vol 15) 1928 Rang 237 : 6 Rang 315 : 112 Ind Cas 230.

——S. 50- Unregistered sale-deed—Delivery of possession—Subsequent registered sale — Priority.

A prior unregistered sale-deed, which is not compulsorily registrable but accompanied by delivery of possession is not invalidated by a subsequent registered sale. The person claiming under the prior unregistered deed must not only prove the deed but also the delivery of possession. A title which has once vested by virtue of a deed if it be unregistered cannot be divested by a subsequent registered document. AIR (Vol 4) 1917 Pat 80 : 44 Ind Cas 354.

——S. 50— Priority — Registered and unregistered documents—Notice —Possession with third person—Inquiry, absence of.

S. 50 of the Act, does not apply where the person claiming title under a subsequent registered document has notice of the title created by a prior unregistered document.

When the transferee is put on inquiry by the knowledge that a third person and not the transferor, is in possession of the property, and he does not choose to make inquiry, his rights as a transferee will be subject to the rights of the person in possession. AIR (Vol 1) 1914 Cal 331 : 19 CLJ 352 : 18 CWN 657 : 20 Ind Cas 195 (DB).

——S. 50—Unregistered sale-deed followed by delivery of possession.

Unregistered sale deed for over Rs. 100 accompanied by delivery of possession had priority over a registered deed of later date. (1910) 7 MLT 372 : 5 Ind Cas 57 (DB).

——S. 50—Failure to make inquiry — Inquiry scope of —Registration Act— S. 50, effect of, on notice by possession.

Possession is evidence of notice, and S. 50 of the Registration Act does not do away with the effect of notice, in favour of the registration to which ceteris paribus it gives preference. No purchaser can protect himself merely by registering his document of title, against the title of a person in possession of the subject-matter, and if he gives that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession is proved to have. Such inquiry should be a thorough one, and he cannot assume, on the discovery of one of the liabilities attaching to the property, that there were no others to support the claim of the person in possession. (1902) 27 B 452 (473) : 5 Bom L R 144 (DB); See also (1903) 5 Bom L R 269 : 27 B 408 (412) (DB).

4. Scope and applicability.

——S. 50—Scope of.

The wording of S. 50 would seem prima facie to apply to previous unregistered deeds, whether they have taken effect by delivery of possession or not ; it would be unduly restricting the scope of the section to say that it does not apply at all, when the previous unregistered transaction has taken effect by delivery of possession. AIR (Vol 26) 1939 Lah 29 : 41 PLR 19: ILR (1939) Lah 261 : 182 Ind Cas 460.

—— S. 50—Applicability.

Section 50 does not apply to a case where both the documents are registered documents. AIR (Vol 21) 1934 Pat 68 : 147 Ind Cas 767.

——S. 50—Scope of conflict between melcharath and agreement for renewal of a kanom — S. 50 does not apply.

The section contemplates a case where there is a conflict between two documents of the same kind, one being registered and the other being unregistered. AIR (Vol 14) 1927 Mad 699 : 101 Ind Cas 836.

——S. 50—S. 50 does not apply where the competition is between an unregistered document falling under S. 90 and a registered document inasmuch as under S. 90 (2) the former document, must also be deemed to be registered. AIR (Vol 10) 1923 Oudh 114 : 9 OLJ 629: 27 OC 64 : 74 Ind Cas 369.

——S. 50—Priority — Registration by fraud.

S. 50 of the Registration Act has no application in cases where the registered deed is obtained by fraud and the party holding the registered deed has no claim to priority by virtue of the section, the object of which is to put an end to fraud. AIR (Vol 6) 1919 Pat 136 : 49 Ind Cas 839.

——S. 50—Applicability.

To attract the provisions of S. 50 of the Regn. Act, it is not necessary that the executant of the two conflicting deeds should be the same person. (1912) 10 ALJ 114 : 16 Ind Cas 625.

——S 51.

——S. 51—Notice, what is.

Where a document relating to immovable property situate at Delhi is registered under S. 30 (2) by the Registrar at Lahore, it would not amount to a notice unless a memorandum of the instrument is entered in the files by the Registrar at Delhi under S. 51. A I R (Vol 23) 1936 Lah 482 : 38 P L R 8 : 163 Ind Cas 69 (DB).

——Ss. 51, 87—Bona fide error in entering document in Book 4, instead of Book 1 — Whether invalidates registration.

The person presenting a document for registration has no control over the procedure of the officer registering it, and it is the latter who, subject to the control of his superior officer, selects the Book in which it should be entered. Consequently, the bona fide error of the registering officer in entering the document in Book 4, instead of Book 1, would not affect the validity of the registration of the document. AIR (Vol 22) 1935 P C 165 : 1 B R 822 : (1935) O W N 952 : 39 C W N 1191 : 1935 A L J 1005 : 42 M L W 474 : 59 M L J 503 : 1935 M W N 1145 : 37 Bom L R 833 : 16 PLT 739 : 63 C 1 : 1935 AWR 1177 : 62 IA 265 : 157 Ind Cas 419.

——S. 51—Entry in wrong book.

Where a registered document conveying the reversionary interest in immovable property of the executant was entered in Book IV and not in Book 1 as prescribed by S. 51 :

Held, that the wrong entry of the document in Book IV would invalidate the registration of the document. A I R (Vol 14) 1927 Mad 586 : 25 M L W 563 : 38 M L T 226 : 52 M L J 482 : 102 Ind Cas 360 (DB).

—— S. 51—Document entered in wrong book—Effect on registration.

Registration in the wrong book is no valid registration especially where that was at the instance of the parties to the document. (1920) 55 Ind Cas 213 (Lah).

——S. 52.

——S. 52—Registration endorsement, if can be treated as sufficient proof.

The Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution but it is certainly open to the Court to treat it as sufficient proof. AIR (Vol 27) 1940 Nag 382 : 1940 N L J 437 : 193 Ind Cas 41.

——Ss. 52 (1) (a), 87—Irregularity.

A document was presented to the Registrar on the 27th December by an unauthorised person. The Registrar made an endorsement that it was presented by him and returned it to him and the latter handed it back to the executant. On the 30th, the Registrar went to the house of the executant where it was presented to him by the executant and the document was then read out and registered. The particulars required by S. 52 (1) (a), were entered on the 30th :

Held, that though there was an irregularity, it was cured by S. 87 and the registration was not invalid. A I R (Vol 18) 1931 Lah 677 : 36 PLR 371 : 132 Ind Cas 881 (DB).

——S. 52 — Signature of person — Presenting document — Registration is valid and passes title to vendee.

When the consideration money in the sale-deed was a little over-stated, to safeguard the purchaser from pre-emption, with the result that the vendor refused to affix her thumb-impression below the registration endorsement, but the document was presented for registration by the purchaser who had signed below the registration endorsement as required by S. 52, Registration Act, held, the document was duly registered and it passed a good title to the purchaser. AIR (Vol 11) 1924 All 938 : 75 Ind Cas 111.

——S. 52 (1)—Endorsement of—Presentation.

The fact that the signature of the executant of a document does not appear immediately under the registration endorsement as to presentation, but only lower down under the endorsement as to execution will not make the presentation invalid. (1913) 11 ALJ 617 : 20 Ind Cas 678.

——Ss. 52, 58 and 60 — Endorsement — Evidentiary value of.

A statement, the endorsement of which cannot be made under S. 52 or 58 cannot be proved by a certicate from the Registrar. (1911) 14 OC 80 : 10 Ind Cas 718.

——S. 54.

——Ss. 54, 55, 61 (2) — Omission of the mention of mortgage from registration index— Mortgagee illegibly mentioning the name of the village mortgaged in mortgage-deed in Urdu script—Purchaser of village, if protected under S. 41, T P. Act.

The omission in the registration indexes of a mortgage-deed as relating to a certain village does not invalidate the whole mortgage-deed. When the registration of a document is complete according to the provisions of S. 61 (2), the omission of it from the index is a matter of importance only for the purposes of notice.

A mortgage deed was written in Urdu script; the name of the village that was mortgaged was not legible, the purchaser of the village could not make out from the document whether that particular village was not mortgaged; the illegibility of the name of the village led to the omission of an entry in registration index on the part of the registration clerk :

Held, that the mortgagees were not guilty of negligence inasmuch as they failed to see that the name of the village was clearly written :

Held, further, that S. 41, T. P. Act did not protect the purchaser who took the property subject to the mortgage. A I R (Vol 21) 1934 Oudh 283 : 11 O W N 770 : 150 Ind Cas 145 (DB).

——S. 57.

——S. 57—Scope and effect.

Section 57, Registration Act, only shows that when secondary evidence has in any way been introduced as by loss of original document, copy certified by Registrar is admissible to prove contents of original without further proof than Registrar's certificate. But that does not make such a copy a document which may be given in evidence without other evidence to introduce it. AIR (Vol 16) 1929 Rang 277.

——S. 57 (5) — Secondary evidence of a mortgage-deed.

A copy of the deed granted under the section is admissible in evidence. AIR (Vol 3) 1916 Oudh 347: 3 OLJ 482: 36 Ind Cas 673.

—S. 58.

——S. 58— Identification of executant of deed — If proves consent to disposition evidenced by it.

A mere identification of the executant of a deed by a particular person at the time of its registration, does not prove his knowledge or consent to the disposition evidenced by the deed. AIR (Vol 36) 1949 All 464 (DB).

——Ss. 58 and 59—Duty of Registering Officer.

The endorsements required by S. 58 to be made upon the document are in reference to admission at execution and the identity of the persons admitting execution and not attestation. And though the registering officer is bound by S. 59 to affix the date and his signature to all endorsements made in his presence, he is not bound to do so at the time they were made, and will comply with the section if he does so on the same day, at a time when the persons who made the endorsements may not be present. Clearly, therefore, this section does not contemplate that the signature of the registering officer to any endorsements is to be treated as that of an attesting witness in connection with an admission of execution. AIR (Vol 23) 1936 Bom 94: 37 Bom LR 913: 161 Ind Cas 374.

——S. 58—Scope explained.

The facts mentioned in the endorsement may be proved by those endorsements provided the provisions of S. 60 have been complied with. AIR (Vol 18) 1931 Bom 105: 32 Bom LR 1385 (DB).

——S. 58—Presumption about endorsement.

Endorsement made in accordance with the statutory provision in S. 58 (1) (c) that the consideration was paid in presence of the Registering Officer raises a presumption that the consideration was paid and the onus is on the person who alleges that it is untrue, to prove it. AIR (Vol 13) 1926 Cal 73 : 90 Ind Cas 229 (DB).

——S. 58—Endorsement about — Admission of execution.

Endorsement as to admission of execution is not necessary—Registration certificate is therefore not admissible to prove admission of execution under Registration Act, S. 60. AIR (Vol 11) 1924 Lah 389: 71 Ind Cas 805.

——S. 58—Registering Officer's evidence is not necessary to prove the certificate of registration, the genuineness of which is to be presumed under S. 79, 34 I. C. 281, 38 A. 1 and 17 C 903, Diss. AIR (Vol 11) 1924 Lah 389: 71 Ind Cas 805.

——S. 58—Evidence Act, S. 32 (2).

If the Sub-Registrar is dead, the endorsement made by him under S. 58 of the Registration Act read with S. 32 (2), Evidence Act, may be admitted, being an entry made by him in the discharge of his professional duty. AIR (Vol 4) 1917 Oudh 248: 20 O C 18: 38 Ind Cas 605 (DB).

——Ss. 58, 59, 60—Document—Secondary evidence —Facts mentioned in endorsement may be proved.

——Ss. 58, 59, 60 provide that the facts mentioned in the endorsement may be proved by those endorsements provided the provisions of S. 60 have been complied with. (1907) 9 Bom LR 401 (404) (DB).

——Ss. 58 (1) (c), 60 (2)—Payment made before Sub-Registrar—Endorsement—Presumption.

Under S. 58 (1) (c), it is the duty of the Sub-Registrar to make an endorsement of any payment of money made in his presence in reference to the execution of

a document. Section 60, Cl. (2) further provides that the endorsement of the Sub-Registrar shall be admissible in evidence for the purpose of proving that the facts mentioned in such endosements occurred as therein mentioned. In the absence of any evidence to prove either that the endorsement was incorrect and no payment was actually made or to show that the money which was paid before the Sub-Registrar was afterwards returned, it must be taken that the sum alleged to be paid before the Sub-Registrar and endorsed by him was paid to the mortgagor and that consideration to that extent did pass. AIR (Vol 24) 1937 Oudh 443:;1937 O W N 760: 13 Luck 455: 170 Ind Cas 523.

—S. 59.

——S. 59—Registrar as attesting witness.

If the conditions for a valid attestation under the T. P. Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the signature of the Registrar might have been made alio intuitu, to satisfy the requirements of the Registration Act. A I R (Vol 21) 1934 Cal 772 : 38 CWN 753 : 61 C 525 : 151 Ind Cas 1063.

——Ss. 59, 60—Proof of signature.

The rule that a signature is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document is applicable to the signature of attesting witnesses as well as executants. AIR (Vol 18) 1931 All. 101: 1930 ALJ 1561: 53 A 1 : 131 Ind Cas 241 (DB).

——S. 60.

1. Date of registration.
2. Effect of registration.
3. Registrar's endorsement.

1. Date of registration.

——S. 60—Document, when taken to be registered.

A document is taken to be registered only when it is entered in the book. AIR (Vol 32) 1945 Pesh 9: 1945 Pesh L Jour 9 : 218 Ind Cas 367 (DB).

2. Effect of registration.

——Ss. 60 and 61—Final certificate of registration as required by S. 60 (1) not made—If affects validity of registration. AIR (Vol 35) 1948 Oudh 223: 1948 O A (CC) 14.

——S. 60—Registering officer as attesting witness.

A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness. AIR (Vol 27) 1940 Nag 382: 1940 NLJ 437: 193 Ind Cas 41.

——S. 60—The mere fact that the deed has been registered cannot validate it and the Courts are entitled to go behind the certificate of registration. AIR (Vol 27) 1940 Nag 13: 1939 NLJ 520: ILR (1940) Nag 74: 187 Ind Cas 295 (DB).

——S. 60—Registrar having jurisdiction — Property existing—Registration is valid unless fraud or collusion exists. AIR (Vol 15) 1928 Nag 1: 23 NLR 143: 11 NLJ 49: 107 Ind Cas 517 (SB).

——S. 60—Registration—Effect of—Not a transfer.

It cannot be laid down as an invariable rule that mere registration of an instrument without reference to other circumstances operates to transfer the property. AIR (Vol 15) 1928 Rang 47 : 5 Rang 636 : 106 Ind Cas 358 (DB).

——S. 60—A mere statement of the vendor at the time of registration of a subsequent sale-deed, that a previous sale-deed with respect to the same property was signed by the vendor at the misrepresentation of the then vendees that the deed was only a mortgage is not sufficient to prove that the previous deed was a mortgage and not a sale. AIR (Vol 11) 1924 PC 186: 47 MLJ 128: 20 MLW 107: 26 Bom LR 742: 35 MLT 139: 1924 MWN 645: 5 LRPC 132: 80 Ind Cas 822.

——S. 60—Certificate—Effect of.

Where there is a presentation of a document by a person not authorised the registration is void and of no effect notwithstanding the certificate. AIR (Vol 1) 1914 PC 16: 37 All 49: 42 IA 22: 19 CWN 282: 13 ALJ 129: 17 MLT 148: 21 CLJ 218: 2 LW 277: 28 MLJ 577: 17 Bom LR 413: (1915) MWN 592: 28 Ind Cas 422.

3. Registrar's endorsement.

(a) Presumption.
(b) Judicial notice.
(c) If proof of execution.
(d) Relevancy or admissibility.
(e) Value, evidentiary.
(f) Omission to seal.

(a) Presumption.

——S. 60—Registrar's endorsement—Presumption.

Registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar whose duty it is to attend the parties during the registration and see that the proper persons are present are competent to act and are identified to his satisfaction and all these things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order.

Hence, where the thumb impression of the executant appears on the Registrar's endorsement and the Registrar apparently satisfied himself by enquiries from a witness to execution and registration who was known to him that the executant was the person who had executed the document and admitted its execution before him the admission of the execution of the document by the executant must be deemed to have been proved by the endorsement. AIR (Vol 29) 1942 Pesh 83 : 204 Ind Cas 327 (DB).

——S. 60—Effect of admission of execution.

Where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of the transaction. A I R (Vol 16) 1929 P C 81 : 56 M L J 511 : 33 C W N 407 : 29 M L W 439 : 114 Ind Cas 568.

——S. 60 — Things verified by competent official as done in his presence are presumed to be duly done.

The registration of a deed is a solemn act to be performed in the presence of a competent official appointed to act as Registrar (or Sub-Registrar) whose duty it is to attend to the parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction ; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. AIR (Vol 16) 1929 Oudh 193 : 6 O W N 169 : 4 Luck 452 : 120 Ind Cas 387 (DB).

——S. 60—Presumption about registered documents.

A party who registers and executes a document should prove that a recital made therein is incorrect, What a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. A I R (Vol 15) 1928 Lah 698 : 108 Ind Cas 374.

——S. 60—Registering Officer's endorsement raises a presumption that the holder of power-of-attorney had power to admit execution.

Where a document purports to have been properly registered in accordance with the provisions of Ss. 32 and 33 with a power-of-attorney. it is the duty of the Sub-Registrar to satisfy himself that the power-of-attorney gave the holder thereof the necessary autho-

rity and it must be assumed until the contrary is proved that he so satisfied himself before he admitted the document for registration and signed the endorsement. Merely because the power-of-attorney is described as a general power in the Sub-Registrar's endorsement it cannot be held that it did not authorize the holder to admit execution or present the document for registration. A I R (Vol 15) 1928 Pat 304 : 111 Ind Cas 57 : 7 Pat 520 (DB).

——S. 60—Document registered— Presumption as to execution and receipt of consideration arises.

It cannot be said that a document is without consideration simply because there was no cash payment at the time of the execution of the deed. Where a document is registered it is to be assumed that the document was explained by the Sub-Registrar to the executants who admitted its execution and the receipt of consideration and that the whole proceedings in connexion with registration and endorsement, etc., were regular and in order. A I R (Vol 14) 1927 Lah 748 : 102 Ind Cas 283 (DB).

(b) Judicial notice.

——S. 60 — Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. A I R (Vol 15) 1928 Cal 154 : 105 Ind Cas 422 : 47 C L J 118 (DB).

——S. 60—One G executed a sale-deed but he being illiterate it was signed by one D for G. The deed was registered and its execution was admitted by G before the Registration Officer. It was more than thirty years old and was produced from proper custody.

Held that the Court was justified in drawing a presumption from the registration endorsement that G had authorised D to sign on his behalf. AIR (Vol 11) 1924 Oudh 265 : 10 O L J 643 : 80 Ind Cas 457.

(c) If proof of execution.

——S. 60 — Certificate of registration — Value of— Proof of execution of document.

Documents which are required by law to be attested must be distinguished from documents which are not so required to be attested. As regards the latter class of document, the certificate of registration is itself some evidence of execution against the party making the admission. AIR (Vol 37) 1950 Nag 6 : 1949 N L J 226 : ILR (1949) Nag 521.

——S. 60 — Endorsement showing presentation and execution by P—Only thing then to be proved is that person admitting execution was P and no impostor.

Where the Registrar's endorsements show that in 1881, a person claiming to be P and to have become son of H by adoption made by his widow M presented the receipt for registration and admitted execution and that he was identified by two persons one of whom was the scribe of the document and was known to the Registrar what remains to be shown is that the person admitting execution before the Registrar was P and no impostor. The question is one of fact. AIR (Vol 30) 1943 P C 83 : 1943 A L J 292 : 47 CWN 607 : (1943) 2 M L J 51 : 10 B R 7 : 1943 O W N 334: 56 L W 593 : 1943 A W R 14 : 1 L R (1943) Kar P C 69 Sup : 46 Bom L R 220 : 207 Ind Cas 553.

——S. 60 (2)— Proof of execution — Endorsement if sufficient.

The effect of the registration endorsement is not to prove execution as is required by S. 67, Evidence Act, but only to prove admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances and the Sub-Registrar's certificate is admissible not to prove execution of the deed but merely to prove the admission of execution. The effect of the admission is in every case a separate question where the surrounding circumstances are not free from suspicion. The evidence of admission is not by itself sufficient to establish execution of the deed. A I R (Vol 28) 1941 Oudh 529 : 1941 O W N 906 : 1941 A W R 274 : 196 Ind Cas 787.

——S. 60—Registrar's certificate—Proof of execution.

The endorsement of a Registrar cannot be relied upon under S. 60 of the Registration Act in proof of the execution of a document. Whether a document requires attestation or not, it is always necessary to prove that the document has been executed and that is signed by the party making the transfer. AIR (Vol 3) 1916 Oudh 146 : 19 O C 23 : 34 Ind Cas 281.

(d) Relevancy or admissibility.

——S. 60—Sub-Registrar's endorsement—Relevancy.

A Sub-Registrar's endosement duly made under, S. 60 is relevant evidence for proving the execution of the document. A I R (Vol 28) 1941 Lah 400 : 197 Ind Cas 581.

——S. 60—Endorsement, value of.

Section 60 (2) provides that the endorsement of the Sub-Registrar shall be admissible in evidence for the purpose of providing that the facts mentioned in such endorsements occurred as therein mentioned. A I R (Vol 24) 1937 Oudh 443 : 1937 O W N 760 : 13 Luck 455 : 176 Ind Cas 523.

—— S. 60—Endorsement—Admissibility.

The Sub-Registrar's endorsements duly made under S. 60, are relevant evidence for proving the execution of those documents. A I R (Vol 23) 1936 Lah 946 : 17 L 686 : 39 P L R 83 : 169 Ind Cas 157 (DB).

——S. 60 — Certificate by registering officer under S. 60 is relevant for proving execution of document.

The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend to the parties during the registration and see that the proper persons are present, are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Therefore the certificate endorsed on the sale-deed by the Registering Officer under S. 60 is a relevant piece of evidence for proving its execution. 6 W R 105 :21 W R 265 : 7 C L R 276 : 17 Cal 903 : 38 All 1 : 19 O C 23, held no good law in view of 33 Cal 537 (P C); A I R 1924 Lah 389, not Foll. 11 L L J 216: A I R (Vol 16) 1929 Lah 711 : 116 Ind Cas 911 (DB).

——S. 60 — Registration endorsement is admissible for proving statement in it. AIR (Vol 14) 1927 All 441: 102 Ind Cas 155 : 25 A L J 441 : 49 All 689 (DB).

——S 60—Endorsement about — Admission of execution.

Endorsement as to admission of execution is not necessary—Registration certificate is not admissible to prove admission of execution under S. 60. A I R (Vol 11) 1924 Lah 389 : 71 Ind Cas 805.

——S. 60—Certificate—Value of.

The registering officer's endorsement is admissible in evidence to prove that the facts mentioned therein actually occurred. (1909) 3 Ind Cas 291 (DB) (Cal).

(e) Value, evidentiary.

——Ss. 60 and 61—Certificate of registration — Evidentiary value of.

The certificate of registration in respect of a document is prima facie evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law. AIR (Vol 36) 1949 Pat 393 : 27 Pat 86 (DB).

——S. 60 — Endorsement by Sub-Registrar of payment of consideration—Evidentiary value.

The endorsement by the Sub-Registrar of the payment of consideration of a sale-deed in his presence is prima facie evidence that the amount was actually paid. A I R (Vol 35) 1948 Nag 110 : I L R (1947) Nag 510 (DB).

——S. 60 — Endorsement by registering officer — Effect.

Endorsement showing that the executant stated before the registering officer that the vendee was his relative. Vendee trying to prove by the endorsement that he was relative of the executor :

Held, that the endorsement does not help him as the presumption of correctness of the document does not relate to the point of relationship. A I R (Vol 26) 1939 Lah 458 : 41 P L R 376.

——S. 60 — Certificate proves only the payment of money referred to.

Under S. 60, the certificate signed by the Registering Officer is evidence of the fact that the payment of money referred to in the endorsement was made as therein mentioned. But the mention in the endorsement of the endorser as mortgagor does not prove the execution of the mortgage but it is certainly evidence of the payment of the sum as a loan. A I R (Vol 22) 1935 Oudh 500 : (1935) O W N 892 : 11 Luck 393 : 157 Ind Cas 567.

——S. 60—Certificate, value of.

A certificate of registration is not conclusive evidence of valid registration. A I R (Vol 20) 1933 Rang 194 : 147 Ind Cas 287 : 11 Rang 207 (DB).

——S. 60 — Evidentiary value of statements before Registrar.

Registration is a solemn act and it carries with it a solemn sanctity and the evidentiary value of the admission which a person makes before the Sub-Registrar, as to the receipt of consideration in full, cannot be belittled as that person had the opportunity to deny the receipt of consideration or to assert partial receipt of consideration if it was a fact at the time when the deed was registered. (1928) 109 Ind Cas 149 (Bom) (DB).

——S. 60—Deed reciting receipt of a certain sum—Registrar's endorsement showing less sum — Latter prevails.

A mortgage deed contained the recital by mortgagor : "To-day I received a further sum of Rs. 1,011 in cash at the time of registration," while the certificate of the Sub-Registrar showed that only Rs. 889 was paid before him

Held, that Sub-Registrar's certificate prevailed as against the statement of the mortgagor in the deed, which does not amount to even an admission which is usually rebuttable.

Ashworth, J. — Admissions are of no evidential value once they are proved untrue. This admission as to receipt in the deed is proved untrue by the Sub-Registrar's endorsement that a lesser sum was paid at the time of registration. The admission must therefore be rejected entirely. AIR (Vol 14) 1927 All 385 : 100 Ind Cas 1037 : 25 A L J 572 : 49 All 707 (DB).

——S. 60—Certificate of Sub-Registrar as to the age of executant is admissible.

On the question whether the executant was a minor at the date of the registration of a document, the certificate of Sub-Registrar that when the parties appeared before the Sub-Registrar, the mother and uncle of the executant appeared with him and produced a medical certificate that the executant was 18 years of age, is admissible evidence although not conclusive. A I R (Vol 13) 1926 All 674 : 96 Ind Cas 332 (DB).

——S. 60 — Registration endorsement that the document was read over to the testator and understood and admitted by him is complete proof of these matters. AIR (Vol 13) 1926 Nag 482 : 96 Ind Cas 401.

——S. 60 — Endorsement of Registering Officer and recitals as to receipt of consideration is strong but rebuttable evidence of contents. A I R (Vol 13) 1926 Oudh 81 : 91 Ind Cas 917 : 1 Luck 7 : 13 O L J 178 : 3 O W N 25 (DB).

——S. 60 (2)—Endorsement—Value of.

The endorsement of the registering officer is only evidence of the facts mentioned by it after the provisions of the section have been complied with a certificate issued for registration. Where the very question to be decided is whether those provisions have been complied with and whether there was a valid registration, S. 60 (2) does not apply. A I R (Vol 5) 1918 All 194 : 16 A L J 313 : 45 Ind Cas 37 : 40 All 434 (DB).

——S. 60—Certificate of Registering Officer—Value of.

The certificate of the registering officer is admissible for the purpose of proving only that the document had been duly registered in the manner provided by this Act, but not that the facts mentioned in the endorsements referred to in S. 59 have occurred as therein mentioned.

The certificate might go so far as to show that the person purporting to sign admitted his signature before the Registrar. In the absence of any further evidence that would not be evidence that the person who admitted execution before the Registrar was the person who could give title to the vendee. From the endorsement that a certain person admitted execution one is entitled to presume that the person who admitted execution was the person who signed the deed. But that does not of itself prove who signed the deed. A I R (Vol 10) 1923 Bom 253 : 25 Bom L R 192 : 72 Ind Cas 304 (DB).

(f) Omission to seal.

——Ss. 60, 87 — Registration of a mortgage deed—Omission of seal in the Registrar's certificate, effect of.

The sealing of a deed is not an essential part of the act of registration. The omission of the registering officer to seal a deed is a mere defect of procedure, and the defect is cured by the provisions of S. 87. (1901) 6 C W N 528 (530) (DB).

——Ss. 64, 65, 3 — Applicability where part of the property is situate outside British India.

Section 64 must be read with S. 65 and the two sections clearly refer to cases where the property is situated in more districts or sub-districts than one as defined in S. 3 of the Act. They have no application where part of the property is situated outside British India. (1900) 25 B 50 (51) : 2 Bom L R 608 (DB).

—S. 68.

——S. 68—Scope.

Section 68 (2) does not confer on the Registrar the power of cancelling the registration of a document, the execution of which is not denied and which has been already registered by a Sub-Registrar. AIR (Vol 20) 1933 Lah 786 : 149 Ind Cas 509 (DB).

—S. 69.

——Ss. 69 and 87, R. 174 — Registrar interested in property registered—Validity of—Registration.

A registration, by a registrar acting in good faith, though having interest in the property registered, is valid. The disability created by R. 174 is a mere question of procedure. AIR (Vol 8) 1921 P C 105 : 57 Ind Cas 329.

—S. 71.

——S. 71—Scope.

Section 71 governs all cases where the Sub-Registrar refuses to register a document except when the refusal is on the ground that the property to which the document presented before him relates is not situate within his sub-district and he is bound to follow the procedure laid down therein. A I R (Vol 31) 1944 Lah 349 : 46 P L R 182 : 216 Ind Cas 180.

——S. 71—Refusal to register — Document returned —Order of refusal not endorsed Effect of.

The act of a Registering officer returning a document on the ground of the executant's failure to

appear is equivalent to a refusal to register, though the order of refusal is not actually written thereon. A I R (Vol 2) 1915 Mad 442 : 26 M L J 397 : 15 M L T 233 : 23 Ind Cas 23 (DB).

——Ss. 71, 72, 73, 76 and 77 — Failure to appear to admit execution—Refusal by Sub-Registrar to admit document — Application to Registrar — Mention of wrong provision—Suit for registration.

The executant did not appear before the Sub-Registrar and he refused to register the document. The grantee then moved the Registrar by an application purporting to be under Ss. 71 and 72 of the Regn. Act, although it was one under S. 73 and was accompanied by a copy of the reasons recorded by the Sub-Registrar under S. 71 for refusing to register, and verified as required by S. 73. The facts were all stated in the application. The application was dismissed and a suit was brought under S. 77 for having the document registered.

Held, that the suit was maintainable. The scope of a suit under the Regn. Act depends upon the proved or admitted facts and circumstances, and not upon erroneous mention of a section of the statute in an application to the Registrar. Failure on the part of the executant to appear and admit execution of a document is equivalent to denial of execution. (1912) 16 Ind Cas 614 (DB) (Cal).

—S. 72.

——S. 72—Appeal.

Refusal by Sub-Registrar to register under S. 17, Punjab Alienation of Land Act—Appeal is competent to the Registrar. A I R (Vol 31) 1944 Lah 349 (350, 351) : 46 P L R 182 : 216 Ind Cas 180.

—— S. 72—Powers of District Registrar

The District Registrar, acting under the powers given to him by the Registration Act, is not a judicial tribunal whose powers and duties are defined by the Civil P. C., or any other statute. The appeal before him is merely a continuation of the original proceeding before the Sub-Registrar and he possesses the same powers as the Sub-Registrar himself and hence, when dealing with an appeal, has the power to take fresh evidence whether the appeal before him is preferred by an executor or by any other party or parties. AIR (Vol 30) 1943 Mad 749 : 56 L W 533 : (1943) 2 M L J 545 : ILR (1944) Mad 276 : 211 Ind Cas 453 (DB).

—— S. 72—Power of Registrar under S. 72.

All that the Registrar need do under S. 72, Registration Act is to reverse or alter the order of the Sub-Registrar refusing to register a document without necessarily directing the document to be registered, that is to say, it is in the power of the Registrar if the Sub-Registrar has refused registration on some ground which did not entitle him to do so, to remand the case to him with a direction to continue in accordance with the Regis. Act from the stage immediately before that where the Sub-Registrar had acted contrary to the Registration Act. AIR (Vol 27) 1940 Oudh 318: 1940 A W R 264 : 1940 O W N 600: 188 Ind Cas 666 (DB).

——S. 72—Re-registration—Suit for registration.

Registration of document in place where no part of property exists due to bona fide mistake of all parties including Sub-Registrar :

Held, that re-registration should be done in proper place. If, however, registration is refused, a civil suit under S. 77 will lie. A I R (Vol 25) 1938 Nag 550 : ILR (1940) Nag 74 : 1938 N L J 403 : 181 Ind Cas 24 (DB).

——S. 72—Suit, when lies.

An appeal under S. 72 is a pre-requisite for a suit under S. 77. AIR (Vol 18) 1931 Cal 664 : 58 Cal 681 : 133 Ind Cas 591 (DB).

——S. 72—Refusal to register.

The expression in S. 72 "refusing to admit a document to registration" includes not only a refusal to register but also a refusal to accept a document for registration.

Where a Sub-Registrar refused under S. 21, Registration Act, to accept a document for registration because it did not contain description of the property sufficient to identify the same.

Held, the order of refusal was appealable under S. 72 of the Act. AIR (Vol 12) 1925 Bom 34 : 49 Bom 40 : 26 Bom L R 934 : 84 Ind Cas 416 (DB).

——S. 72—Non-appearance of executant.

Where refusal to register is based on any ground except denial of execution, S. 72 applies.

Where the Sub-Registrar refused to register the deed on the ground that the executant had not appeared to admit execution.

Held, that S. 72 applied and that an appeal to the Dt. Registrar was competent. AIR (Vol 12) 1925 Oudh 445 : 2 O W N 348 : 12 O L J 506 : 29 O C 87 : 88 Ind Cas 494.

——S. 72—Non-appearance when amounts to denial of execution.

The question whether the non-appearance of a party to admit execution is equivalent to a denial of execution is a doubtful question on which opinions may differ. The Calcutta and the Bombay High Courts have consistently held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution within the meaning of the Registration Act, but it is difficult to understand how a Sub-Registrar is to distinguish between cases of wilful non-appearance and cases other than those of wilful non-appearance, e. g., a mere failure to appear due to an accident or to any other legitimate cause, or to some unforeseen circumstances. If in these doubtful circumstances the petition writer makes a mistake in quoting the wrong section, or even if he makes the remedy which is open to the applicant under the law, the mistake is a bona fide mistake and should be condoned by allowing the petitioner to amend his petition. A I R (Vol 11) 1924 Lah 28 : 5 L L J 217 : 74 Ind Cas 688 (DB).

——S. 72—Order under.

An order was made by the Sub-Registrar refusing registration, on the Registrar refusing to condone delay. The executant of the deed then applied to the Registrar to set aside the order of the Sub-Registrar who rejected the application. Held the order was one under S. 72. A I R (Vol 10) 1923 Bom 187 : 25 Bom L R 45 : 47 Bom 290 : 72 Ind Cas 118 (DB).

——Ss. 72, 76 and 77—Refusal to register—Dismissal of appeal by Registrar—Suit to enforce registration.

If a Sub-Registrar refuses to register a document as presented out of time, and on appeal the Registrar rejects the appeal, the order of the latter is tantamount to refusing to order the document to be registered and a suit under S. 77 of that Act to enforce registration is maintainable. AIR (Vol 7) 1920 Cal 926 : 24 C W N 304 : 54 Ind Cas 562 (DB).

——Ss. 72, 73 and 76 — Refusal of Sub-Registrar to register document — Failure to appear — Appeal—Application under S. 73 — Dismissal for default—Power of Registrar to restore.

No appeal lies to the Registrar against the refusal of the Sub-Registrar to register a document upon the wilful failure of the executant of the document to appear before the Sub-Registrar as such failure amounts to a denial of execution within S. 72 of the Registration Act. In such a case the only procedure open to the party presenting the deeds is to apply to the Registrar under S. 73 of the Registration Act to direct registration. When an application under S. 73 of the Registration Act has been dismissed for default, the Registrar has full power to restore the matter and re-hear the case, at least before he finally disposed of the matter under S. 76 of the Act. AIR (Vol 5) 1918 Cal 225 : 41 Ind Cas 57 (DB).

——S. 73.

——S. 73—Application under, by agent—Agent must be authorised.

The words "as aforesaid" in the phrase "or agent authorized as aforesaid" in S. 73 (1), are not mere surplusage, and they can only refer to the special agent mentioned in S. 32 and S. 33. For the Registrar to have jurisdiction to order registration it is necessary that the application should be presented in the manner laid down by S. 73, and where it is not so presented or made, the Registrar's order directing registration is illegal and invalid and nothing done upon it can be vaild or legal. AIR (Vol 25) 1938 Lah 763 : 40 PLR 718 : ILR (1938) Lah 716 : 181 Ind Cas 754 (DB).

——S. 73—Scope.

Principles which apply to the first presentation of a document under S. 32 need not necessarily apply to the presentation of an application under S. 73 (1).

There is no question of presentation at all under S. 73. AIR (Vol 20) 1933 Mad 407 : 37 LW 471 : 64 MLJ 449 : 1933 MWN 636 : 142 Ind Cas 646.

——S. 73—Limitation.

Sub-Registrar's order refusing registration—Appeal to District Registrar or suit filed within 30 days of communication but beyond thirty days of order—Appeal or suit is not barred. AIR (Vol 17) 1930 Mad 490 : 31 MLW 487 : 123 Ind Cas 345 (DB).

——S. 73 — Unverified petition — Application under S. 73 described as appeal—No verification — Section 73 is not complied with.

An application under S. 73 which is described as an appeal under S. 72 and is not verified as required by para. 2 of S. 73 does not sufficiently comply with the provisions of S. 73. There can be no enquiry by the Registrar under S. 74 in such a case and consequently a suit under S. 77, for which such enquiry is a necessary preliminary, cannot be maintained. AIR (Vol 12) 1925 Nag 235 : 20 NLR 158 : 7 NLJ 4 : 88 Ind Cas 149.

——S. 73—Where the only defect in the petition was that it was not verified as required by sub-clause (2) of S. 73, but in all other respects it was perfectly valid and a good application under S. 73 :

Held, that the mere fact that it was headed as an appeal or that an erroneous section of the statute was mentioned therein would not be sufficient to take it away from the category of an application if it was in fact and in law an application under S. 73, and the Registrar could not very well refuse to entertain it merely because it purported to be under S. 72 if the latter section had obviously no application, and that the erroneous mention of section in the application did not vitiate it in any way whatever.

At the most it could be said that the application made under S. 73 was bad and refused because it was not properly verified, but the application would still be an application under S. 73. AIR (Vol 11) 1924 Lah 28 : 5 LLJ 217 : 74 Ind Cas 688 (DB).

——Ss. 73 and 87 — Order of refusal to register set aside by Registrar — Order setting aside sent down to Sub-Registrar — Procedure, if proper.

Where a Registrar after setting aside an order of refusal to register made by a Sub-Registrar sent it down himself to the latter instead of returning it to the applicant to make a fresh application for registration, it was held that the method was a defective procedure and did not vitiate the proceedings. (1912) 34 All 253 : 9 ALJ 188 : 13 Ind Cas 531 (DB).

——Ss. 73, 74 and 77 — Application for Registration — Order of dismissal for absence, if one under S. 77.

An order of dismissal of an application for registration of a document made owing to the absence of parties is an order of refusal within the meaning of S. 77 of the Act. (1912) 34 All 165 : 9 ALJ 4 : 13 Ind Cas 83 (DB).

——Ss. 73, 74, 75, 76, 77—Ground of denial of execution — Application to Registrar to order registration not made within the prescribed time — Suit in civil Court to compel registration barred.

When registration of a document has been refused by a Sub-Registrar under S. 71 on the ground of denial of execution by one of the alleged executants, no suit will lie in a civil Court to compel registration, unless an application has been made to the Registrar under S. 73 to establish the right of applicant to have the document registered and has been made within thirty days after the making of the order of refusal. In computing the period of thirty days within which such last-mentioned application must be made, the applicant is not entitled to the exclusion of the time necessary for obtaining a copy of the Sub-Registrar's reasons for refusing to register. When under the circumstances an application is made to the Registrar after the time limited has expired, and is rejected on the ground of limitation, such rejection cannot be considered as a refusal to register within the meaning of clause (b) of S. 76. (1902) AWN 99 : 24 All 402 (406) (FB).

——S. 74.

——S. 74 — Madras Estates Land Act, S. 145 (2) — Powers of District Registrar.

Section 74 (a) gives greater power to the District Registrar than to the Sub-Registrar, for, whereas the latter cannot register a document if a party denies execution, the District Registrar can.

Section 74(b) however, does not require the District Registrar to do anything that the Sub-Registrar is not bound to do.

The requirements of law to be regarded by the Registrar while registering the document mean also the requirements of any other law that may affect the law of registration.

Where the District Registrar, instead of enquiring into the factum of execution of document under S. 74 (a), held that the transferee had not complied with the requirements of S. 145 (2), Madras Estates Land Act and therefore, refused to register the document under S. 74 (b) :

Held, that the refusal was correct : AIR 1945 Mad 309, Reversed. AIR (Vol 32) 1945 Mad 465 : 1945 Mad W N 413: (1945) 2 M L J 133: 58 L W 363 (DB).

——S. 74 — Validity of order under — Provisions of section are mandatory.

The provisions of S. 74 are mandatory and the District Registrar has no jurisdiction to refer the matter to his deputy, the Sub-Registrar and if it is so referred any proceedings or order made by the Sub-Registrar ordering the petitioner to be prosecuted is illegal. AIR (Vol 16) 1929 Pat 500 : 10 PLJ 889 : 30 Cr LJ 1101 : 1929 Cr C 252 : 159 Ind Cas 888.

——S. 74—Non-compliance with law.

Failure to pay penalty ordered by Registering Officer is non-compliance with law. AIR (Vol 13) 1926 Lah 451 : 27 PLR 870 : 94 Ind Cas 251 (DB).

——Ss. 74, 75 and 84 — Registration — Enquiry, nature of — Procedure.

The enquiry under S. 74 of the Act is intended to be a summary one The result of a criminal trial under S. 83 of the Act wherein the Criminal Court has jurisdiction to enquire into the fact of execution of a document, may be considered by the Registrar in an enquiry under S. 84. AIR (Vol 5) 1918 Pat 313 : 46 Ind Cas 878 (DB).

——S. 74—Special Registrar—Power to record statement of witnesses in inquiry under S. 74.

A special Registrar acting for the Registrar under rules framed by the Inspector-General of Registration, is a person authorised by law to record the statements of witnesses in an inquiry under S. 74 of the Act. AIR (Vol 1) 1914 Cal 183 : 18 CWN 605: 20 Ind Cas 661 (DB).

——S. 74 – "Thirty days"—Presentation after thirty days—District Registrar – No power to extend time——Limitation Act, S. 5—No applicability.

The Registering Officer has no jurisdiction to register a document presented after the lapse of thirty days from the date of the order passed by the District Registrar under the 1st paragraph of S. 75 even if the time for such presentation is extended by a subsequent order of the District Registrar. It is not a mere matter of procedure. A document registered after the said period of thirty days is not validly registered and creates no title.

The order of the District Registrar directing the registration of a document after the lapse of thirty days from the date of the order passed by him under the first paragraph of S. 75 is ultra vires. Section 5 of the Limitation Act, has no application to such a case and time for registration cannot be extended under that section. Where a person is affected by a need which he impeaches as not duly registered it is open to him to take the objection, although he was no party to the deed. (1906) 5 CLJ 188 (191, 192).

——S. 74 (b)—Scope—"Requirements of the law for time being in force."

"The requirements of the law for the time being in force" in S. 74 (b) must be the requirements of the law relating to registration which entitle the Registrar to refuse registration if not complied with.

Section 145 (2), Madras Estates Land Act is not such a law and its non-compliance will not entitle the Registrar to refuse registration : A I R 1945 Mad 309, Reversed. AIR (Vol 32) 1945 Mad 465 : 1945 M WN 413 : (1945) 2 MLJ 138 : 58 LW 363 (DB).

——S. 75—Registration after more than 4 months — Legality.

Document presented for registration more than four months after execution — Application under S. 73 and also registration under S. 75 without there being any application under S. 25 to extend to the original period of four months:

Held, that the registration was illegal. AIR (Vol 26) 1939 Lah 292:42 P L R 267:184 Ind Cas 556(DB)

——S. 75—Applicability.

Obiter. — The presentation of a document under S. 75 (2) does not take the place of a presentation under S. 34. The procedure to be followed after a presentation under S. 75 (2) is different from the procedure to be followed after a presentation under S. 34 and this might make a vital difference in a particular case. AIR (Vol 25) 1938 Lah 255 : 181 Ind Cas 747 (DB).

——S. 75 — The meaning of the latter part of subs. (4) of S. 75 is that although he is not a civil Court yet any costs ordered by him can be recovered as if he were a civil Court and as if those costs were awarded in a suit under the Civil P. C. He can therefore send his order for costs for execution exactly as if they had been awarded in a suit and the method of their recovery is to be in accordance with the Civil P. C AIR (Vol 24) 1937 Mad 585 : (1937) 1 M L J 635 : 1937 M W N 519 : 45 L W 540 : 172 Ind Cas 406.

——S. 75—Revision.

Registrar acting under S. 75 (4) merely acts as if he were a Civil Court. He is not a Court subordinate to the High Court within S. 115. AIR (Vol 15) 1928 Mad 475 : 51 Mad 245 : 27 M L W 346 : 1928 M W N 101 : 54 M L J 595 : 109 Ind Cas 180.

——S. 75—Denial of execution—What amounts to.

Executant refusing to appear — Document registered in spite of such refusal — Registration is valid.

A refusal to appear after notice before the registration authorities amounts to a denial of execution. AIR (Vol 12) 1925 Lah 542 : 6 Lah 344 : 26 P L R 691 : 89 Ind Cas 615 (DB).

——S. 75—'Duly presented.'

There is nothing in S. 75 to prevent the Registrar or the Sub-Registrar from registering a document which has been duly presented and the execution of which has been proved, without requiring a repetition of all the original steps, but be cannot be compelled to register unless the document be "duly presented a second time." "Duly presented" means presented according to law. AIR (Vol 9) 1922 P C 279 : 21 A L J 361 : 37 C L J 377 : 25 Bom L R 655: 18 M L W 124 : 1923 M W N 873 : 44 All 514 : 49 I A 375 : 27 C W N 437 : 31 M L T 284 : 69 Ind Cas 44.

——S. 75 — Gift deed — Registration after donor's death.

The registration of a deed of gift by the donee after the donor's death is valid, even without the consent of the donor's legal representatives. AIR (Vol 4) 1917 Mad 27 : 40 Mad 204 : 31 M L J 690 : 4 L W 465 : 20 M L T 450 : (1917) M W N 112 : 38 Ind Cas 707 (FB).

——S. 75—Registered sale—Forgery.

Where a Court finds that a deed of sale registered under S. 75 of the Act is a forgery, the question of burden of proof does not arise. AIR (Vol 2) 1915 Cal 423 : 28 Ind Cas 138 (DB).

——S. 75 (1) — Admission by counsel.

Admission by the counsel of a party as execution of a document on behalf of the executant implies admission as to execution as required by S. 75 (1). AIR (Vol 19) 1932 Oudh 178 : 8 O W N 280 : 139 Ind Cas 61 (DB).

——Ss 75 (3), 47, 60—Effect of—Purpose of S. 75 (3) —Words "shall take effect" in S. 75 (3), meaning of.

A comparison of Ss. 47, 60 and 75 shows that normally a document becomes effective between the parties from the date when it is drawn up (S. 47) but it is taken to be registered only when it is entered in the book (S. 60). In the case of compulsory registration there could have been a doubt as to when the document takes effect between the parties. It was for clearing this doubt that S. 75 (3) was enacted. It was made clear that just as any other document, the document compulsorily registered was to operate as a valid effective document between the parties from the date when it was executed. In other words, it was laid down that the provisions of S. 47 applied to cases of compulsory registration. The words "shall take effect" in cl. (3) of S. 75 have the same meaning as the words "shall operate" in S. 47. AIR (Vol 32) 1945 Pesh 9 : 1945 Pesh L Jour 9 : 218 Ind Cas 367 (DB).

——S. 76.

——S. 76—Refusal to register—Suit.

Registrar refusing in appeal to register document no ground that it contravened Punjab alienation of Land Act — Suit for compulsory registration is competent. AIR (Vol 31) 1944 Lah 349 : 46 P L R 182 : 216 Ind Cas 180.

——S. 76—Scope.

Where a Registrar, without making an enquiry into the allegations of the executant that the date of execution had been altered, refused to register a document, but gave no reasons in support of that order.

Held, that his order amounted to a refusal to register on the ground of denial of execution and a suit lay under S. 77. AIR (Vol 15) 1928 Lah 98 : 108 Ind Cas 379 (DB).

——S. 76—The language of S. 76 (a) is wide enough to cover all orders of the Registrar refusing registration, whether such orders are passed on documents presented to him in the first instance or otherwise and whether or not such orders were passed by following an irregular procedure. AIR (Vol 12) 1925 Mad 619 : 48 M L J 221 : 86 Ind Cas 797 (DB).

——Ss. 76, 77 and S. 25—Dismissal of appeal—Cause of action.

Per Seshagiri Aiyar, J. — The application to the Registrar may also be regarded as an original petition to him under S. 76 and his dismissal of the appeal is in effect a refusal to direct the Sub-Registrar to register the document which will furnish a cause of action under S. 76. AIR (Vol 4) 1917 Mad 277 : 19 M L T 397 : (1916) 2 M W N 38:34 Ind Cas 769 (DB).

——Ss. 76, 77—Suit to compel registration—Grounds of such suit.

Where a Registrar refused to register a document presented to him upon the grounds that there was not sufficient proof that the document was executed by the authority of the alleged executant and that there was undue and unexplained delay in presenting the document for registration, it was held, that a suit would lie under S. 77 to compel registration.

Held also, that in a suit under S. 77 the Court is only concerned with the genuineness of the document sought to be registered and not with its validity. 1907 A W N 46:4 A L J 171:29 A 284 (287)(DB).

——S. 77.

1. Scope.
2. "Refuses to order document to be registered."
3. Failure to apply for extension of time under S. 34.
4. "Registered."
5. Parties to the suit.
6 Limitation for suit.
7. Notice under S. 80, Civil Procedure Code.
8. "Within thirty days after the passing of such decree."
9. Appeal from decree.
10. Scope of inquiry in suit.
11. Tampered document.
12. Suit independently of this section.

1. Scope.

——S. 77—Suit under.

Where on the refusal of the Registrar to register a document the aggrieved party brings a suit under S. 77 his claim has to be confined only to the registration of the document, because in a suit under S. 77 the Court is only concerned with the genuineness of the document sought to be registered, that is, whether the document is executed by the person by whom it is alleged to be executed, and not its validity and the question of its validity must be determined in a suit properly framed for that purpose.

A suit in which a decree for possession is sought and relief is asked for against a third person to whom the property has been transferred by the person who executed the deed in plaintiff's favour is outside the scope of S. 77. AIR (Vol 33) 1946 Pat 62 : 24 Pat 325 (DB).

——Ss. 77 and 32—Enforcing of registration.

Registration of an executed document can only be enforced by the proper proceedings under the Registration Act, followed if necessary by suit under S. 77 of the Act, but not by a suit of any other kind. AIR (Vol 10) 1923 Nag 76 : 71 Ind Cas 33.

——S. 77—Suit to enforce registration—Procedure.

Before a plaintiff can institute a suit under S. 77 of the Registration Act to enforce registration of a document he must follow strictly the procedure prescribed by the Act, for obtaining registration of documents. AIR (Vol 6) 1919 Cal 477: 27 C L J 538: 44 Ind Cas 361 (DB).

2. "Refuses to order document to be registered."

——S. 77—Scope.

The words "refuses to order the document to be registered" in S. 77 have been used to cover both cases, that is to say, where the Registrar refuses to order the registration of a document in his own office or where he refuses to direct that the Sub-Registrar should register it. A I R (Vol 29) 1942 Pesh 37 : 200 Ind Cas 632 (DB).

——Ss. 77, 25 — Registrar refusing to condone delay — Sub-Registrar refusing registration—No appeal to Registrar—Suit, if maintainable.

Section 76 makes a clear distinction between (a) refusing to register a document and (b) refusing to direct registration of a document. Clause (a) would thus apply when a document is presented directly to a Registrar for registration as may be done under S. 30 or S. 40. But, if the Registrar condones delay, then "he may direct that such document be accepted for registration." It follows that a Registrar who refuses to condone delay is refusing to direct registration of a document and that his action cannot be brought under cl. (a).

Hence, where, upon the refusal of the Registrar to condone delay under S. 25, the Sub-Registrar makes an order refusing registration, a suit under S. 77 does not lie if no appeal is made to the Registrar against the order of the Sub-Registrar. A I R (Vol 26) 1939 Bom 254 : 41 Bom L R 470 : 182 Ind Cas 943 (DB).

——S. 77 — Order stating that document was not registrable for reasons given.

The proper way to interpret an order of a Registrar is to look at not merely the form but the substance of it as well.

Where an order of the Registrar was as follows : The document "should have been registered within four months under S. 23. Neither urgent necessity nor unavoidable accident is shown to bring S. 25 into operation.....The time limit of eight months, however, has expired so that the question of refusal to register on account of denial of execution does not arise. The document is not registrable under the Act" :

Held, that the order amounted to an order refusing either to accept the document for registration or to register the document. A I R (Vol 26) 1939 Rang 50 : 179 Ind Cas 708 (DB).

——S. 77—Scope.

Section 34 is subject to S. 77. Consequently, the refusal to register a document on account of the executant not having appeared within the four months prescribed can be interfered with by the Court in a suit under S. 77. A I R (Vol 21) 1934 Mad 113 : 1933 M W N 1373 : 38 L W 1000 : 66 M L J 424 : 148 Ind Cas 94 (DB).

——S. 77—Suit, when lies.

No suit can be brought under S. 77 until the remedies open to the plaintiff under that Act have been exhausted, that is to say, until the Registrar has rejected the appeal against the order of the Sub-Regitrar refusing to register the document. AIR (Vol 19) 1932 Lah 138 : 134 Ind Cas 482.

——S. 77—Suit, when lies.

Suit under S. 77 before refusal of registration — Withdrawal of, without leave to bring fresh suit, on objection by defendants that it was premature — Fresh suit after refusal is not barred under O. 23, R. 1, Civil P. C. A I R (Vol 19) 1932 Lah 138 : 134 Ind Cas 482.

——S. 77—Applicability.

The Sub-Registrar, when moved to issue process under S. 36, ought to apply to the prescribed local Court for issue of a summons; but the fact that he does not take the proper steps to secure the attendance of the defendants cannot, in any way, prejudice the right of the plaintiffs to institute a suit under S. 77, when registration is refused. A I R (Vol 25) 1938 Pat 136 : 16 Pat 660 : 19 P L T 67 : 4 B R 439 : 174 Ind Cas 385 (DB).

——S. 77—Suit is competent under S. 77 even where Sub-Registrar refuses to accept document for regis-

tration under S. 25, because there is no difference of meaning between "refusing to register" and 'refusing to accept for registration" as used in Registration Act : 24 Bom 699, Diss. from. A I R (Vol 16) 1929 Bom 365 : 53 Bom 644 : 31 Bom L R 676 : 119 Ind Cas 651 (DB).

——S. 77 — Refusal to register on wrong ground — Right of suit under S 77 is not lost.

Registration is an act of the Registrar of an administrative character and any error committed by him may be regarded as an error of procedure covered by S. 87. The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act. There is a clear distinction between a defect in procedure, that is, the fault of the registering officer, for which the person presenting the document is in no way responsible, and a mistake made by such a person in complying with the statutory provisions of the Act. The requirements of the Act must be followed by the person presenting the document.

A document was presented for registration in due time but the execution thereof was denied by executant. An application was then made under S. 73, but the Registrar instead of proceeding under S. 74, held wrongly that the document could not be registered in view of a local law. A suit was then filed to enforce registration under S. 77 and it was decreed.

Held, that the refusal of Registrar on a wrong ground did not deprive the party of his right of suit under S. 77. A I R (Vol 16) 1929 Lah 409 : 30 P L R 306 : 11 L L J 251 : 116 Ind Cas 317 (DB).

——S. 77 — Executant dying before registration — Return of document for want of executant's successor amounts to refusal.

In such cases Court should look to the substance and not to the form of the order. 102 Ind Cas 796 : 8 Lah 208 : 28 P L R 349 : AIR (Vol 14) 1927 Lah 395 (DB).

——S. 77—Conditions precedent.

Suit to compel registration does not lie independently of S. 77—Refusal to register by Sub-Registrar and application to Registrar are conditions precedent to such a suit. 99 Ind Cas 998 : 4 Rang 500 : AIR (Vol 14) 1927 Rang 83.

——S. 77—Valuation of suit.

Suit for enforcing registration—Plaintiff can put his own valuation of the suit. 97 Ind Cas 762 : 53 Cal 1023 : 30 C W N 951 : AIR (Vol 13) 1926 Cal 1091 (DB).

——S. 77—Delay in presentation of document—Reference to Registrar—Powers of Registrar - Registration ordering "Registration refused"—Interpretation of.

Where a matter is referred to the Registrar under S. 34 (4) and proviso to S. 34 (1), the Registrar may direct the registration if he is of opinion that the delay was due to "urgent necessity or unavoidable accident." If he is not so satisfied about the delay the proper form of the order is to express his opinion that the delay is not due to urgent necessity or unavoidable accident. When he so expresses his opinion (such opinion being remitted to the Sub-Registrar), the Sub Registrar ought to follow it up by endorsing on the document "Registration refused" and then the remedy of the person who seeks registration is to file an appeal under S. 72.

Where the District Registrar did not pass an order expressing his opinion about the delay, but he passed an order on the document "Registration refused" nor did the Sub-Registrar follow up the order of the Registrar by passing an order "Registration refused."

Held, that one way of construing the order of the Registrar is to regard him as having abridged the proper and regular procedure, i.e., instead of the matter going before the Sub-Registrar for his endorsement and an appeal being filed against the order of the Sub-Registrar and the Registrar passing final orders on such appeal, he anticipated such last order in appeal and passed his final order at an earlier stage. If so, the plaintiff's suit was maintainable. 86 Ind Cas 797: AIR (Vol 12) 1925 Mad 619: 48 MLJ 221 (DB).

——S. 77—It is clear that in order that the suit may be treated as maintainable under S. 77, the order must be one of refusal to order the document to be registered under S. 72 or S. 76 an order refusing to sanction acceptance of penalty and refusing to condone delay cannot be treated as a refusal to register by the Registrar within the meaning of S. 76 (a). 72 Ind Cas 118 : 25 Bom L R 45 : 47 Bom 290 : AIR (Vol 10) 1923 Bom 187.

——S. 77—Dismissal of application for registration—Suit to enforce registration.

The dismissal of an application for registration owing to the failure of the applicants to appear before the Sub-Registrar is equivalent to a refusal to register and it does not take away the right of suit under S. 77 to enforce registration. 54 Ind Cas 570 : AIR (Vol 7) 1920 Cal 206 (DB).

——S. 77—Suit to enforce registration—Deed creating charge on land already mortgaged — Punjab Alienation of Land Act, S. 9 (3).

In a suit under S. 77 of the Registration Act to enforce registration of a deed of mortgage, which though it purported to create a further charge in the lands already mortgaged actually created a charge upon other lands also which had not previously been mortgaged. Held, that the mortgage deed in dispute was not merely an additional charge upon lands already mortgaged but was an entirely new deed and as it was in a contravenation of the provisions of the Punjab Alienation of Land Act the Registrar's order refusing to register it was correct. 1 Lah L J 212 : AIR (Vol 6) 1919 Lah 436 (DB).

——S. 77 — Sub-Registrar's refusal to register—Failure to appeal to Registrar—Suit, if maintainable.

A refusal by the Registrar to order a registration is a condition precedent to a civil suit brought under S. 77 of the Registration Act. As in this case the Sub-Registrar's refusal to admit to registration had not been appealed against to the Registrar the suit was not competent. 102 P R 1917 : 169 P W R 1917 : 7 P L R 1918 : 43 Ind Cas 294 : AIR (Vol 5) 1918 Lah 53 (DB).

3. Failure to apply for extension of time under S. 34.

——S. 77—Where the executant was purposely keeping out of the way.

Held, that to apply for extension of time under S. 34, would have been a perfectly useless proceeding and the plaintiff's failure to make an application could not affect his right to a decree in the suit which he subsequently brought under S. 77. 88 Ind Cas 494 : 2 O W N 348 : 12 O L J 506 : 29 O C 87 : AIR (Vol 12) 1925 Oudh 445.

4. "Registered."

——Ss. 77, 23-A — "Registered," if includes "re-registered" — Validity of registration disputed in written statement—Limitation.

The word "registered" should be taken to include the word "re-registered" in S. 77. Therefore, a disappointed applicant under S. 23-A has a right to bring a suit under S. 77.

In a suit for possession on the basis of a registered deed, the defendant pleaded that the document was inadmissible in evidence as the registration was not valid. Thereupon the plaintiff applied for the return of the document for presentation for re-registration but the Court, feeling itself doubtful as to the

invalidity of the registration, went into the question and gave a finding that it was invalid. The plaintiff then applied for re-registration :

Held, that limitation under S 23-A ran, not from the date when the plaintiff knew about the plea taken by the defendant but from the date of the finding by the Court. AIR (Vol 29) 1942 Pesh 37 : 200 Ind Cas 632 (DB).

5. Parties to the suit.

——S. 77—Suit for compulsory registration—Proper defendant.

Ordinarily, neither the registering officer nor the Government is a necessary party to a suit for compulsory registration of a document. Where, however, no one is opposing the registration but the registering officer not being satisfied with the genuineness of the document, of his own accord refuses to register it, the registering officer is the proper defendant. AIR (Vol 32) 1945 Mad 11 : 57 L W 491 : (1944) 2 M L J 186 : 1944 M W N 572 (DB).

——S. 77—'Representative' meaning of—Benami sale deed — Real owner, whether representative—Suit, when lies.

A person claiming as a real owner under a deed of sale and alleging that the ostensible owner was a benamidar is not a representative of the latter within the meaning of S. 2 (10). He cannot present the document for registration and has no locus standi to institute a suit under S. 77 on the allegation that the benamidar, in collusion with the executant, omitted to take proper steps to have the document registered. AIR (Vol 18) 1931 Cal 664 : 58 C 681 : 133 Ind Cas 591 (DB).

——S. 77—Third parties.

Only parties to the deed can be made parties in a registration suit and a third person is not entitled to challenge the decision in such suit in a collateral proceeding. 116 Ind Cas 317 : 30 P L R 306: 11 L L J 251 : AIR (Vol 16) 1929 Lah 409 (DB).

——S. 77—Person claiming title under a prior sale in his favour by the alleged executant, is not a proper party.

In a suit under S. 77 of the Registration Act the only question is whether or not the document purported to have been executed by a certain person is executed by that person. The only person who can present a document for a registration or institute a suit is the person claiming under the document, and the only person who is entitled to deny the execution is the person who is purported to be the executant of it. Therefore, a person claiming to have purchased the property at a prior sale from the executant is not a proper party to such a suit, the title question not being strictly within the scope of S. 77. 89 Ind Cas 57 : AIR (Vol 12) 1925 Cal 1257 (DB).

6. Limitation for suit.

——S. 77 — Plaint insufficiently stamped — Deficit court-fees paid after 30 days — Limitation — C. P. Code, S. 149 and O. 7, R. 11 (c).

A suit under S. 77 of the Registration Act filed on an insufficiently stamped plaint within 30 days of the order of refusal by the District Registrar is not barred although the balance of the requisite court-fees was paid beyond 30 days of that order but within the period of extention of time granted by the Court. AIR (Vol 35) 1948 Cal 53 : I L R (1948) 1 Cal 365 : 82 C L J 199 : 51 C W N 755 (DB).

——S. 77—Refusal, what amounts to—Order dismissing appeal as time barred erroneous—Civil suit lies.

An order dismissing an appeal as time barred is as much an order of refusal as one passed on different grounds. Though it is a condition precedent to a civil suit that the party must appeal to the District Registrar within a stated time, where the decision of the District Registrar is erroneous on the point of limitation, a civil suit does lie. AIR (Vol 17) 1930 Mad 490 : 31 M L W 487 : 123 Ind Cas 345 (DB).

——S. 77—Limitation.

The date of announcing the order to the party is the starting point. AIR (Vol 16) 1929 Lah 409 : 30 P L R 306 : 11 L L J 251 : 116 Ind Cas 317 (DB).

——S. 77 — Suit under, filed in a wrong Court, returned and refiled in proper Court but after 30 days —S. 14, Limitation Act does not avail to save limition.

Under S. 29 (1) of the Limitation Act nothing in that enactment affects or alters any period of limitation specially prescribed for any suit, appeal or application by any special or local law, and inasmuch as Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused, and as S. 77 limits the period within which suit is to be brought to 30 days, the period cannot be extended under S. 14 of the Limitation Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction on the matter. AIR (Vol 13) 1926 Nag 126 : 89 Ind Cas 884.

——S. 77—Inter-relation with S. 34—S. 34 does not limit Ss. 71 to 77.

Section 34, which is subject to the provisions of various sections including S. 77, is not intended to lay down any limitation upon the effect of Ss. 71 to 77. It simply provides that the document shall not be registered unless the delay is excused. But where there is an order made by the Sub-Registrar refusing the registration and where the Registrar has refused to direct the registration of the document on an application which, may be treated as an appeal, the final order of the Registrar can be said to satisfy requirement of S. 72 of the Registration Act. AIR (Vol 10) 1923 Bom 187 : 47 Bom 290 : 25 Bom L R 45 : 72 Ind Cas 118 (DB).

——S. 77 — Suit under — Extension of period—Proceedings in wrong Court.

As Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused and as S. 77 limits the period within which a suit is to be brought to 30 days : the said period cannot be extended under S. 14 of the Limitation Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction in the matter. AIR (Vol 7) 1920 Cal 70 : 24 C W N 29 : 54 Ind Cas 228 (DB).

——S. 77 – 'Refusal to register' meaning.

An order of a Registrar refusing to accept a document for Registration on the ground that it was time-barred, is a 'refusal to register' within the meaning of S. 77. There is no substantial distincion between the two within the meaning of S. 77 read with Ss. 76 and 72. 21 Bom 699; 18 Mad 255 and 18 Mad 99, Not foll. The time for filing a suit under the section should be computed from the date of the appellate order of the Registrar refusing to register under S. 72 or 76 and not from the date of any prior order refusing to extend time. A I R (Vol 4) 1917 Mad 277 : 19 M L T 397 : (1916) 2 M W N 38 : 34 Ind Cas 769, Affirmed. AIR (Vol 5) 1918 Mad 1082 : 40 Mad 759 : 33 M L J 51 : 40 Ind Cas 192 (SB).

——S. 77—Order refusing to order the document to be registered — Ambiguous passage — Limitation—Starting point.

Where a Registrar ordered that either a new and clear sale-deed should be made or a note be added making the ambiguous passage quite clear.

Held, that this was an order refusing to register the document. The expression "making of the order" in S. 77 does not mean merely recording the order of refusal in writing but also communicating it to the party concerned so as to bind him, and that the starting point for limitation of a suit is the date of plaintiff's actual knowledge of the order except where he wilfully neglects to get knowledge in which

case the date will be that when he would have got knowledge. AIR (Vol 4) 1917 Lah 63 : 41 P R 1917 : 55 P W R 1917 : 41 Ind Cas 76 (DB).

——S. 77—Suit—Limitation.

A suit for the registration of deeds filed within 30 days from the order of refusal to register on an application for review of a previous application for registration which was struck off, is within time. (1913) 17 C W N 585 : 18 C L J 45 : 18 Ind Cas 450 (DB).

——S. 77—Suit for registration of document — Last day a holiday — Suit filed next re-opening day — General Clauses Act (X of 1887), S. 7 — General Clauses Act (I of 1897), S. 10.

If a Registrar refused to register a document on 29th November and on the 30th day after the Court was closed and the plaintiff instituted on the next re-opening day a suit under S. 77 of the Registration Act, the suit should be held to be properly instituted in view of the previous decisions of the Court and the implied sanction of legislature by the General Clauses Act. (1912) 16 C W N 721 : 14 Ind Cas 173 (DB).

——S. 77—Time, how reckoned.

30 days are to be counted from the date on which the order is communicated to him. (1911) 16 C W N 20 : 12 Ind Cas 33 (DB).

——S. 77—Appeal before Registrar for default—Suit to compel registration — Limitation Act, S. 52 — If lies.

A suit to compel registration under S. 77 of the Act is maintainable even if the plaintiff's appeal before the Registrar was dismissed for default. S. 5 of the Limitation Act applied to suits under S. 77 of the Registration Act. (1910) 12 C L J 464 : 8 Ind Cas 794 (DB).

——S. 77—Suit to compel registration — Limitation Act, Ss. 5, 6.

Section 5 of the Limitation Act, applies to a suit brought under S. 77 of the Registration Act, to compel registration of a document. 1905 A W N 175: 2 A L J 714 : 28 A 48 (49) (DB).

——S. 77—Suit to set aside order of refusal.

A suit to set aside an order under S. 77 must be instituted within 30 days from the making of it : the making of the order means not merely recording it in writing but communicating it to the party concerned so as to bind him by it. (1903) 5 Bom L R 622 (624) : 28 Bom 8 (DB).

7. Notice under Section 80, Civil Procedure Code.

——S. 77—Limitation for suit for compulsory registration — Notice under S. 80, Civil P. C., if necessary.

Registration Act being a special law, its provisions are not affected by Civil P. C., under S. 4 (1), Civil P. C., Hence, in a suit for compulsory registration, the period of limitation is governed by S. 77, even when the suit is against the Registrar, and two months' notice under S. 80, Civil P. C. is not necessary. AIR (Vol 27) 1940 All 108 : 1939 ALJ 1151 : 1939 AWR 878 : 186 Ind Cas 505 (DB).

8. "Within thirty days after the passing of such decree."

——Ss. 77 (1) and 75 (2) — Right of suit — Scope of —Document not re-presented within 30 days of decree—Power of Sub-Registrar to refuse to register.

Under S. 77 (1), Registration Act, the right which can be claimed by a person aggrieved by the refusal of the Sub-Registrar to register a document is a limited one, and that right is to obtain an order in the nature of a mandamus from the Court that the document be registered if it be "duly prescribed" within 30 days of the passing of the decree. If the document is presented within 30 days, the Sub-Registrar can be compelled to register it under S. 75 (2) of the Act. But if the party omits to re-present the document for registration within 30 days, whether or not the Sub-Registrar may be able to register it waiving this condition, the Sub-Registrar cannot be compelled to register it, and would be within his powers to refuse to register it. AIR (Vol 37) 1950 Nag 165 : 1950 NLJ 266 : ILR (1950) Nag 605.

——Ss. 77, 73— 'Decree' meaning of —Presentation for registration within thirty days of date of appellate decree —Sufficiency of.

The word 'decree' as used in S. 77 means a final decree ; and if an appeal is filed from a decree, the document may be presented for registration within thirty days of the date of the decree of the Appellate Court. If the decree of the lower Court is affirmed by the High Court that decree will merge in the decree of the High Court and it will be open to the High Court to pass the very order which the lower Appellate Court was competent to pass and to direct that the document be registered within thirty days from the date of the decree passed by the High Court. Where the delay in the registration of the document was due mainly to the mistaken notion of the lower Court that the plaintiff could not ask the document to be returned to him to be presented for registration before the expiry of thirty days, the plaintiff should not be deprived of the benefit of the decree passed in his favour in consequence of this mistaken view. AIR (Vol 22) 1935 Pat 497 : 16 PLT 706 : 1 B R 879: 158 Ind Cas 395.

——S. 77—Registration in contravention of S. 77 — Validity.

It is arguable that though the document has been registered, yet as the registration was effected in contravention of the express provision of S. 77, that registration is invalid and the document must be registered again. AIR (Vol 22) 1935 Pat 497 : 16 PLT 706 : 1 BR 879 : 158 Ind Cas 395.

——S. 77— Ex parte decree — Setting aside of decree—Registration, whether becomes invalid—Registration, if necessary.

Where an ex parte decree passed in a suit under S. 77 for the compulsory registration of a document is set aside, the registration effected under the decree stands cancelled automatically and if the document is not re-presented for registration within the prescribed time after the passing of the revised decree, the document must be deemed to be unregistered and remains inoperative.

There is no duty on the part of the defendants in a case of this nature to get the registration cancelled on the setting aside of the ex parte decree and no question of estoppel, therefore, arises against them. AIR (Vol 20) 1933 Pesh 24 : 141 Ind Cas 384 (DB).

——S. 77—Appeal —Appellate Court can direct stay of registration ordered by decree in suit under the section.

Section 77 of the Registration Act does not prevent a Civil Court having power to hear an appeal against a decree obtained by the plaintiff in suit under the section, directing the Registrar to register a particular document within thirty days from the passing of such decree, from staying the execution of the decree under the C. P. Code. In such a case on the ultimate failure of the appeal, the document can be presented for registration within thirty days from the disposal of the appeal. AIR (Vol 12) 1925 Mad 401 : 47 MLJ 735 : 20 MLW 966 : 85 Ind Cas 192.

——S. 77—Decree for registration — Document must be presented within 30 days of date of decree. AIR (Vol 9) 1922 Pat 408: 1 Pat 146: 69 Ind Cas 198 (DB).

——S. 77—30 days, how reckoned.

The 30 days mentioned in S. 77 of the Act is to be reckoned only from the time the judgment is drawn up and signed by the Judge and not from the time

the judgment is pronounced. AIR (Vol 2) 1915 Mad 865 : 38 Mad 291 : 14 MLT 160 : 20 Ind Cas 914.

——S. 77—Thirty days —Decree not providing time —Presentation for registration within 30 days of appellate decree confirming the original decree — Decree, form of.

There is no positive enactment in the section that the document must be presented for registration within thirty days after the passing of the decree. The decree, no doubt, ought to provide that the document should be only presented for registration within thiry days after the passing of the decree. But where the decree was silent as to the period within which the document should be presented for registration, and there was an appeal which was infructuous and the document was presented after 30 days of the original decree, but within 30 days from the appellate decree : Held that the registration was not bad. (1906) 33 C 1020 (1021, 1022) (DB).

9. Appeal from decree.

——S. 77—Suit for compulsory registration — Trial Court decreeing suit—Appellate Court, in effect, finding agreement valid but refusing registration—Order for return of consideration :

Held, that by ordering the return of the consideration money, the lower Appellate Court had not set aside the finding of the trial Court that the agreement was valid. If the plaintiff was entitled to the return of his money, the decision was merely a decision on a question of law, whether the Judge had exercised what he considered to be his discretion in favour or against the plaintiff as the case might be under S. 77 and the High Court, in second appeal, could set aside that order. (1936) 164 Ind Cas 315 : 2 B R 736 (2).

10. Scope of inquiry in suit.

——Ss. 77 and 35—Admission of execution — Essentials. A I R 1949 Mad 775, Dissented from. See A I R (Vol 37) 1950 Mad 239 : (1949) 2 M LJ 684 (DB).

——S. 77—Burden of proof — Suit to have document registered —Onus of proof — Shifting of.

In a suit under S. 77, Registration Act, the initial onus is on the person who alleges that the document in question was executed by the persons whose names appear thereon as executants. Where, however, these persons only admit their endorsements and allege that they made the endorsements on blank paper, the onus is easily shifted. AIR (Vol 37) 1950 Pat 370 (DB).

——S. 77—In a suit under S. 77, Registration Act, the Court has to find whether the document is executed by the person by whom it is alleged to be executed and not whether it is a valid document. Whether the money consideration stated in the document was paid or not and whether the document is legally operative or not are immaterial so far as the due execution of the document is concerned. AIR (Vol 37) 1950 Pat 370 (DB).

——S. 77—Suit under—Scope of the powers of Court in.

Section 77 of the Registration Act, provides a statutory right of suit of a very limited character. In such a suit the Civil Court has got to do only what the registering officer should and could have done under the powers conferred on him by the Registration Act. The Court should be guided by the same considerations which guide the Registrar in registering or refusing to register a document presented to him. In a suit under S. 77 the Court is concerned with two questions; (a) whether the document has been executed, that is to say, whether the document bears the genuine signature of the executant or his thumb impression if he is unable to sign his name, and (b) whether the requirements of the law for registering documents have been complied with. If these points are decided in favour of the plaintiff, then the registration ought to be directed. The Court cannot, in such a suit, go into a defence as to whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature. AIR (Vol 36) 1949 Mad 775 : 1949 M W N 289 : 62 M L W 282 : (1949) 1 M L J 479.

[But see AIR (Vol 37) 1950 Mad 239 : 62 M L W 843 : 1949 M W N 757 : (1949) 2 M L J 684 (DB). where AIR (Vol 36) 1949 Mad 775 : (1949) 1 M L J 479, is dissented from.]

——S. 77—Office "in which the document is sought to be registered" — Interpretation—Jurisdiction of Court to entertain suit.

The office "in which the document is sought to be registered" as contemplated by S. 77 of the Registration Act is the office where the document was presented for registration. It is in that office that the document must be sought to be registered in the suit as well and the suit can be brought only in the Court within the jurisdiction of which such office is situated. AIR (Vol 35) 1948 Cal 53 : ILR (1948) 1 Cal 365: 51 C W N 755 : 82 C L J 199 (DB).

——S. 77—Suit under—Duty of Court.

In a suit under S. 77, all that is required to be shown by the plaintiffs is whether the document was executed or not, (or also in some cases, whether certain requirements of the law as to presentation for registration have been complied with). In such cases, the Court is concerned, not with the validity, but with the genuineness of the document sought to be registered, that is whether the document has been executed by the person by whom it is alleged to have been executed. AIR (Vol 25) 1938 Rang 176 (177) : 1938 Rang L R 102 : 176 Ind Cas 140.

——S. 77—Frame of suit.

It is now well settled that no other claim can be coupled with the prayer to enforce registration of a document under S. 77. AIR (Vol 20) 1933 Cal 196 : 56 C L J 413 : 142 Ind Cas 520.

——S. 77—Suit for registration — Proof, if required.

In a suit for a decree directing registration of certain documents, the enquiry in Court is to be directed on two points, firstly, whether the document has been executed, and secondly, whether certain requirements of the law as to presentation for registration in due time to the proper office and in the manner generally prescribed had been complied with by the person presenting the document for registration. AIR (Vol 19) 1932 Cal 588 : 55 C L J 107 : 139 Ind Cas 234.

——S. 77—Refusal for want of Revenue Officer's sanction.

A relinquishment by a Hindu widow of the whole estate including sir, inherited from her husband, in favour of his reversionary heirs without reservation of the cultivating rights in it, does not require permission from a Revenue Officer and its registration cannot be refused on the ground of its absence. AIR (Vol 14) 1927 Nag 394 : 102 Ind Cas 30.

——S. 77—Insufficient description of property—Refusal to admit document to registration — Appeal under S. 72 and suit under S. 77 lie.

The expression in S. 72 "refusing to admit a document to registration" includes not only a refusal to register but also a refusal to accept a document for registration.

Where a Sub-Registrar refused under S. 21, Registration Act, to accept a document for registration because it did not contain a description of the property sufficient to identify the same :

Held, the order of refusal was appealable under S. 72 of the Act and that if the Registrar on appeal upheld the order, the party aggrieved would institute a suit, in the Civil Court, under S. 77 of Act, for

a decree ordering the document to be registered. AIR (Vol 12) 1925 Bom 34 : 49 Bom 40 : 26 Bom L R 934: 84 Ind Cas 416 (DB).

——S. 77 — Questions to be decided in suit — Court deals in suit under S. 77, only with genuineness of deed.

In a suit instituted under S. 77 the Court is concerned not with the validity, but with the genuineness of the document sought to be registered, that is whether the document had been executed by the person by whom it is alleged to have been executed; the question of its validity must be determined in a suit properly framed for that purpose. The Court will not consequently, examine such defences as that the document was cancelled; or that the document was executed by a guardian of a minor in contravention of his powers; or that the document is void for want of consideration; or that the document was executed by the donee of a voidable power of attorney or that the document was obtained by undue influence. AIR (Vol 11) 1924 Cal 600 : 39 C L J 40 : 79 Ind Cas 520 (DB).

——S. 77—In a suit under S. 77 the Court is only concerned with the genuineness and execution of a document. Questions relating to its validity are not legitimately within its scope. AIR (Vol 11) 1924 Lah 28 : 5 L L J 217 : 74 Ind Cas 688 (DB).

——S. 77—Court shall decide only fact of execution.

In a suit to compel registration under the Registration Act the Court has simply to determine the fact of execution, and if a prima facie case of execution is made out and the requirements of the law complied with, to order registration of the document. It cannot go into other considerations. Where registration was refused by the Sub-Registrar on the ground of denial of execution under S. 71 of the Registration Act.

Held, the plaintiff was bound under the Registration Act to make an application to the Registrar under S. 73 of the Act in order to establish his right to have the document registered and that such an application is necessary prior to a suit being brought under S. 77 of the Registration Act. AIR (Vol 11) 1924 Nag 77 : 7 N L J 4 : 20 N L R 158 : 75 Ind Cas 664.

——S. 77—Genuineness of the deed only has to be considered. AIR (Vol 8) 1921 All 52 : 19 Cri L J 224: 60 Ind Cas 869.

——S. 77—In a suit for the registration of the document under S. 77 the Court is not entitled to enquire into anything more than whether the ostensible executant signed and delivered to the other party the document which he produced for registration and it cannot enter into any question regarding its validity. AIR (Vol 8) 1921 Lah 138 : 2 Lah 202 : 88 P L R 1921 : 62 Ind Cas 789 (DB).

——S. 77—Suit—Scope of — Validity of document.

A suit under S. 77 is limited to two points (1) whether the document has been executed and (2) whether the requirements of the law for registration of document are complied with. In such a suit the plaintiff would get a decree if the document was in fact executed by the defendant though it was not a bona fide document. The Court is not however concerned with the questions where the document is valid and freely executed. AIR (Vol 4) 1917 Cal 380 : 35 Ind Cas 778.

—— S. 77—Function of Registrar under S. 77 — Suit under—Parties.

A registering officer or Court has nothing to do with the legal effect of a document but only has to satisfy himself that the document was executed by the person by whom it purports to have been actually signed. The proper defendant in a suit brought under the Registration Act is the person who actually signs or marks the document in token of execution whether for himself or on behalf of another, and is the person executing the document under Ss. 32, 34, 35, 58 and 73 of the Registration Act. A person who executes a document in favour of another, compulsorily registrable, is bound to assist in the registration of it irrespective of its validity. AIR (Vol 2) 1915 Nag 18 : 11 N L R 177 : 31 Ind Cas 867.

——S. 77—Suit for — Registration of document — Executed under misapprehension.

A document purporting to be a sale deed of certain properties by pardanashin women but which comprised other properties as well, is not properly executed, so that a suit for registration of the document will not lie. AIR (Vol 1) 1914 Cal 602 : 23 Ind Cas 10 (DB).

——S. 77—What points to be gone into.

In a suit under S. 77 the point of execution of a document and that of presentation in due time in the proper manner and to the proper office, are the only two points which can be put in issue; the defendant is not allowed to show reasons for his non-liability under the document in a suit under S. 77. (1910) 14 C W N 12 : 5 Ind Cas 20.

——S. 77—Jurisdiction of Courts—Munsif's Court—Will disposing of property of the value of more than Rs. 2,500—Court-fees Act, Sch. II, Art. 17 (6).

Per Curiam.—A District Munsif has no jurisdiction to try a suit under S. 77 to direct registration of a will, where the will in question disposes of property of more than Rs. 2,500 in value. The suit is not one to which S. 7, Cl. 4 (c) of the Court-fees Act, is applicable, but is one to which Art. 17 (6) of Sch. II of the Court-fees Act, applies, i. e , a suit in which it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by Act.

Per Subrahmanya Aiyar J.—In the absence of specific statutory provision the jurisdiction of Courts with reference to the pecuniary value of the subject-matter ought, having regard to the general considerations underlying the constitution of the mofussil Courts in this country, to depend upon a basis ascertainable and determinable by the Court itself whenever that is practicable, and not upon the mere will of the plaintiff. (1907) 17 M L J 573 : 3 M L T 73 : 31 Mad 89 (93) (FB).

11. Tampered document.

——S. 77 — Document bearing sure signs of being tampered with—Registrar or the Court should only consider whether the deed is in the state in which it was executed by the parties and should not enter into an enquiry as to the probabilities of its provisions. AIR (Vol 11) 1924 Mad 810 : 47 Mad 833: 20 M L W 977 : 47 MLJ 271 : 82 Ind Cas 483 (FB).

12. Suit independently of this section.

——Ss. 77, 49, proviso— Registrar refusing to register sale-deed—Aggrieved party can bring suit under S. 77 or he may sue for specific performance of contract of sale — Unregistered sale-deed is admissible as evidence of contract of sale in such suit.

Where the Registrar refuses to register a sale-deed it is open to the aggrieved party either to bring a suit for mere registration of the sale deed under S. 77 or to have recourse to the fuller and more comprehensive remedy provided by a suit for specific performance of the contract of sale. The suit for specific performance of the contract of sale is not barred merely because the aggrieved party does not choose to bring a suit under S. 77 within the prescribed time :

In the suit for specific performance of the contract of sale the unregistered sale-deed is admissible under the proviso to S. 49 as evidence of the contract of sale. AIR (Vol 33) 1946 Pat 62 : 24 Pat 325 (DB).

——S. 77—Scope.

Court can receive and adjudicate upon suits for specific performance of unperformed unregistered con-

tracts. The exact conditions under which a plaintiff will be allowed to sue depend, rather upon the circumstances than upon a strict interpretation of S. 77. AIR (Vol 22) 1935 Pesh 12.

——S. 77—Scope.

Deed of exchange not registered due to the laches of defendant—Procedure under S. 77 not followed by the plaintiff :

Held, that the suit for compulsory registration could not lie but as the equities were in favour of the plaintiff, a suit for specific performance could lie. A I R (Vol 22) 1935 Pesh 12.

——S. 77—Refusal to register document — Infructuous suit under S. 77 — Fresh suit for specific performance and possession.

In the case of an agreement for transfer of immovable property, a suit under S. 77 is not the exclusive relief open to the purchaser and the mere failure of a suit under S. 77 or its infructuous termination cannot operate as a bar to a suit for the specific performance of the contract by executing a new and a fresh document and for recovery of actual possession.

The relief of specific performance is discretionary but the ordinary presumption is that a contract for transfer of immovable property cannot be compensated for by damages. A I R (Vol 19) 1932 All 96 : 1931 ALJ 1092 : 54 A 68 : 136 Ind Cas 561 (DB).

——S. 77—Refusal on executant's objection.

Sale-deed refused to be registered on executant's objection — Vendee's remedy is by suit under S. 77 and not by suit for specific performance against executant. 7 A L J 887 ; 12 C L J 464 ; 44 I C 361, Dissented from. A I R (Vol 13) 1926 Mad 530 : 49 Mad 302 : 23 M L W 277 : 50 M L J 674: 100 Ind Cas 385 (DB).

——S. 77 — Decree for specific performance — S. 77 does not affect equitable jurisdiction of Courts to decree specific performance of contracts to sell.

Though independently of S. 77 of the Registration Act, a suit to compel registration of a document does not lie, the Registration Act does not touch or affect the equitable jurisdiction possessed by the Civil Courts to pass a decree for specific performance by the execution and registration of a fresh document where circumstances exist entitling the plaintiff to such a decree. AIR (Vol 13) 1926 Pat 89 : 7 PLT 730 : 1926 PHCC 11 : 95 Ind Cas 187.

——S. 82.

1. Offence.
2. Proof of offence.
3. Specification of offence.
4. Sentence.
5. Sanction.
6. Jurisdiction of Registration Authority.
7. Denial of execution.
8. Limitation.
9. Scope.

1. Offence.

——Ss. 82, 83—Offence under.

D, Having two sisters G and B — D and G conspiring and G holding herself out as B and executing sale deed in D's favour of land belonging to B — Deed registered— D and G held guilty under S. 467, I. P. C., and S. 82 (b) and (c), Registration Act. AIR (Vol 30) 1943 Pat 227 : 44 Cr L J 652 : 22 Pat 95 : 9 BR 434 : 10 CLT 37 : 207 Ind Cas 552 (DB).

——S. 82—False thumb impression.

Putting the thumb impression by an accused as that of another in column (1) of the register Form No. 8 maintained by the Registration Department, in order to facilitate registration of the document, under R. 53 will be an offence under the section. AIR (Vol 15) 1928 Pat 129 : 6 Pat 305 : 28 Cr L J 850: 104 Ind Cas 626 (DB).

——S. 82 — Identification — Witness to have direct knowledge — Dishonest intention not necessary for conviction.

The identifying witness must be in a position to depose without the possibility of error to the identity of the person, he is identifying. Merely stating that he knows that a person is so and so, because he has been told he is so and so by some other person and with no knowledge of the facts would make the identifying liable to the penalties of S. 82 of the Registration Act. Fraudulent or dishonest intentions are not essential for offences under S. 82. A I R (Vol 9) 1922 Nag 86 : 23 Cr L J 303 : 66 Ind Cas 527.

——S. 82 (c)—False personation—Interpretation.

To complete the offence of false personation under S. 82 (c) fraudulent intent is not necessary; hence where a person at the instance of another goes to the Registrar and demands the return of a document which had been presented for registration representing that he is that other person, he commits the offence of false personation within the meaning of S. 82 (c). (1903) 5 Bom L R 138 (139).

——S. 82—Forgery— Using as genuine forged document.

It was alleged by the prosecution that the accused had forged the registration, endorsement and stamp on the back of a kabala by which he had sold certain lands to D, and that he had produced before a Sub-Registrar a forged mortgage deed, whereby he purported to mortgage to D the identical lands sold under the kabala.

The accused was charged and tried in one trial on charges under Ss. 467 and 468, Penal Code, in respect of forgery of the kabala and under S. 82, Registration Act and Ss. 467 and 471, Penal Code, with reference to attempt to cheat the Loan Office :

Held that forgery of kabala and the presentation of the forged document did not form part of same transaction and that there was misjoinder (Retrial ordered.) (1903) 30 C 822 (829, 830) : 7 C W N 639.

2. Proof of offence

——S. 82 (c).— In order to establish an offence under S. 82 (c), it is not enough to prove merely the assumption of a fictitious name. If is essential to prove further that the assumed name was used as a means of falsely representing another individual. AIR (Vol 22) 1935 Mad 913 : 1935 M W N 1162 . 42 L W 662 : 159 Ind Cas 155 (1).

3. Specification of offence.

——S. 82—Abetment—Omission in charge—Effect.

Where it is proved that the accused abetted another person to personate him as a third party, in order to get a document registered, and rendered himself liable for punishment under S. 82 (d), but the charge did not specify the offence of abetment.

Held, that as the shortcomings of the charge neither misled the accused in any way nor occasioned a failure of justice the non-specification of the offence of abetment was not material. A I R (Vol 20) 1933 Cal 481 : 34 Cr L J 526 : 143 Ind Cas 15 (DB).

——S. 82 — Forgery — Using as genuine forged document.

It was alleged by the prosecution that the accused had forged the registration, endorsement and stamp on the back of Kabala by which he had sold certain lands to D, and that he had produced before a Sub-Registrar a forged mortgage-deed whereby he purported to mortgage to D the identical lands sold under the Kabala.

The accused was charged and tried in one trial on charges under Ss. 467 and 468, Penal Code in respect of forgery of the Kabala and under S. 82, Registration Act and Ss. 467 and 471, Penal Code with reference to attempt to cheat the Loan Office,

Held ,that forgery of Kabala and the presentation of the forged document did not form part of the same

transaction and that there was misjoinder. (Retrial ordered). (1903) 30 Cal 822 (829, 830) : 7 C W N 639.

4. Sentence.

——S. 82 — Enquiry under S. 35 (2) — Person telling lie not to benefit himself or cheat any one but to save his sisters (Muhammadan ladies not accustomed to go to office) from the trouble of turning up before the Registrar.

Held, that though it was an offence under S. 82, yet it was not a serious one. [Conviction upheld and accused sentenced to imprisonment for period already undergone]. A I R (Vol 23) 1936 Cal 418 : 37 Cr L J 1151 : 40 C W N 1059 : 165 Ind Cas 415 (DB).

5. Sanction.

——S. 82—Permission under S. 83 is not necessary for the institution of a prosecution by a private person for an offence under S. 82. A I R (Vol 30) 1943 Pat 227 : 22 Pat 95 : 44 Cr L J 652 : 9 B R 434 : 10 CLT 37 : 207 Ind Cas 552 (DB).

——S. 82 — No sanction is required for a prosecution under S. 82. AIR (Vol 11) 1924 Rang 213 : 76 Ind Cas 431 : 1 Rang 299 : 25 Cr L J 191.

——S. 82 — No prosecution for any offence specified in S. 82 can be commenced without the sanction of one or other of the Officers referred to in S. 83. A I R (Vol 8) 1921 All 205 : 64 Ind Cas 142 : 19 A L J 813 : 22 Cr L J 750.

——Ss. 82, 83—S. 83 of the Act lays down that a prosecution for any offence under the Act coming to the knowledge of the Registering Officer in the official capacity may be commenced by or with the permission of certain Registration Officers specified in the section. The word "Sanction" is not used at all. All that is required before a prosecution under the Registration Act can be commenced is that permission should be given by a Registration Officer mentioned in S. 83 of the Act. AIR (Vol 4) 1917 All 410 : 39 All 293 : 15 A L J 136 : 18 Cr L J 546 : 39 Ind Cas 690.

——Ss. 82 and 83—Sanction—Jurisdiction.

No proescution of an offence under S. 82 can be initiated without the permission of some Registering authority mentioned in S. 83. A I R (Vol 3) 1916 All 64 : 38 All 354 : 14 A L J 412 : 17 Cr L J 465 : 36 Ind Cas 145.

6. Jurisdiction of Registration Authority.

——S. 82—Falsity of recitals.

Sub-Registrar cannot enquire into truth or falsity of recitals, as false recital is no offence.

The proceeding or enquiry in S. 82 (a) must be a proceeding or enquiry as prescribed by the Act. AIR (Vol 11) 1924 Pat 754 : 5 P L T 372 : 1924 P H C C 199 : 2 Pat L R Cr 162 : 25 Cr L J 636 : 81 Ind Cas 124.

——S. 82 — High Court cannot interfere with Registrar's order.

The District Registrar examined witnesses and made a full inquiry and then proceeded to enquire into the whole case ; and he came to a finding that the documents in question ought to be cancelled and that they could not be registered. He, therefore, upset the order of the Special Sub-Registrar directing registration and at the same time refused to sanction the prosecution for falsely denying execution, under Section 82 of the Registration Act.

Held, District Registrar has given good reasons in that judgment and until that judgment is upset by a proper authority, either by the Board of Revenue or by a decree of a Civil Court, that judgment is a good judgment. That being so, and the High Court being unable to go into the reasons for which that finding was come to, High Court cannot interfere with that part of the order which refused to accord sanction. The District Registrar acts as a Revenue Court, and there can be no doubt that High Court has no jurisdiction to interfere with orders passed by the Revenue authorities in their Revenue administration or by the Revenue Courts. The order passed by the District Registrar may have been without jurisdiction but the remedy for the petitioner was either to approach the Board of Revenue to get the order set aside as being without jurisdiction, or, if necessary to file a suit in the Civil Court. A I R (Vol 10) 1923 Pat 155 : 23 Cr L J 415 : 67 Ind Cas 511.

7. Denial of execution.

——S. 82—Denial of execution—Sanction—Prosecution—Suit to declare forgery —Stay of prosecution.

A prosecution for falsely denying execution of a document sanctioned by the Registrar and commenced before a Magistrate should be stayed pending a suit by the accused to declare the document a forgery. (1900) 5 C W N 44 (45) (DB).

8. Limitation.

——S. 82 — Prosecution under — Time for ordering prosecution—Denial of document—Refusal to register—Appeal from the refusal—Limitation.

On the petitioner denying the execution of a document in favour of A before the Sub-Registrar that officer refused to register the document. Thereupon A lodged a complaint against the petitioner for cheating under S. 417, I.P.C., which was dismissed under Ss. 203 and 205, Criminal P. C., on the 26th March 1906. On the 27th April 1906, A appealed to the special Registrar who rejected the appeal for not having been preferred within 30 days from the Sub-Registrar's refusal to register, but at the same time submitted a report to the District Registrar which ultimately led to an enquiry with result that a proceeding was drawn up against the petitioner under S. 82 of the Registration Act.

Held,—that under the circumstances the petitioner shall not be prosecuted under S. 82 of the Registration Act. That the presentation of an appeal to the Special Registrar after the time limited therefor against the refusal of the Sub-Registrar to register a document on denial of execution, does not give any locus standi for the institution of a proceeding for enquiry as to the execution of the document. (1906) 12 C W N 47 (49) (DB).

9. Scope.

——S. 82 — Illegal prosecution—Order for prosecution under Ss. 82 and 471, I. P. C. — Former found illegal under S. 74 — Order under S. 471, I. P. C. remains.

Where a person is ordered to be prosecuted under S. 82, Registration Act and S. 471, I. P. C., and the prosecution under S. 82 is illegal, having regard to the provisions of S. 74, Registration Act, the illegality or irregularity in no way affects the validity of the order of prosecution under S. 471, I. P. C. and if the prosecution under S. 82 is set aside the part of the order under S. 471 remains. For Penal Code has no relation to Registration Act and is governed by principles entirely different from those governing prosecution under S. 82. A I R (Vol 16) 1929 Pat 500 : 119 Ind Cas 888 : 10 P L T 889 : 30 Cr. L J 1101 : 1929 Cr C 252.

——S. 82—Stay of criminal trial—When High Court can interfere.

There is no invariable rule as regards the staying of criminal proceedings (under S. 82, Registration Act) pending the issue in a civil suit. This is a matter for the discretion of the trial Court and in Criminal Revision, High Court cannot interfere with the order unless the Court has in exercise of its jurisdiction acted in a manner which is unjudicial. A I R (Vol 16) 1929 Pat 500 : 119 Ind Cas 888 : 10 P L T 889 : 30 Cr L J 1101 : 1929 Cr C 252.

——S. 82—Fresh trial — Acquittal under Ss. 419 and 114, Penal Code — Subsequent trial under S. 82 (c), Registration Act, is not barred.

Where a person executed a mortgage and registered it and was subsequently tried and acquitted under Ss. 419 and 114, Penal Code.

Held, that his subsequent trial under S. 82 (c), Registration Act, was not barred as he committed two entirely distinct offences; one was cheating by personation when he executed the deed of mortgage; and the other an offence under the Registration Act) when he represented himself at the registration office to be another, and that the offence of personation at the registration office was a totally different and subsequent one to the offence of cheating. A I R (Vol 14) 1927 Rang 303 : 105 Ind Cas 236 : 6 Bur L J 201 : 28 Cr L J 908.

——S. 82—S. 83 does not bar a prosecution by a private person for an offence under S. 82. A I R (Vol 8) 1921 Mad 140: 62 Ind Cas 582 : 13 M L W 195: 1921 M W N 144 : 22 Cr L J 566 : 40 M L J 211 (DB).

——S. 83.

——S. 83—Scope and applicability.

Section 83 is not a prohibitory but an enabling section. The section does not inhibit a prosecution by a private person but enables a prosecution to be commenced by or with the permission of the authorities specified therein where an offence comes to the knowledge of a registering officer in his official capacity. The section has no application whatever to cases in which offences are committed under the Act but do not come to the knowledge of the registering officer. AIR (Vol 32) 1945 Nag 200 : 1945 N L J 231: ILR (1945) Nag 542.

——S. 83—Applicabitity.

Section 83 deals only with a prosecution for any offence under the Act "coming to the knowledge of a Registering Officer in his official capacity." But the section has no application whatever to cases in which offences are committed under the Act, but those offences do not come to the knowledge of the Registering Officer: A I R (Vol 24) 1937 Bom 191 ; 39 Bom L R 85 : I L R (1937) Bom 859 · 38 Cr L J 714 : 169 Ind Cas 41 (DB).

——S. 83—Offences coming to knowledge of Registering Officer in official capacity — His sanction for prosecution, if necessary.

Section 83 is not prohibitory either in terms or in intention. On the contrary, it is an enabling section and provides that a prosecution for any offence which comes to the knowledge of a Registering Officer in his official capacity may be commenced by or with the permission of specified Registration Officers. Consequently, sanction of Registration Officer may or may not be obtained for prosecution for offences coming to his knowledge in his official capacity. A I R (Vol 24) 1937 Bom 191 : 39 Bom L R 85 : ILR (1937) Bom 359 : 38 Cr L J 714 : 169 Ind Cas 41 (DB).

——Ss. 83, 81 and 82 — Prosecution under S. 83— Previous sanction of Registration Authorities — Necessity of— Offences under Ss. 81 and 82—Nature of.

It is absolutely essential that permission of the Registration Authorities should be obtained before the prosecution of a person under S. 83. Prosecution under S. 83 without such previous sanction is illegal. When it has not been obtained, subsequent sanction will not cure the want of it. Similarly, neither S. 532 nor S. 537, Criminal P. C , will cure the defect of want of such permission.

The offences contemplated in Ss. 81 and 82 are principally offences committed against the Registering Authorities, though, of course indirectly private persons may also be injured thereby. Consequently, a person wishing to take advantage of the provisions of Ss. 81 and 82 should follow the procedure laid down in the Act. A I R (Vol 21) 1934 All 963 : 36 Cr L J 137 : 1934 A L J 965 : 4 A W R 524: 57 All 412 : 152 Ind Cas 667 (FB).

—— S. 83 – Interpretation.

"May" in S. 83 should be read as "must be"— Prosecution under S. 83 cannot be commenced by private person without permission, under S. 83. 11 Cal 566 (FB) ; 40 Mad 880 ; A I R 1921 Mad 140 ; A I R 1924 Pat 754 ; A I R 1925 Nag 344, Diss. from. A I R (Vol 14) 1927 Rang 61 : 99 Ind Cas 401 : 4 Rang 437 : 5 Bur L J 156 : 28 Cr L J 145 (DB).

——S. 83—Sanction.

Permission under S. 83 of the Registration Act is not a preliminary requisite for the institution by a private person of proceedings for an offence under S. 82 of the Act. 10 Cal 604 and 37 All 107, Diss. A I R (Vol 12) 1925 Nag 344 : 87 Ind Cas 913 : 26 Cr L J 1025 : 21 N L R 167.

——S. 83 — For instituting a complaint under S. 82 no permission is necessary under S. 83. 38 All 354 not Foll.; A I R (Vol 11) 1924 Pat 754 : 81 Ind Cas 124 : 5 P L T 372 : 1924 P H C C 199 : 2 Pat L R Cr 162 : 25 Cr L J 636.

——S. 83—Sanction—Necessity of.

For the institution of proceedings by a private person for offences under the Act the permission of the officers specified in S. 83 is not a preliminary requisite. The words 'may be commenced' in the section do not exclude complaints by private persons. A I R (Vol 5) 1918 Mad 439 : 40 Mad 880 : 21 M L T 118 : 5 L W 414 : 18 Cr L J 416 : 38 Ind Cas 976 (DB).

——S. 87.

1. Scope and applicability.
2. Defect of procedure

See also N. 1.

3. Defect of jurisdiction.
4. Irregularity regarding stamps.

1. Scope and applicabitity.

——S. 87—The operation of S. 87 does not extend to those cases in which an application for registration is made out of time. AIR (Vol 26) 1939 Pat 96 : 5 B R 110 : 179 Ind Cas 505 (DB).

——S. 87—Defect curable.

Registration, to be effective, must be in accordance with the provisions of the Registration Act, and if it is not, and if the defect is not curable as a defect of procedure under S. 87, then S. 49 applies and the document cannot be used for any of the purposes specified therein. Section 87 deals with defects of procedure and if the defect is one of jurisdiction as opposed to one of procedure, then it is not curable. AIR (Vol 25) 1938 Nag 550 : I L R (1940) Nag 74 : 1938 N L J 403 : 181 Ind Cas 24 (DB).

——S. 87—Unless there is anything contrary on the record, the presumption is that an official has been duly appointed by the Registrar. Even if all the necessary qualifications to give power to the Registrar were not fulfilled, still S. 87 would cover any defect in such appointment. AIR (Vol 22) 1935 Lah 301 (DB).

——S. 87—The section does not apply when the presentation is out of time. AIR (Vol 20) 1933 Rang 5 : 11 Rang 15 : 141 Ind Cas 705.

——S. 87—Section 87 does not apply where the facts of the case do not show a mere defect in procedure but disclose a want of jurisdiction in the Registering Officer.

Where a power-of-attorney executed on 9th February 1910, authorised the agent to present for registration a mortgage-deed which had been executed on 8 February 1910, and the words "8th February, 1910," in the power-of-attorney were altered to "4th October 1910" and a mortgage-deed executed on 4th October 1910, was presented for registration by the

agent under the same power-of-attorney and the deed was registered by the Registering Officer :

Held, that as the deed was not registered in accordance with law, it was not a registered document and no mortgage was effected thereby.

Held, further, that S. 87 had no application to the case as there was a want of jurisdiction in the Registering Officer. AIR (Vol 18) 1931 P C 52 : 35 C W N 354 : 53 C L J 198 : 60 M L J 441: 1931 M W N 241 : 8 O W N 548 : 33 L W 596 : 33 Bom L R 434 : 1931 A L J 489 : 12 P L T 543 : 10 Pat 481 : 58 I A 58 : 131 Ind Cas 321.

——S. 87—Fraud on Registrar—Effect of.

Fraud on the Registrar effecting registration of a document is equivalent to non-registration. A I R (Vol 6) 1919 Oudh 418 : 21 O C 341 : 50 Ind Cas 220.

——S. 87—It is questionable whether S. 87 of the Regn. Act can be extended to cure the short-coming of persons who apply to have documents registered. (1909) 13 C W N 722 : 4 Ind Cas 69 (DB).

2. Defect of Procedure.

See also N. 1.

——Ss. 87 and 32—Deficiency in competency of person presenting document for registration.

The presentation of a document by a person legally competent to do so is the indispensable foundation of the authority of the registering officer to register the deed, and deficiency in that regard is not a mere defect of procedure curable under S. 87 of the Registration Act. ILR (1948) 1 Cal 13: 51 C W N 675 (DB).

——S. 87—Charge entered into wrong book by mistake of the Registration Department — Subsequent mortgage — No application by mortgagee for encumbrance certificate — Suit to enforce charge—Mortgagee if can plead want of notice of charge—Validity of charge if affected.

A stakeholder of a kurivari entered into an agreement with the subscribers and created a charge over certain of his properties as security for the benefit of the subscribers. This charge was entered into Book No. IV instead of Book No. 1 by a mistake of the Registration Department. The same property was later mortgaged to a third party who did not take care to apply for an encumbrance certificate prior to taking the mortgage. After thirteen instalments had been paid and three remained unpaid, the stakeholder being dead, a new arrangement was entered into with his son, but there was nothing to show that the subscribers intended to abandon the charge created in their favour. In a suit by some of the subscribers, to recover the money paid by them it was contended by the mortgagee's representative that as he had no notice of the charge it was not binding on him and that the old agreement regarding the charge had been terminated by the new agreement.

Held, (1) that the mistake of the registering officer could not render the registration invalid and the transaction would be binding provided it did not injure innocent third parties. But the subsequent mortgagee by his failure to apply for an encumbrance certificate must be deemed to have had notice of the charge and hence the charge was binding on the parties. (2) In the circumstances, the security created for the benefit of the subscribers was not abandoned by them under the new agreement and they were entitled to the benefit of the charge created under the old agreement. AIR (Vol 34) 1947 Mad 175 : 1946 M W N 751: 59 L W 661: (1946) 2 M L J 355.

——S. 87—Improper registration — Remedy.

Where a Sub-Registrar of a sub-district having no jurisdiction to accept for registration a document has wrongly accepted and duly registered it, the District Registrar having control over such Sub-Registrar and the Sub-Registrar by whom the document ought to have been registered, can remedy the wrong and register the document. If, instead of registering it himself, he directs the latter Sub-Registrar to register it, it is mere irregularity curable by S. 87. A I R (Vol 27) 1940 Nag 13 : 1939 N L J 520 : I L R (1940) Nag 74 : 187 Ind Cas 295 (DB).

——S. 87—M making gift in favour of S and presenting deed for registration but withdrawing it—On his death within seven days, S presenting deed for registration — Sub-Registrar refusing registration — Registrar, on appeal, remanding case — Notices sent to heirs of M who appearing and objecting on ground that they were not impleaded within four months of execution of deed :

Held, that the failure to get the representatives of the deceased executant impleaded within four months from the date of execution was a mistake of procedure on the part of the Sub-Registrar and no responsibility lay on S in this respect; S 87, therefore, applied and the action of the Sub-Registrar in registering the document could not be deemed invalid when the only objection was that there was a defect in procedure.

Held, also that the Courts below were justified in holding that failure to raise the point of non-execution amounted to a recognition on the part of the heirs of M that they had no grounds to deny execution. AIR (Vol 27) 1940 Oudh 318 : 1940 A W R 264: 1940 O W N 600 : 188 Ind Cas 666 (DB).

——S. 87—Entry in wrong register — Validity.

The bona fide error of the registering officer in entering the document in Book 4 instead of Book 1, would not affect the validity of the registration of the document. AIR (Vol 22) 1935 P C 165 : 1 B R 822 : 1935 O W N 952 : 39 C W N 1191 : 1935 A L J 1005 : 42 L W 474 : 1935 A W R 1177 : 69 M L J 503 : 1935 M W N 1145 : 37 Bom L R 833: 16 P L T 739 : 62 I A 265 : 63 Cal 1 : 157 Ind Cas 419.

——S. 87—Applicability.

In seeking to apply S. 87, it is important to distinguish between defects in the procedure of the Registrar and lack of jurisdiction. Where the Registrar has no jurisdiction to register, as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction or where the presentation is out of time, the section is imperative. On the other hand, if the Registrar has jurisdiction in the exercise of it, the section takes effect.

Where a deed, after being duly attested, was presented for registration to the Sub-Registrar by one of the mortgagees and he registered it in the absence of the executant :

Held, that the defect being only one of procedure, the registration was not illegal. AIR (Vol 22) 1935 Lah 416 : 16 Lah 1019 : 38 PLR 35 : 157 Ind Cas 78 (DB).

——S. 87 — Death of executant — Registration on admission by person who is not really the legal representative.

The defect is merely one of procedure falling under S. 87 and the document is not invalid. AIR (Vol 21) 1934 Mad 425 : 39 LW 715 : 66 MLJ 677 : 1934 MWN 624 : 149 Ind Cas 1174.

——S. 87 — Where the executant dies before the document is registered, it is not incumbent that all his representatives should join in presenting the document for registration; and supposing that it is so incumbent, non-joinder of all is a mere defect in procedure curable under S. 87. AIR (Vol 19) 1932 Cal 110 : 58 Cal 876 : 133 Ind Cas 191 (DB).

——S. 87—Registrar registering a document which was registrable by Sub-Registrar — Omission to state that the Registrar was acting under S. 30 :

Held, that the registration was valid. AIR (Vol 18) 1931 Cal 478 : 58 Cal 133 : 133 Ind Cas 110 (DB).

——S. 87—Document presented by an unauthorised person — Document returned and such person handing it over to the executant—After 3 days, the Registrar going to the house of the executant who then presenting the document to the Registrar—Registrar reading out the document and registering it and entering the particulars :

Held, that though there was an irregularity, it was cured by S. 87 and the registration was not invalid. AIR (Vol 18) 1931 Lah 677 : 36 P L R 371 : 132 Ind Cas 881 (DB).

——S. 87—Where a Registering Officer acts with due care but takes a mistaken view of the law, the mistake must be treated as a defect in his procedure, to which the provisions of S. 87 of the Registration Act apply. AIR (Vol 18) 1931 Nag 159 : 27 NLR 116 : 134 Ind Cas 286.

——S. 87 — Section applies to defects in procedure and not to defects in jurisdiction.

In seeking to apply S. 87 it is important to distinguish between defects in the procedure of the Registrar and lack of jurisdiction. Where the Registrar has no jurisdiction to register, as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction or where the presentation is out of time, S. 87 is inoperative. On the other hand, if the registrar having jurisdiction has made a mistake in the exercise of it, S. 87 takes effect.

Where, therefore, a document not duly stamped is admitted for registration the mistake is an error in procedure and is cured by S. 87. AIR (Vol 16) 1929 PC 279 : 58 MLJ 59 : 30 MLW 481 : 6 O W N 869 : 56 IA 379 : 51 CLJ 6 : 34 CWN 6 : 1929 MWN 941 : 7 Rang 624 : 32 Bom LR 117 : 120 Ind Cas 645.

——S. 87 — Section 49 (2), Tenancy Act, lays down the way in which a registering officer must satisfy himself that proper sanction has been given to the transfer of the right to occupy sir land before registering a document purporting to transfer that right, that is, it regulates the procedure and nothing else. If, therefore, a registering officer commits a mistake in following the procedure the registration is not invalidated thereby. AIR (Vol 15) 1928 Nag 283 : 111 Ind Cas 148 (DB).

——S. 87—Denial by some executants — Two of the executants not admitting execution — Irregularity cannot be cured under S. 87.

Where only the Chairman of the Chittagong Municipal Committee admitted the sale deed before the Sub-Registrar, but neither the Vice-Chairman who signed it in the capacity of a Commissioner as required by S. 37 of Bengal Municipal Act, nor the vendee admit its execution before the Sub-Registrar. Held, as the registering officer never registered the document as regards the executants other than the Chairman, although the indenture took effect as a deed executed and registered by the Chairman, it had no legal operation as a deed executed and registered by the Vice-Chairman or by the purchaser. In such circumstances, there is no room for the suggestion that what had happened is a defect in procedure curable by S. 87 of the Indian Registration Act. It cannot be disputed that where by the constitution of a corporation any special mode of execution of its deed is prescribed or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding, be executed in the manner or with every formality so prescribed. AIR (Vol 10) 1923 Cal 35 : 50 Cal 180 : 36 Cal LJ 109 : 70 Ind Cas 794 (DB).

——S. 87—Registration not invalidated by defect in procedure.

Where a document is presented by a person duly authorised to present it, who thus initiates the jurisdiction of the Registering Officer, and who does all that he is required to do under the Act and is guilty of no shortcoming thereunder, it would be contrary to the scheme of the Act, and it could not have been the intention of the Legislature that he should be punished for any error or defect in the procedure of the Registering Officer subsequent to the presentation. If the Registering Officer committed an error, it must be held to be an error, in the procedure to be cured by S. 87 of the Act. AIR (Vol 10) 1923 Rang 176 : 1 Rang 22 : 2 Bur LJ 69 : 74 Ind Cas 82 (DB).

——S. 87—Where a Sub-Registrar, by virtue of R. 174 of the rules made under S. 69, is incompetent to register a wakfnama, but overlooking his own interest or regarding it as an interest which created no disqualification, in perfect good faith, effects the registration himself, the defect is one in the procedure and is curred by S. 87. AIR (Vol 8) 1921 PC 105 : 39 MLJ 263 : 42 All 609 : 47 IA 224 : 18 A L J 1089 : 32 CLJ 471 : 1 PWR 1921 : 28 MLT 220: 12 MLW 539: 1920 MWN 565 : 25 CWN 122 : 57 Ind Cas 329.

——S. 87—Document duly stamped and registered—Effect.

If a document, presented to the Court appears to be duly stamped and registered, the Court cannot take cognizance of any irregularity in its registration. (1912) 36 Bom 564 : 14 Bom LR 45 : 14 Ind Cas 353.

——S. 87 — Omission to use a seal as required by S. 50—Irregularity—Cure of.

The sealing of a deed is not an essential part of the act of registration. The omission of the registering officer to seal a deed is a mere defect of procedure and the defect is cured by the provisons of S. 87 of the Registration Act. (1902) 6 CWN 528 (530).

——S. 87 — Irregularity, cure of — Irregularity — Agent—Principal's death — Registration.

A Registrar who registers a deed at the request of one whom he knew to derive his power of attorney from a dead man, and accepts his admission of the dead man's execution of the deed, disregards Ss. 32 and 34 of Act III of 1877, and the registration is invalid. (1901) 23 All 233 (241, 242) : 28 I A 15 : 5 C WN 177 : 11 MLJ 58 : 3 Bom LR 114 (PC).

3. Defect of jurisdiction.

——Ss. 87, 72 — Registration of document in place where no part of property exists — Curing of defect —Re-registration—Limitation—Suit for compulsory registration—Competency.

If a document is wrongly registered at a place where no portion of the property is situate within the jurisdiction of the Sub-Registrar there, because every one concerned, including the Sub-Registrar, has made an innocent mistake in good faith, the defect is one of jurisdiction and cannot be cured under S. 87 and the registration of the document is wholly inoperative to effect the transfer.

If it is held by a Court competent to decide that the registration was invalid because the Sub-Registrar had no jurisdiction to accept the document for registration, the property comprised in it lying outside the territorial limits of his jurisdiction, that is enough to enable the parties to present the document for re-registration. No question of limitation can arise because there is no limitation for the re-registration of a ducument. If, however, registration is refused and upon appeal, the Registrar also refuses to direct registration, then a civil suit will lie under S. 72 to compel registration. AIR (Vol 25) 1938 Nag 550 : I L R (1940) Nag 74 : 1938 N L J 403 : 181 Ind Cas 24 (DB).

4. Irregularity regarding stamps.

——S. 87—Bond on wrong stamp.

The fact that a mortgage bond is written on a wrong stamp and is, therefore, not properly stamped at the time when it is registered, does not invalidate

the registration. AIR (Vol 15) 1928 Rang 50 : 5 Rang 666 : 107 Ind Cas 168 (DB).

——S. 87 — Bill of exchange—Letter of hypothecation registered but not stamped—Admissibility.

Where a registering officer having examined a document presented to him for registration came to the conclusion that being a letter of hypothecation accompanying a bill of exchange it was exempt from duty under Art. 40, Ex. (2) and accordingly certified on the bill of exchange that it was properly stamped and registered the letter of hypothecation without requiring any further duty to be paid in respect of it.

Held, under S. 87 of the Registration Act improper registration could not possibly affect the validity of the document. AIR (Vol 6) 1919 Cal 235 : 23 C W N 534 : 29 C L J 305 : 51 Ind Cas 88 (DB).

—S. 89.

——S. 89 — Copy of order sanctioning loan not sent to Sub-Registrar — Whether affects operation of Land Improvement Loans Act, S. 7.

There is no provision in the Land Improvement Loans Act which requires that a copy of the order sanctioning the loan should be sent to the Sub-Registrar. The bond itself is not compulsorily registrable under S. 17 (2) (ix), and the failure of the Collector to send a copy to the Sub-Registrar for registration cannot affect the operation of S. 7, Land Improvement Loans Act. A I R (Vol 26) 1939 Bom 183 : 41 Bom L R 257 : 182 Ind Cas 635.

—S. 90.

——S. 90—Exemptions under S. 17.

It could not have been the intention of the legislature that the exemptions set out in S. 90, so far as they relate to Government grants should be co-extensive only with the exemptions contained in Cl. (vii), sub-s. (2), S. 17 : 36 All 176, Diss. AIR (Vol 14) 1927 Pat 319 : 6 Pat 446 : 104 Ind Cas 209 (DB).

——S. 90—Interpretation—Documents exempt from registration — What are — Rule of ejusdem generis if applicable.

The document which it is intended to exclude from the necessity of registration under S. 90 (d), are those which purport to be, or are evidence of, grants or assignments by Government, of any interest in land, including sanads and inam title-deeds.

The words "other documents purporting to be or to evidence grants or assignments by Government of land or any interest in land" are not words of such general import in themselevs as to afford any scope for the application of the rule of ejusdem generis. They afford in themselves a precise definition of the classes of documents which it was intended to exempt and there is no reason for restricting their operation to a class of documents which has not been satisfactorily defined. A I R (Vol 14) 1927 Pat 319 : 6 Pat 446 : 104 Ind Cas 209 (DB).

——S. 90—Lease by Government.

The provisions of the T. P. Act relating to registration as merely supplementary to the provisions of the Indian Registration Act and when so read a lease by Government does not require registration. AIR (Vol 10) 1923 Oudh 114 : 9 O L J 629 : 27 O C 64 : 74 Ind Cas 369.

——S. 90—Exemption from registration.

A Rajinama by a Khatidar of unalienated lands, subject to S. 74, Bombay Land Revenue Code abandoning his rights to another subject to the payment of Revenue need not be registered under S. 90, Registration Act. AIR (Vol 3) 1916 Bom 59 : 41 Bom 170 : 18 Bom L R 976 : 38 Ind Cas 838 (DB).

——S. 90 (1) (d)—Exemption.

Where the wording of the leases so clearly and definitely refers to the use and occupation of each of the buildings, they must be taken as leases of immovable property falling under S. 17 (1) (d) but not exempt under S. 90 (1) (d) as grant or assignments of interest in land. A I R (Vol 23) 1936 Lah 26 : 38 P L R 770 : 161 Ind Cas 918.

——S. 90, (1) (d)—Lease by Government—Registration.

The word 'grants' of assignments of interest in S. 90, (1) (d) of the Registration Act include a lease by Government. 36 All 176, Diss. AIR (Vol 7) 1920 Mad 413 : 43 Mad 65 : 37 M L J 332 : 53 Ind Cas 345 (DB).

—S. 97.

——S. 97—Registered document, when takes effect—Position of parties and third parties.

It is undoubtedly true that as between the transferor and the transferee, the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property both of which are registered, the one executed earlier in point of time will have priority, but as regards third party, the point of time at which the deed is to be effective is when it is registered. AIR (Vol 28) 1941 Cal 78 : ILR (1941) 2 Cal 270 : 44 C W N 802 : 193 Ind Cas 530 (DB).

REGISTRY OF TENANT

See Landlord and Tenant.

REGULATIONS

See also under respective Provinces.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA

——Art. 24.

——Art. 24—Turning-points and bends.

Article 24 as modified by R. 5 of Local Rules governing navigation in the Hughli—Question regarding "turning points and bends" mentioned in R. 5 must be regarded from practical stand-point of navigator — Prohibition in R. 5 cannot be supposed to extend to all parts of river where channel is not completely straight. (Interpretation of R. 5 indicated). AIR (Vol 25) 1938 P C 263 : 4 B R 819 : (1938) 2 M L J 992 : 43 C W N 29 : 69 C L J 101 : 32 S L R 954 : 176 Ind Cas 886.

——Art. 28.

——Art. 28—Failure to give sound signals to country craft — Whether breach of Regulation.

There is nothing in Art. 28, Regulations for Preventing collisions at Sea, which exempts a steamer from giving sound signals to a Bungalow. The regulations have to be followed. A general practice to ignore them in certain cases is no answer to the charge that a breach of the regulations is prima facie negligence. The burden lies upon the party failing to give signals to show that failure to give sound signals did not contribute to the collision. AIR (Vol 26) 1939 Sind 349 : I L R (1940) Kar 53 : 189 Ind Cas 9.

RE-HEARING

See (1) Civil P. C., S. 151; Ors. 41, 47.
(2) Criminal P. C., Ss. 369, 428, 439, 440.
(3) Presidency Small Cause Courts Act, S. 38.

REIMBURSEMENT

See (1) Contract Act, Ss. 69 and 70.
(2) T. P. Act, Ss. 72 and 76.

REJECTION OF PLAINT

See Civil P. C, O. 7, Rr. 11 to 13.

RELATIONSHIP

See (1) Evidence Act, 1872, S. 32.
(2) Landlord and Tenant.

RELEASE

See also (1) Landlord and Tenant.
(2) Registration Act, S. 17.
(3) Stamp Act, S. 55.

——Oral — Validity of inference from conduct — Writing unnecessary.

A surrender or relinquishment of a lease, does not require to be in writing but can be inferred from the acts of the parties. AIR (Vol 6) 1919 Cal 694 : 22 C W N 441 : 44 Ind Cas 297 (DB).

——Effect of — Title if passes.

Relinquishment of an interest is valid to pass title in the absence of satisfactory proof that there was no intention to convey any interest under the document. AIR (Vol 4) 1917 Mad 671 : (1916) 1 M W N 9 : 33 Ind Cas 188 (DB).

——Will — Legatee — Surrender of right under — Bequest.

It is open to a person entitled to an absolute estate under a bequest by his father to surrender his rights thereunder and allow his brothers to share equally with him in the estate. (1913) 20 Ind Cas 429 (DB) (Oudh).

——Effect of — Title cannot pass by.

Title cannot pass by a mere release where the law requires a conveyance.

Where a partner gives a release to his co-partners and the latter brings a suit for moneys due to the firm. Held, that the claim could not be sustained as there was no assignment of the interest of the partner in favour of the plaintiffs, that no title vested in them under S. 130 of the T. P. Act and that they were not entitled to maintain the suit. (1912) 16 C L J 436 : 16 Ind Cas 440 (DB).

——Nature of—If operates as a conveyance.

A release is at best only an admission by the executing party that he has no interest in the property and does not operate as a conveyance. (1912) 22 C L J 380 : 13 Ind Cas 455 (DB).

RELEASE, DOCTRINE OF

See (1) Civil P. C., O. 22, R. 4.
(2) Deed—Construction.
(3) Landlord and Tenant.
(4) Registration Act, Ss. 17 and 49.
(5) Stamp Act, S. 55.

RELEVANCY

See Evidence Act, Ss. 5 to 16.

RELIEF

See (1) Civil P. C., S. 151; O. 7, R. 7.
(2) Equity.
(3) Specific Relief Act.

RELIGION, OFFENCES RELATING TO

See Penal Code, Ss. 295 to 298.

RELIGIOUS AND CHARITABLE ENDOWMENT

See (1) Charitable Endowments Act.
(2) Civil P. C., S. 92.
(3) Hindu Law—Religious Endowment.
(4) Madras Hindu Religious Endowments Act.
(5) Muhammadan Law—Waqf.
(6) Religious Endowment.
(7) Religious Endowments Act.
(8) Trusts.

RELIGIOUS BROTHERHOOD

See (1) Hindu Law—Religious Endowment.
(2) Mahomedan Law—Waqf.

RELIGIOUS ENDOWMENT

See also (1) Charitable and Religious Trusts Act, 1920.
(2) Charitable Endowments Act, 1890.
(3) Civil Procedure Code, S. 92.
(4) Hindu Law—Religious Endowment.
(5) Madras Hindu Religious Endowment Act.
(6) Malabar Law.
(7) Muhammadan Law—Wakf.
(8) Religious Endowments Act, 1863.

1. Alienation.
2. Archakas. See also N. 9.
3. Court's duty.
4. Cypres. See also Muhammadan Law—Wakf.
5. Dedication.
6. Founder's rights.
7. Idol.
8. Mahant.
9. Management. See also N. 16.
10. Manager. See also N. 9.
11. Mosque. See also N. 5 and 20 and Muhammadan Law—Wakf.
12. Mutt. See also N. 8.
13. Property. See also N. 1, 5 and 20.
14. Religious Institution. See also N. 11, 12 and 19.
15. Right to worship. See also N. 2.
16. Shebait. See also N. 1, 5, 10, 17 and 21.
17. Succession.
18. Suit. See also N. 7 and 9 and Civil P. C., S. 92.
19. Temple. See also N. 9.
20. Trust.
21. Trustee.

1. Alienation.

——Representative suit by worshippers or beneficiary for injunction, declaration or possession — Competency—Relief, nature of—Trustee, if party.

Where a trustee has alienated the trust property and therefore, would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit or declines to institute a suit, the worshippers, who are the beneficiaries entitled to participate in the benefits of the institution are entitled to maintain a suit for preserving the trust property or restoring it to the trust either by instituting a suit for declaration or for an injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit and where he is made a party, it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust. Again, in certain circumstances, it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the defendant from interfering with their right of worship, which is a personal right, without making the trustee a party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser. A I R (Vol 24) 1937 Mad 819 : 46 L W 270 : (1937) 2 M L J 301 : 1937 M W N 1176 : 173 Ind Cas 586.

——Order of Court enabling shebait to mortgage is prima facie evidence of due and proper enquiry as to necessity. (1936) 63 Cal 454.

——Mortgage—Decree for sale—Propriety of.

It is not an inflexible rule that the property belonging to a temple is not liable for sale in pursuance of a mortgage. Where the property mortgaged does not represent the original endowment but was acquired by the temple piecemeal as a commercial investment for the purpose of increasing its resources, there is no necessity for safeguarding this property for the perpetual use of the temple at the expense of the mortgagees who have advanced money on security and for legal necessity and a decree for sale of mortgaged property can be passed. AIR (Vol 21) 1934 Nag 222 : 31 N L R 113 : 152 Ind Cas 362.

——Alienation as private property—Suit by succeeding trustee—Defence—Estoppel.

When a person, assuming the position of trustee in respect of property as to which there was no previous dedication obtains from the Court a declaration that that property is trust property and acts as such trustee, but subsequently alienates the property as his own private property, the alienee is entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not trust property. A I R (Vol 18) 1931 Mad 97 : 1930 M W N 1217 : 60 M L J 155 : 33 L W 485 : 130 Ind Cas 463 (FB).

——Trustee empowered to sell only to purchase mere valuable property—Alienee buying with knowledge of the trust — Alienation set aside — Alienee entitled to refund of sale price.

K, dedicated certain properties to a kattalai in temple whereby he constituted himself as the first trustee and provisions for the succeeding trustees were made in the deed; one of such provisions was "Neither myself nor the managing members of the charity who shall be conducting the charity shall have any right to alienate the same in any manner. Should any such alienation be made it shall not be valid. But myself and those that succeed me as managing members shall have the right to sell the same only if other properties of value equivalent to these charity properties are available and if the income out of such other properties is likely to exceed that of this property; and to buy with the sale proceeds such other properties for the above charity." Of his successors, one alienated, without any necessity, some of the trust properties to a third person who had notice of the trust and the terms of the trust deed, and later on executed a sale-deed thereby conveying his private property to himself as a trustee. A suit by the succeeding trustee was brought to set aside the alienation.

Held, that it was for the alienee to show that the conditions which were required in the deed of trust to validate the transaction existed, for a mere representation and a bona fide belief in the existence of the necessity did not validate the same.

Held further, that the alienation of the trust properties with a view to purchase his own property was invalid and not binding on the trust.

Held also, that on the alienation being set aside the alienee was entitled to be reimbursed with the amount paid as consideration for sale. A I R (Vol 17) 1930 Mad 372 : 117 Ind Cas 139 (DB).

——Permanent lease is not binding on succeeding Mahants, unless for necessity.

It is beyond the power of a mahant of an endowment to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the benefit of an augmentation of a variable rent from time to time unless there is some special circumstance of necessity justifying the permanent lease. Such an act is a breach of duty in the mahant and is void as against succeeding mahants. A I R (Vol 16) 1929 Cal 612 : 34 C W N 135 (DB).

——Alienation by Mahant — Benefit for estate is synonymous with necessity.

The words "for the benefit of the estate" should be construed in a sense almost synonymous with necessity and that they mean something which is necessary for the protection and preservation of the estate. A I R (Vol 16) 1929 Cal 612 : 34 C W N 135 (DB).

——Except for necessity no lease can be granted by the head of a religious institution so as to continue after his death. AIR (Vol 16) 1929 Lah 816: 11 L L J 493 (DB)

——Although the property devoted to religious purposes is, as a rule, inalienable, it is competent to the Court to direct the sale of such property if it is satisfied that the loan was raised for a necessary purpose. AIR (Vol 15) 1928 Pat 543 : 8 Pat 48 : 9 P L T 553 : 112 Ind Cas 438 (DB).

——Permanent lease ancient, and ratified by successive dharmakarthas—Presumption is that grant was for necessity.

Though it cannot be said that the burden, generally speaking, of establishing the circumstances under which the grant of a permanent lease by a trustee of a devasthanam came properly to be made is on those who set up and rely upon such a grant, still when the grant is fairly ancient and successive dharmakarthas have ratified the transaction, there is, generally speaking, a presumption that the grant was made under circumstances of necessity and justification. AIR (Vol 14) 1927 Mad 1188: 1927 M W N 875 (DB.)

——Alienation by manager — Successor can challenge — Time runs from the time latter assumes office — Limitation Act, Art. 144. AIR (Vol 14) 1927 Mad 1163 : 104 Ind Cas 355.

——An alienation by a trustee would not bind the trust. AIR (Vol 13) 1926 Mad 861 : 23 M L W 740 : 96 Ind Cas 105.

——Where properties set apart for a family trust were transferred by way of a permanent lease, and the lessee was subsequently sued for possession.

Held, that he was entitled to the value of the improvements made by him. AIR (Vol 12) 1925 Mad 796 : 21 M L W 256 : 95 Ind Cas 1002

——Trust property descending from Guru to Chela. —Alienation by Chela after Guru's death —Daughters of Guru cannot question it. AIR (Vol 9) 1922 Lah 320 : 4 L L J 67 (DB).

——Dohli tenure — Suit by alience for possession— Defendant can plead non-binding nature of.

The dohli tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the revenue records the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose, for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office the proprietors can eject him and put in some one else under a like tenure. Tenure of this kind cannot be alienated by sale or mortgage, and any alienation of that character, if made by the dohlidar, would be absolutely void. There is, therefore, no reason why the defendant should not be able to impeach the alienation, more especially when we remember that the office of dohlidar is similar to that of a trustee, and that it is open for one trustee to impeach the validity of an alienation made by his predecessor. AIR (Vol 9) 1922 Lah 126 : 25 P L R 1922 : 2 Lah 313 : 65 Ind Cas 252 (DB).

——Perpetual lease — Necessity and benefit of institution — Ejectment suit by succeeding trustee — Limitation Act, Art. 134 - Adverse possession.

A mourasi lease of a debutter property was granted whereby the shebait purported to relinquish all future increment in the value of the property for a little more than 7 years' purchase of rents arising therefrom reserving to them almost the same rent that was being raised before such mourasi. Two of the three shebaits concerned subsequently parted with their interests as lessors to the lessee. No evidence was adduced as to what happened to the money raised by such transaction:

Held, that this was not justifiable in the interests of the endowment. The lease granting the above mourasi recited that the necessity for such a demise

was that the shebaits be called to fill up a tank on the property which they could not afford the means to do.

Held, that such necessity was illusory and the mere advisability of filling up a tank did not constitute a necessity to justify alienation of the trust property. In an ejectment suit, the defendant pleaded exclusive possession and denied the title of plaintiffs as landlords of certain premises, claimed by the latter as appertaining to a debutter of which they were present shebaits. The plaintiffs contended that it was not open to the defendant to fall back upon the title under a mourasi lease purported to have been granted by previous shebaits to the defendant's predecessors in title.

Held, that the effect of the defendant's plea was merely to put the plaintiffs to the proof of title which would justify their prayer for ejectment and did not prevent the defendant from relying on the moursai lease. Where a defendant claims to be in possession of endowed property as a tenant under a mourasi lease granted by previous shebaits and the successors of the latter seek to recover possession on the ground that the lease was invalid.

Held, that if the grant of such a lease constituted an alienation which it was beyond the power of the lessor to make, then the lessee is to be taken as a trespasser and his possession as adverse to the title of the lessors from the date of the grant of the mourasi and limitation would begin to run from that date.

Held, on the evidence, that the mourasi lease granted to the defendant's predecessors in title created a new holding and that the principle laid down did not apply to this case and the suit was barred by Art. 134. Possession of debutter property which is adverse against some of the shebaits of an idol, is necessarily adverse against all of them. (1909) 13 C W N 805 (814, 815) : 3 Ind Cas 93.

——**Conversion — Test — Dealings with property — Release by Government, effect of.**

Held, that in this case the properties if originally debutter have been so converted with common consent. In dealing with a question as to whether properties alleged to be debutter are really debutter or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for consideration. Release by Government is not conclusive evidence of property being debutter. (1907) 12 C W N 98 (102, 103) (DB).

——There is no absolute prohibition against the alienation of endowed property by the Manager for the time being and alienation of endowed property for the necessary purposes of preservation or maintenance of the endowment is lawful. Here a sale of portion for purposes of paying the costs of litigation in which the question at issue was whether the property is debutter or not, was held lawful. (1907) 6 C L J 404 (409) : 11 C W N 489 (DB).

——**Manager or trustee, powers of, to alienate— Expenditure binding on the endowment—Not binding expenses — Civil litigation expenses - Exe ution sale of endowed property, permissibility of—Binding nature of such debt on succeeding trustees.**

Monies applied by a trustee of a Religious Endowment in defending himself or any other parties from a criminal charge, cannot be charged against the endowment as expenditure made for the purpose of the endowment, even though the criminal cases cropped up in the course of protecting the property of the endowment. But expenses incurred in conducting civil litigation for protecting properties of the endowment are binding upon the endowment. With the exception of cases coming under the operation of Bombay Act 6 of 1863, there is no absolute prohibition against the alienation of endowed property by the manager for the time being; and alienation of endowed property is lawful if for the necessary purposes of preserving and maintaining the endowment. Debts contracted for the necessary purposes of preserving and maintaining the endowment would devolve as liabilities on each successor to the trusteeship to the extent of the assets received by him. The endowed property can be sold in execution of a decree obtained on loans contracted for the above-mentioned purposes. 1903 A W N 50 : 25 A 296 (311, 312) (DB).

——**Alienability of property given to a mutt.**

Property given for the maintenance of a mutt is, as a general rule, inalienable in the absence of special circumstances; but such property can be lost by the operation of the statute of limitation. (1902) 4 Bom L R 743 : 27 B 363 (368, 369) (DB) ; See also 23 M 271 (279) : 4 C W N 329 : 10 M L J 29 : 2 Bom L R 597 : 27 I A 69 (PC).

2. Archakas.

See also N. 9.

——**Mortgage of archaka miras by one of the holders of the miras to the other holder—Validity.**

Where one of the holders of archaka miras in a temple mortgaged his rights to the other holder borrowing a certain sum of money from the latter :

Held, that the mortgage was void and not enforceable inasmuch as the holder of a religious office cannot transfer his right to the office for consideration to another person who, though qualified to hold the office is not in the line of succession from the transferor. AIR (Vol 23) 1936 Mad 103: 69 MLJ 888: 1936 M W N 116: 43 LW 331 : 160 Ind Cas 416 (DB).

——**Right of Archaka — Transfer of right— Validity —Mortgagee's right to question validity of transfer.**

Hereditary religious offices are inalienable and no custom qualifying this principle can be upheld if the alienation amounts to a sale for the pecuniary advantage of the holder of the office.

Where a widow who succeeded to her husband's turn of worship in certain temples granted a mortgage over that right in favour of the first defendant s father and the plaintiff who obtained a deed of transfer from the widow of the right of worship sought to redeem the right of worship from the 1st defendant:

Held, that the transfer by the widow to the plaintiff was invalid as it was a sale for consideration effected for the personal benefit of the widow. A I R (Vol 22) 1935 Mad 5 : 1934 MWN 1062: 67 MLJ 759: 40 LW 799 : 153 Ind Cas 464.

——So long as archakas perform duties they ought not to be ousted from possession of inam, and even if there is general trustee, archaka may be trustee for daily worship, and specified services. A I R (Vol 17) 1930 Mad 466 (DB).

——**Suit by Dharamakartas (Vadagalis) for declaration of right of management and injunction restraining archakas of Tengali sect from interfering with their management of Tengali shrine — Issues proper — Question of ritual — C. P. C., S. 11 - Acquisition by prescription of discontinuance of established ritual— Res judicata.**

The plaintiffs (Vadagalais) sued for a declaration that they as Dharmakartas of the Sri Devaraja Swami Temple and of the shrine of the Manavala Mahamuni (situate within the said temple of Sri Devarajaswami), are entitled to the sole management and superintendence of the said shrine of Manavala Mahamuni and of all ceremonies in the said shrine including the annual Tirunakshatram Othsavam and that the defendants 2 to 6 (Archakas—Tengalais) are not entitled to put up pandals or do anything else independent of the plaintiffs in the said shrine either in connection with the annual Tirunakshtram or otherwise and the 2nd to 6th defendants be restrained from so acting independently and from interfering with the plaintiffs' performance of their duties as Dharmakartas; that it be declared that the defen-

dants 2 to 6 are not entitled to carry the idol or Manavala Mahamuni in procession either in the prakaram of Sri Devarajaswami or outside the prakaram during the Tirunakshtram Othsavam or otherwise; and that the 2 to 6 defendants be restrained from carrying the said idol in procession either during the approaching Tirunakshtram Othsavam to be held from the 21st instant or at any other time :"

Held, that in a suit by the Dharmakartas for an injunction to restrain the archakas from interfering with their right of management of Manavala Maha muni shrine, the question as to what processions the said idol is entitled does not arise; and that if the Dharmakartas do not carry out the worship in accordance with established usage, the proper course is for the defendants or other persons interested in such worship as worshippers of the said idol to proceed under the Religious Endowments Act, S. 14, or S. 539, C. P. C.

Moore J.:—A civil court cannot adjudicate as to the rights, processional ceremonies, etc., to which any shrine or idol may be entitled.

Per Sankaran Nair J.: — Whether any decision on the matter of procession between the Dharmakartas (Vadagalais) and Archakas (Tengalais) alone could be binding as between the Vadagalais and Tengalais or any other persons interested in the form or mode of worship in the temple :

Quaere : Whether any decision as to the ritual in a temple arrived at for the purpose of giving a particular relief in a suit can be said to be a decision of a competent court so as to bind the parties in subsequent suits based on a different cause of action for a different relief.

Quaere : Whether, in case the carrying of the idol in procession formed part of the public worship in the temple or was in accordance with established usage, the Dharmakartas can set up their own breach of trust in not so carrying the idol in procession as giving them a prescriptive right in the discontinuance.

Quaere : The question in all such cases is what is the established usage, and in the absence of any such usage what is the worship prescribed in the Sastras. Absence of any procession for a long period of time may be evidence, and even strong and conclusive evidence against such usage, for a usage, however well established, may be discontinued by a community interested in the trust or in the continuance of the usage. But no such discontinuance can be implied where the Dharmakartas, members of a hostile sect, discontinued it, and the discontinuance far from being acquiesced in by the community interested in the worship, was immediately challeged as a breach of trust. (1905) 16 MLJ 150 (158, 159) (DB).

3. Court's duty.

——Power of Court to pass just and proper orders.

Where the suit relates to wakf property, the Court has jurisdiction to pass such order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment asked for by the plaintiff mutwalli. AIR (Vol 18) 1931 Oudh 375 : 8 OWN 722 : 136 Ind Cas 241 (DB).

——Scheme—Interpretation of.

Scheme framed by Chief Court of Lower Burma in Civil Misc. No. 186 of 1919 provides for the filing of affidavits of the Parsi inhabitants who desire to support a particular candidate for appointment as trustee and so it is the intention of the scheme that the information conveyed by those affidavits should be part of the material used by the Court in deciding which candidate to appoint. AIR (Vol 16) 1929 Rang 221 : 7 Rang 561 : 121 Ind Cas 815 (DB).

——Scheme of management—First superintendent to be appointed by Court—Further vacancy to be filled in by the Board.

Court cannot order Board to remove a superintendent and appoint another. A I R (Vol 13) 1926 Mad 659 : 91 Ind Cas 794 (DB).

——Court cannot cancel suspension by majority of members of the Board acting in their individual capacity.

Where a scheme provided "the Board shall have no power of suspension or dismissal of the treasurer except by a vote of majority of the members subject to confirmation by the Court." But three out of the five members of the Board acting in their individual capacity suspended the treasurer :

Held, that there was no resolution of the Board placed before the Court for confirmation and the order of the Court cancelling what purported to be the suspension of the treasurer was without jurisdiction. A I R (Vol 13) 1926 Mad 659 : 91 Ind Cas 794 (DB).

——Scheme — Alteration — Detail — Discretion of Court.

The court has unquestionable power in a proper proceeding to alter the scheme under a decree, but the alteration will be made only if it is in the interests of the foundation and in harmony with its objects. The court will, however, be slow to interfere if the alteration proposed is a detail of administration on which opinions may reasonably differ. (1901) 3 Bom L R 258 (259, 260) (DB).

See also 15 M L J 133 : 28 M 319 (324) :—and on appeal the decision of the Privy Council reported in 30 M 138 (142, 143) : 34 I A 78 : 9 Bom L R 588 : 11 CWN 442 : 17 MLJ 236 : 2 MLT 119 (PC).

4. Cypres.

See also Muhammadan Law—Wakf.

——Doctrine of cypres—Applicability.

The Court cannot apply the doctrine of Cypres unless it can be gathered from the will that the testator had a general charitable intention. If such an intention is clearly expressed, it will be given effect to in another way, should the way intended by the testator be open to objection or be impracticable. The fact that a person makes a charitable bequest in order that his name shall be kept prominently before the public will not render his action invalid. Regard can only be had to the nature of the bequest. Therefore, when there is a general charitable intention, the fact that variety lies behind it will not matter. A I R (Vol 32) 1945 Mad 217 : (1945) 1 M L J 328 : 58 L W 160 : 1945 M W N 309 : I L R (1945) Mad 854 (DB).

——Subscriptions paid by subscribers to Committee of persons chosen from amongst themselves, for carrying out well-defined charitable purpose—Object impracticable—Cypres application of funds.

Where the subscriptions were paid to the Committee of persons chosen by subscribers from amongst them for the purpose of fulfilling a specific and well-defined charitable purpose, a complete trust is created to apply the funds in carrying out the objects mentioned. If the object has become impracticable, the subscribers have a clear right to the return of their subscriptions pro rata, subject only to the rights of the trustees. The members of the Committee are trustees in either event; in the event of impracticability being shown, they are trustees for the subscribers; if, on the other hand, impracticability is not shown, they still have to carry out the trust. In case of impracticability of the object of the trust, the trustees cannot abandon the scheme because that is not a matter in their power at all nor can they, without recourse to the Court, make a cypres application on the ground that there was a general charitable intent. AIR (Vol 24) 1937 P C 240 : 1937 O W N 658 : 41 C W N 1072 : 46 L W 225 : 39 Bom L R 1012 : 18 P L T 883 : 1937 A L J 1378 : 1937 M W N

1297 : 4 B R 243 : 31 S L R 585 : 1937 A W R 950 : 172 Ind Cas 458.

5. Dedication.

(a) General.
(b) Effect.
(c) Presumption.

(a) General

——User—Onus.

Where the original right in the land in suit is with the proprietary body, burden lies heavily on the party who asserts to prove dedication by user of the whole area to the purposes of the shrine.

That the right of occupation but not the proprietorship has been dedicated is not an impossible position as a matter of law :

Held, on facts after considering the evidence that save as regards the samadhs themselves and the langar buildings, the case of dedication by user in respect of houses occupied by sadhus and attached to the udasishrine known as "Dera Baba Than Singh" situated in the village of Kot Fateh Khan in Attock District of the Punjab failed. AIR (Vol 28) 1941 P C 56 : 7 B R 997 : 1941 O W N 970 : 1941 A W R 845 : 43 P L R 631 : 1941 A L J 610 : 43 Bom L R 998 : 68 I A 83 : I L R (1941) Lah 803 : 74 C L J 428 : 23 P L R 1 : I L R (1941) Kar (P C) 110 (Sup) : 195 Ind Cas 721.

——Free food supplied in house to poor for long time.

Where all that is established is that for a long time, the ancestors of the parties had maintained a chhetar in their house, where free food was supplied to poor students and others and there is no evidence as to the dedication of the house itself to a charitable purpose, the mere fact that a free kitchen was maintained in the house is insufficient to establish that the owners had divested themselves of the ownership of the house and it had become religious property. A I R (Vol 28) 1941 Lah 347 : 43 P L R 489 : 197 Ind Cas 481 (DB).

——Essentials—Offerings to Brahmin residing there, effect—Dedication to demon, effect of.

There need not be some image or idol or some dedication in order that the particular "Than" should be considered to be a religious place where the public had a right of worship. No particular act is necessary to signify a dedication. It is enough if the public have been going there and making offering. The mere fact that these offerings were made to a Brahmin family does not show that it was a case of Brahmin family "carving out a livelihood from these offerings." Such offerings are always handed over to Brahmin Pujaris and the fact that the Pujaris take the offerings does not in any way detract from the right of the persons who make the offerings to continue to do so. Similarly, the fact that the place is not connected with a deity but with a demon does not make any difference. The portion of the house in which the "Isthan" is situated is not, therefore, liable to sale in execution of decree. A I R (Vol 26) 1939 All 387 : 1939 A L J 391 : 1939 A W R 327 : 185 Ind Cas 334 (DB).

——Deed of endowment, if necessary — Conduct of parties.

It is not necessary in order to establish debutter that any deed of endowment should be forthcoming in every case and the course of dealings by the parties may furnish evidence of dedication in the absence of any deed. At the same time, very strong evidence should be forthcoming in order to establish the debutter nature of the property in the absence of a deed.

The fact that the property is granted rent-free does not necessarily show that it is debutter property. (1937) 166 Ind Cas 859 : 62 C L J 10 (DB).

——Proof—Conduct of parties—Alienability of property Sale in execution.

Though, as a matter of law, the mere non-performance of a charity will not negative the existence of a charitable trust if otherwise the trust is proved, yet in the absence of a deed of endowment, where the Court has to draw an inference as to the existence of the trust only from a course of conduct, the character of enjoyment by the so called trustees will be a material factor and the Court canot start with the presumption that they were throughout guilty of breach of trust.

Where the evidence relating to grant of a land merely showed that the land was subject to a burden of feeding Brahmins :

Held, that this did not amount to such a complete dedication as to impress the whole property with the character of charitable trust and render it unsaleable in execution of a decree obtained against the grantee. A I R (Vol 23) 1936 Mad 138 : 1936 M W N 264 : 70 M L J 407 : 43 L W 620 : 160 Ind Cas 1003 (DB).

——Bona fide endowment—Test.

One test of a bona fide or a nominal endowment is to see how did the founder treat this property, or how have descendants treated it and has the income of the endowed lands been continually applied to the object of dedication. AIR (Vol 22) 1935 Mad 60 : 1934 M W N 979: 155 Ind Cas 772 (DB).

——Deed—Necessity of — Divesting of property.

No writing is necessary to create an endowment except when it is created by a will; no trust is required even in the case of a dedication to an idol which cannot itself physically hold lands. It is not necessary though it is usual, to vest lands in trustees; nor is it necessary that there should be any express words of gift to the idol.

It is necessary for the validity of a deed of endowment that the executant should divest himself of the property. Whether he has done so or not is to be determined by subsequent acts and conduct. A I R (Vol 19) 1932 Bom. 305 : 34 Bom L R 415 : 138 Ind Cas 433 (DB).

——Intention of executant should be seen and should be determined from language of deed, surrounding circumstances and subsequent conduct.

There may be circumstances under which the mere execution and registration of a deed of endowment may not amount to a complete dedication and the proceeding may be merely a nominal one. On the other hand, if a valid dedication has once been completed there would be no power left in the donor to revoke it, and no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it. Not only the language of the document but the surrounding circumstances as well as subsequent conduct may be taken into consideration for dealing whether there was a real intention to dedicate the property. The mere fact that no mutation took place on the strength of a dedication does not necessarily show that the deed was not acted upon. A I R (Vol 16) 1929 All 315 : 51 All 621 : 1929 A L J 473 : 116 Ind Cas 433.

——Judgment-debtor dedicating property after it was attached by the decree-holder—Conduct inconsistent with intention to dedicate—Dedication was not genuine.

A judgment-debtor made a dedication of attached property along with other property, in favour of an idol. No mutation of the property was effected in favour of the idol. There was no evidence showing that the income of the property was spent for the expenses of the idols or to show that the installation of the idol took place as provided for in the deed of endowment. Further the judgment-debtor subsequent to the execution of the endowment deed mortgaged the property to another without making any

mention in the mortgage deed of the previous endowment deed.

Held, that the transaction evidenced by the deed of endowment was not a genuine transaction. A I R (Vol 16) 1929 Oudh 246: 118 Ind Cas 846 (DB).

——Difference between grant to religious institution and grant to a person, indicated.

The use of the word "devadayam" is not conclusive in favour of the temple or mosque itself, where the question is whether it is a grant to the temple or to a temple servant, though it may be some evidence along with other circumstances; but it is of very great weight where the claim of private property is set up. Where the grant is made to a person in the capacity of mutavalli, manager, superintendent, dharmakartha, or even servant of the mosque or temple, and where it does not appear that there is some other trustee, it may be regarded as a grant to the temple or mosque itself. Where it appears that a substantial part of the income goes to the benefit of the institution, as for the erection of a building or for its upkeep and repairs, or such other things, the grant may be considered as a grant to the institution itself, even though some surplus may be used by the trustees for their own maintenance. Where none of the above "indicta" appears, that is, where the grant does not show that it was granted to a temple or mosque, nor describes the grantee in the capacity of trustees, manager, etc., and where it does not appear that any portion of the income that may be considered as substantial has gone to the benefit of the temple or mosque, then in such a case it must be treated as a grant to the grantee named (persona designata) and, if services are mentioned, it is a grant for service. AIR (Vol 15) 1928 Mad 282: 27 MLW 101: 106 Ind Cas 891 (DB).

——The description of a grantee as "mulla" does not imply that the grant is made to him as representing a religious institution. AIR (Vol 15) 1928 Mad 282: 27 MLW 101: 106 Ind Cas 891 (DB).

——The question whether an absolute debutter is created or there is merely a charge in favour of the deb sheba depends upon the terms of the deed and the circumstances of each case. AIR (Vol 13) 1926 Cal 1083: 54 Cal 30: 30 CWN 930: 44 CLJ 479: 98 Ind Cas 684 (DB).

——Dedication to temple is not a transfer within T. P. Act.

A dedication of property to a temple is not a transfer within the meaning of the Transfer of Property Act. The idol is only a symbol of the deity and it is contraty to the Hindu religion to say that a deity can make an acceptance of a gift of worldly goods; hence the legal conception of gift is not fulfilled, as it lacks the requisite of a valid acceptance, what happens during a dedication is that the person making the dedication divests himself of ownership with the pious intention that the property shall be used for the furtherance of the religious objects of the temple. But an idol, though incapable of making an acceptance, is a "juridical person" in an ideal sense, which, for practical purposes, means that the ministers of the idol have over the dedicated property the rights of trustee, or the rights of a guardian as if the idol were an infant.

These principles are of general application and will apply to dedications of all kinds of property, which, if they were transfers between living persons, would be governed by the Transfer of Property Act. AIR (Vol 13) 1926 Nag 469: 96 Ind Cas 1004.

——No document is necessary for the dedication of property to a charity. AIR (Vol 9) 1922 Mad 236: 42 MLJ 570: 45 Mad 281: 16 MLW 55: 30 MLT 323: 70 Ind Cas 337 (DB).

——Perpetuity is not essential for a charitable gift. A donation may be charitable just as well as an endowment. But, if the donation can wholly be applied as income, it is often unnecessary to consider whether it is charitable and thus within the exception to the rule against perpetuities. AIR (Vol 8) 1921 Bom 338: 24 Bom LR 1060: 84 Ind Cas 759.

——Dedication—Complete and incomplete—Instances of incomplete dedication. See (1904) 8 CWN 809 (820): 6 Bom LR 765: 1 ALJ 585: 32 C 129: 31 IA 203 (PC).

——Dharam—Charities—Bequest to—Validity of—A bequest to dharam is void for uncertainty. (1902) 4 Bom LR 555 (559).

(b). Effect

——Dedication — Effect of — Members of settlor's family made shebaits—Deed, validity of—Property, if can be subjected to charge in favour of idol.

The effect of a valid deed of dedication is to place the property comprised in the endowment extra commercium and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebaits and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. In view of the privileges attached to dedicated property, it has not infrequently happened that simulate dedications have been made and a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol. The dedication moreover, may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or, that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol is a question which can only be settled by a conspectus of the entire provisions of the will. It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes, it may not be protected by the dedication. AIR (Vol 24) 1937 PC 185: 3 BR 550: 46 LW 14: 41 CWN 968: 1937 OWN 711: 65 CLJ 572: 39 Bom LR 933: 1937 MWN 966: 64 IA 203: 1937 ALJ 1008 ILR (1937) 2 Cal 447: 31 SLR 538: (1937) 2 MLJ 527: 168 Ind Cas 765.

——Question of fact — Dedicating portion of income for religious purposes—Property alienability of—"Waqf", meaning of.

The question whether a dedication is real or nominal is a question of fact to be decided in view of all the circumstances of each case but one important test which is usually supplied by Courts is the conduct of the founder and his successors in dealing with the property.

The word "waqf" is borrowed from Muhammadan Law and implies permanent dedication of property for religious or charitable purposes. When property is declared waqf, the original owner is divested of it and it vests in Almighty God.

The fact that under the terms of a will, the expenses in connection with a serai were to be defrayed from the income of a certain property of the testator would not render the whole of the property either waqf or inalienable. AIR (Vol 18) 1931 Lah 170: 32 PLR 304: 131 Ind Cas 283 (DB).

——Major portion of property to be applied for expenses of testator's heirs — Minor portion for charity — Property is not absolutely dedicated to charity.

Where a will directed testator's son to build a choultry and instal a deity therein and perform a puja and provided that the testator's son and his heirs "from generation to generation according to the rule of primogeniture shall without alienating the properties in any manner enjoy them paying sircar kist therefor and conduct the charity and utilize the balance of the income for family purposes" and it was found that the charity even if it was conducted on a lavish scale could not consume any considerable portion of the income.

Held, that the dominating purpose and intention of the testator in executing the will was to provide for the members of his family and the maintenance and conduct of the charity was only of subsidiary importance.

Held further that the properties covered by the will were not properties absolutely dedicated to a trust but were only properties burdened with a trust. AIR (Vol 15) 1928 Mad 190 : 107 Ind Cas 786 : 27 M L W 88 : 1928 M W N 86 : 54 M L J 272 (DB).

——Where buildings were already dedicated to the common use of both sections of a community, the contribution to the common religious buildings by one section for rebuilding or improving largely can create no exclusive right in favour of the section. AIR (Vol 13) 1926 P C 13 : 93 Ind Cas 219 : 24 A L J 100 : 1926 M W N 199 : 50 M L J 631.

——Deed—Absolute dedication.

Founder appointing himself and his family members to be shebaits and providing for their residence in Thakurbari and for their remuneration—Character as absolute dedication is not affected. AIR (Vol 13) 1926 Cal 1083 : 98 Ind Cas 684: 54 Cal 30 : 30 CWN 930 : 44 C L J 479 (DB).

——Founder of idol constituting himself dharmakarta — Gift — Transfer of Property Act, S. 122 — Meaning of 'donee' — Declaration of trust — Trust Act, II of 1882, Ss. 1 and 5 — Denial of execution — Registration, effect of.

Where the plaintiff found an idol in his land and executed a document in favour of the idol to the effect that a piece of land belonging to him was given by him to the idol for a temple being built on it, that he had no objection to a permanent temple being built on it, and that he bound himself to be the Dharmakarta of the idol, but did not register it and upon its being presented for registration denied execution and the document was compulsorily registered.

Held, (1) that there was a dedication of the land to the public (i. e., as a public religious institution); (2) that it did not require registration under S. 122, T. P. Act; (3) that there was no transfer of property, the plaintiff only constituting himself a Dharmakarta; (4) that it was a declaration of trust in relation to immoveable property (5) that such declaration of trust was for a public religious purpose; (6) that therefore, the Indian Trusts Act, II of 1882, S. 5, had no application; (7) that the transaction not being a gift within the meaning of S. 122, Transfer of Property Act, nor a trust within the meaning of the Indian Trusts Act, the refusal to register the document and denial of execution before the Registrar did not take away the effect of dedication and the registration under the registration Act, (1903) 13 M L J 364 (366, 367) (DB).

——Dedication to public use as burial ground—Title to land, no necessity for passing — Abandonment of user by public—Reversion to owner.

An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel: it proceeds not upon the principle that a grant has actually been made but rather on the principle that the owner, having allowed the public to enjoy the same for any particular purpose, is estopped from denying the right of the public to the enjoyment of such use. Exclusive and continuous use by the public with the owner's knowledge and acquiescence for the prescrip ive period will raise the presumption of a grant and dedication to the public. It is one of the essential elements of a good dedication that it be made to the public, that it be irrevocable, and that the land be for ever dedicated for the designated public use. An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. But after a valid dedication has been made, if the use for which the property is dedicated becomes impossible of execution or if the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public therein fail and a reversion takes place, as the dedication has spent its force when the use ceases. If land is dedicated for cremating or burial purposes, and there is subsequently an abandonment, the property reverts to the dedicator or his heirs. (1906) 33 C 1290 : 10 C W N 1044 : 4 C L J 343 (350, 351) (DB).

(c) Presumption

——Dharam khatas—Nature of.

Ordinarily dharam khata is no more than a separate "charity account," which usually exists in the account books of Hindu commercial trading firms and to which a part of the income is credited from time to time. The amount standing in the account, however, is not dedicated to charity in the sense that it ceases to be the property of the firm. It is the purse out of which the charitable contributions are made. AIR (Vol 28) 1941 Lah 347 : 43 P L R 489 : 197 Ind Cas 481 (DB).

——Proof — Land partially exempted from assessment — Described as devasthan in Record of Rights —Evidentiary value of.

The description of the land as devasthan and the fact that it has been partially exempted from payment of assessment from before 1874 are important items of evidence. But considered by themselves, they are far from being convincing. Devasthan properties are not necessarily public. They may be private as well as public waqfs and the revenue records do not always distinguish between them. A I R (Vol 21) 1934 Bom 257 : 36 Bom L R 520 : 152 Ind Cas 50 (DB).

——Succession from guru to chela.

Where natural heirs have been excluded from succession, there is a presumption that the institution has been dedicated to religious uses even though there is no direct evidence of dedication. A I R (Vol 21) 1934 Lah 920 : 35 P L R 619 : 155 Ind Cas 396 (DB).

——Proof—Property descending from guru to chela.

The property of a sadh cannot necessarily be presumed to be devoted to religious purposes for the reason that it descended from guru to chela and secular property, even if acquired by a sadh, does not change its nature unless dedicated to a special purpose. AIR (Vol 21) 1934 Lah 1 : 151 Ind Cas 375 (DB).

——Proof.

The incription "Om" on a building does not prove dedication nor the fact that the building was built by public subscription. AIR (Vol 19) 1932 Lah 220 : 33 P L R 180 : 135 Ind Cas 681.

——Perumal Koil Inam Devadayam — Meaning of.

Though the word "Devadayam" used in the revenue records to describe the lands attached to a temple may not be conclusive, the use of the words "Perumal Koil Inam" tends to show that the inam was regarded as an inam belonging to the temple. AIR (Vol 18) 1931 Mad 78 : 125 Ind Cas 250 (DB).

——Practically whole income given to sons as managers—No fixed amount allocated for worship—Very little effect given to the endowment - Endowment is illusory

A dedication under which the sons of the dedicator were the superintendents and were to take practically whole income of the endowed property as managers and no fixed amount was laid down for being spent upon the purposes of worship etc , but the superintendents were given complete discretion to spend whatever they thought fit and it was found that the managers did not keep any accounts whatever of the income of the endowed property and the only way in which effect could be said to have been given to the endowment was that the superintendents executed leases of the property in the name of the God.

Held, that the endowment was purely illusory or colourable. The testator's intention was to preserve the property in his family and to let his two sons and their descendants enjoy the income of the property without having the power of alienation. A I R (Vol 16) 1929 All 302 : 1929 A L J 324 : 116 Ind Cas 849 (DB).

——The mere use of the words "devadayam" does not necessarily show that the grant is to a religious endowment. The word "devadayam" indicates a gift for religious purposes, but does not necessarily connote anything more. AI R (Vol 15) 1928 Mad 282 : 27 M L W 101 : 106 Ind Cas 891 (DB).

— Building upon common land and using the building is sufficient evidence of appropriation. A I R (Vol 13) 1926 P C 13 : 50 M L J 631 : 24 A L J 100 : 1925 M W N 199 : 93 Ind Cas 219.

— From a public user the fact of a public dedication can always be inferred. The facts that the general public are worshipping in a temple, and do so without any permission or leave or license, will show that the dedication is a public one. A I R (Vol 13) 1926 Oudh 578 : 1 Luck 489 : 3 O W N 645 : 13 C L J 696 : 97 Ind Cas 853.

——Use of income of property for support of idol does not prove endowment.

It may be that a portion of the profits of the lands mortgaged in the possession of the defendant had been for sometime used for the worship of the idol; but that circumstance cannot impose on the respondent the liabilities attaching to the office of shebait. The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose. A I R (Vol 9) 1922 Nag 122 : 67 Ind Cas 258.

——Golden Temple at Amritsar — Granthi has absolute powers of disposal over income — Property acquired by Granthi, passes to his natural heirs when there is no dedication by him — When the property goes to another Granthi and not to natural heirs, presumption of dedication arises. A I R (Vol 8) 1921 Lah 337 : 49 P L R 1921 : 59 Ind Cas 734 (DB).

— Mere evidence of public worship is not sufficient to hold a particular place dedicated to public—Facts showing its private nature, negative dedication to public.

Mere evidence of public worship alone is not sufficient to justify a Court in holding that a particular property has been dedicated to the public but the facts that the person in possession treated the place just as if it had been his own property, he locked the door whenever he went away, he let the sacred lamp go out, re-built the place at a cost of his own money, and the public walked about the place with their shoes on, which they never would have done had it been dedicated and he was entered in the Government register as owner and not as manager of the property, go to show that it was private property. AIR (Vol 8) 1921 Sind 1 : 15 S L R 38 : 63 Ind Cas 370 (DB).

— Grant, ambiguous terms of — Proceeds of land used for the support of an idol.

The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, but it is a fact that may well be taken into consideration when the intention of the founder has to be gathered from an ancient document expressed in ambiguous terms. A grant of a mouzah was made "by way of lakheraj debuttor" to a Mohant in 1787, and it was perfectly clear from the evidence in the case that the donee received the gift as a gift for the service of the particular idols whose shebait he was, and that the income of the mouzah had ever since been entirely appropriated to that service. In 1860, the then mohant, describing himself as "Brittibhogi holder of debuttor" granted a mokarari pottah or permanent lease, of the mouzah, which was therein described as "my long-standing ancestral lakheraj debuttor property endowed for the service of the deity : "

Held, that the mouzah was debuttor property in the sense of having been dedicated to the worship of the idol represented by the grantee mohant. (1909) 19 M L J 530 : 10 C L J 284 : 14 C W N 1 : 11 Bom L R 1234 : 6 A L J 857 : 36 C 1003 (1013) : 36 I A 148 : 4 Ind Cas 449 (PC).

6. Founder's rights.

——Charitable endowment — Owner of impartible estate founding choultry—Transfer of estate—Trusteeship in owner, if also transferred as annexe to estate.

Apart from cases where an estate is impartible by reason of the tenure or grant on which it is held, it is clear that where a stranger becomes by purchase or otherwise the owner of an impartible estate, the estate is no longer impartible in his hands. Hence, when the impartible estate is transferred to a stranger in whose hands the estate will not continue to be impartible, the trusteeship of a religious or charitable institution founded by the owner of the impartible estate cannot be held to pass as an annexe to the impartible estate, specially so where the charity (choultry in the case) is outside the estate and is maintained out of the income derived from properties endowed or purchased for the trust. AIR (Vol 33) 1946 Mad 5 : 1945-2 M L J 264 : 58 L W 474 : 1945 M W N 582 : 222 Ind Cas 360 (DB).

——Manager transferring office—Suit by founder for possession—Cause of action.

Under a deed of endowment one J was appointed as the manager of the temple. But heritable rights were not conferred by the document and the right of management was not given to J's heirs. Further, there was no provision entitling J to transfer the right of management in his lifetime, For over 12 years, J acted as manager and then he transferred the managership to another person. The heirs of the founder of the endowment sued for possession :

Held, that the moment J executed the transfer of managership, the heirs of the founder had a fresh cause of action to sue for possession of the endowed property by dispossession of the transferee. AIR (Vol

27) 1940 All 252 : ILR (1940) All 235 : 1940 A L J 193 : 1940 A W R 111 : 189 Ind Cas 471 (DB).

—— Subsequent misapplication of income by donor.

Where there was a completed dedication by the donor for religious purposes, the subsequent misapplication of the income by him would not affect its validity and would not re-invest him. AIR (Vol 27) 1940 Mad 920 : 1940 M W N 907 : 1940-2 M L J 409 (DB).

——Founder, when can alter the line of devolution.

Once a founder prescribes a line of devolution as regards the trusteeship in the document creating the trust, the founder has no right to alter the line of devolution of the trusteeship unless he had reserved such a power in the original document itself. AIR (Vol 27) 1940 Mad 633 : 1940 M W N 235 : 51 L W 381 : 192 Ind Cas 847.

——No reservation made by founder—Whether can interfere with scheme of management.

The right to manage the dedicated property remains with the founder and after his death descends to his heirs according to the personal law or usage governing the rules of inheritance. The founder has, however, complete power of disposing of that right and if he has once exercised his right of disposing of that right, no further right of disposal, in the absence of any reservation, is left with him.

Where an express provision for the management in the shape of a definite scheme has been laid down in the deed of endowment by the founder of the deed, it must be held that the said founder intended to preclude himself from interfering with that scheme at a subsequent stage. AIR (Vol 27) 1940 Oudh 228 : 1940 O W N 28 : 15 Luck 303 : 1940 A W R 44 : 190 Ind Cas 65 (DB).

——Founder not relinquishing rights — Subsequent benefactions, if mere accretions.

The fact that a religious and charitable institution has been founded for the use and benefit of the public does not mean that the founder has relinquished his rights as founder especially when the evidence points to the conclusion that he had never meant to give up such rights.

The benefactions subsequently received do not make those who have made them joint founders with the original founders, and the benefactions are not to be regarded as anything beyond an accretion to the existing foundation. AIR (Vol 24) 1937 Cal 67 : 64 C L J 341 : ILR (1937) 1 Cal 515 : 170 Ind Cas 290 (DB).

—— Removal of shebait—Suit under S. 92, Civil P.C.

If any relief is to be granted in a suit under S. 92, Civil P. C., ordering removal of shebait and trustees or interfering with their rights as founders, something substantial will have to be shown justifying the removal or the interference. AIR (Vol 24) 1937 Cal 67 : 64 C L J 341 : ILR (1937) 1 Cal 515 : 170 Ind Cas 290 (DB).

——When the worship of an idol has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution. This principle applies to private as well as to public trusts. AIR (Vol 24) 1937 Cal 67 : 64 C L J 341 : ILR (1937) 1 Cal 515 : 170 Ind Cas 290 (DB).

——Religious endowment—Endowment to religious institution of one caste to another—Custom against founder.

In India, a religious institution may be endowed by a person of any caste, and yet there can be a custom in that institution in favour of the opponents of the founder and against, the members of the community or family of the founder. AIR (Vol 22) 1935 Bom 371 : 37 Bom L R 584 : 158 Ind Cas 796 (DB).

——Endowment of lands under a deed—No provisions made therein for management—Donor or his heirs are competent to appoint trustee – Disagreement among donor—Appointment should be by majority vote. 103 Ind Cas 134 : AIR (Vol 14) 1927 Mad 820 (DB).

——The founder of an endowment has an inherent right to appoint his successor in the absence of any express provision to that effect. (1908) A W R 132 (132) : 5 ALJ 256 (DB).

——Katlai—Purchase of land in the name of idol—Deed in the custody of donor — No reservation—Power to appoint manager of the katlai.

A person who absolutely makes a gift of land for the purpose of a katlai in favour of an idol, without reserving any rights whatever, cannot subsequently appoint a manager for the katlai.

Held also, that the fact that the donor retained the deed of gift with herself was not sufficient evidence of any reservation of the power to appoint a manager in the donor. The conduct of the parties years after the execution of a deed is of no avail in construing the deed. (1908) 18 M L J 304 (305) (DB).

——A person can maintain an action with respect to trespass to the property by reason of his possessory title only even though he had dedicated it to charity. (1907) 9 Bom L R 1301 (1304).

7. Idol.

——Shebait — Consent of.

Where, in a suit, a shebait, in another capacity is claiming an indemnity out of the debuttar estate, the deity is entitled to representation other than that through the shebait, and the consent of the shebait would not be binding upon the deity, even in the absence of fraud. (1942) I L R (1942) 1 Cal 365.

—— Appointment of Managing Committee — Rules authorizing secretary to file suits with sanction of Chairman — Court if can permit Chairman to institute suit on behalf of committee

The right to bring a suit or to take other legal proceedings on behalf of an idol is by law vested in the shebait or manager.

Where a committee of management has been appointed and the rules framed under the same provide that the secretary should file suits with the sanction of the Chairman, still the Court can permit the Chairman of the committee to bring a suit or file a darkhast on behalf of the committee. A I R (Vol 26) 1939 Bom 75 : 40 Bom L R 1278 : I L R (1939) Bom 87 : 180 Ind Cas 45 (D B).

——Representation.

In a case where the very existence of a property of an idol is disputed, where the person in possession of the property who are the direct descendants and heirs of the persons who originally purchased the property deny the rights of the religious institution with regard to the property, somebody must be appointed or allowed to represent the interest of the idol as against the interest of those persons who are in possession of the property adversely to the idol, and it would not be in consonance with ordinary notions of equity or justice that a person who comes forward not on his own behalf but on behalf of a religious or charitable foundation should be nonsuited on the ground that he had no power or no legal position to represent the idol. A I R (Vol 19) 1932 Bom 305 : 34 Bom L R 415 : 138 Ind Cas 433 (D B).

——Donor of dedicated property can himself acquire title to it by adverse possession.

Adverse possession can be acquired against idols in respect of property dedicated in their favour, the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself.

A donor executed a deed dedicating his property to an idol making his mother a shebait.

No mutation was effected and the municipal taxes were continued to be paid by the donor. Two years later the donor with his mother revoked the dedication and thereafter the donor treated the property as owner for over 12 years.

Held, that he acquired title by adverse possession. A I R (Vol 16) 1929 All 315 : 51 All 621 : 1929 A L J 473 : 116 Ind Cas 433 (D B).

——Trustees binding together to defeat interest of idol by fraud — Decree obtained is not binding on idol. A I R (Vol 15) 1928 All 689 : 1929 A L J 229 : 114 Ind Cas 734 (D B).

——It is doubtful whether an idol can be regarded as a minor so that if the darmakarthas of the temple or some of the worshippers sue for the purpose of establishing the rights of the idol, they can be regarded to some extent in the position of guardian. A I R (Vol 15) 1928 Mad 614 : 110 Ind Cas 894 (D B).

——Idol can be represented in litigation by de facto manager.

One A gifted property to the idol but remained manager during his life. After his death, four Panchas named in the deed of gift were to manage, but the terms of the deed clearly implied that the deity was to be the owner and the Panchas were to be mere managers.

Held, that a de facto guardian of the idol had power to file a suit on behalf of the idol for declaration that it was entitled to have the property partitioned. A I R (Vol 15) 1928 Nag 217 (2) : 107 Ind Cas 663.

——Idol is juridical person capable of holding property — Possession adverse against mahant is adverse against the idol — Limitation begins to run from the date of taking possession by alienee — Succeeding mahant does not get fresh start for the mahants form a continuing representation of the idol. A I R (Vol 13) 1926 Oudh 444 : 2 Luck 239 : 3 O W N Sup 1 : 95 Ind Cas 27 (D B).

——Formal delivery of possession through Court to a mortgagee after foreclosure is dispossession of the idol.

When a mortgagee after having foreclosed his mortgage, takes formal delivery of possession through Court of a plot attached to an idol of patti land he must be deemed to have dispossessed the institution of the said land. The delivery of possession should, in the eyes of the law, be deemed to have destroyed the presumption as to the continuity of possession in favour of the actual owner. The possession of the mortgagee becomes adverse, not from the date when overtacts of physical possession are committed by the mortgagee, but from the time when delivery of possession of the property is taken by him from the Court. A I R (Vol 13) 1926 Oudh 444 : 2 Luck 239 : 3 O W N Sup 1 : 95 Ind Cas 27 (D B).

——Person interested can sue on behalf of idol though not authorised to do so.

A person suing on behalf of the idol is not personally interested in the suit; any more than is the next friend or guardian of a minor : if he has no adverse interest to the idol, he can sue and the suit will not be defeated on the technical ground that he had not been authorised to sue on behalf of the idol if he has sufficient interest in the property of the idol. A I R (Vol 10) 1923 All 160 : 21 A L J 148 : 45 All 319 : 4 L R A Civ 128 : 71 Ind Cas 480 (D B).

——Where a person has been recognised as the de facto manager of the property of an idol he is entitled to sue to eject a trespasser and take the other steps for protecting the idol's property. (1921) 64 Ind Cas 737 (D B) (Cal).

——Bequest to trustees for establishment of image and worship of deity after testator's death if valid.

Held by the Full Bench — The rule which requires that for the validity of a gift the relinquishment must be in favour of a sentient being does not apply to bequests of trustees for the establishment of an image and the worship of a Hindu deity after the testator's death. Such disposition is for religious purposes and is valid under Hindu Law. 25 C 405; 2 C W N 295; 29 C 260; 6 C W N 267; 33 C 521 and 7 C W N 121 overruled.

Per Mookerjee J. — It cannot be assumed that a Hindu deity is a juridical person for all purposes and stands on precisely the same footing capable of the same rights, and subject to the same liabilities as an ordinary sentient being. In the case of donation after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity it has a secondary sense different from what it bears when used in relation to persons. According to strict juridical notions there can be no gift in favour of the gods. When a dedication is made in favour of the deity, the owner is divested of his rights and the King is the custodian of all such property.

Per Chatterjee J. — A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost another may be substituted in its place and when so substituted, it is not a new personality but the same deity and properties previously vested in the lost or mutilated Thakoor becomes vested in the substituted Thakoor. (1909) 10 C L J 355 (373, 375, 395) : 37 Cal 128 : 14 C W N 18 : 3 Ind Cas 642 (D B).

——Jurisdiction of Court — Right of worship of idol outside temple.

A right to stop an idol in front of one's house is not part of the right to worship by a member of the community for whose benefit the temple has been dedicated. A worshipper has no right to obstruct the highway for an indefinite time and consequently a suit for the enforcement of right to stop the idol in front of a house in a public highway is not enforceable in a civil Court. The right to worship in a temple is enforceable in a civil Court and there is a right to worship in a temple at any time during the hours of public worship.

Where an idol of a temple is taken from the temple and located in an other place outside the temple for purposes of public worship, any worshipper of the temple will have equal rights of worship both in the temple and in places where the idol is placed outside the shrine for public worship. (1909) 19 MLJ 743 (746) : 7 M L T 248 : 5 Ind Cas 76 (D B).

8. Mahant.

——Udasi institution — Agreement by mahant of Udasi institution transferring managements to Sikhs belonging to different sect.

An agreement by a mahant of an Udasi institution to hand over the management of a strictly Udasi institution to a committee, the majority of which consist of Sikhs belonging to a different sect, is null and void and not enforceable. AIR (Vol 26) 1939 Lah 239 : 41 PLR 777 (DB).

——Plaintiff failing to make out his title —Question of defendant's qualification.

Where the plaintiff failed to make out his title to sue in ejectment the defenant, it was unnecessary to enter upon the question of the qualification of the defendant to occupy the office of mahant.

There was, held, no reliable evidence of the plaintiff's due appointment to the gaddi in question under any of the customs alleged. AIR (Vol 25) 1938 PC 59: 1938 OWN 48: 4 BR 238: 1938 AWR 40: 1938 MWN 614 : 47 LW 124: 32 SLR 308: 172 Ind Cas 633.

——Record of Rights—Property in name of mahant —Ownership.

The Revenue Authorities can only function through a human agency. Therefore, the mere entry of the name of the mahant in the column of owner does not prove that the property was his private property and not that of the institution of which he is the Mahant. AIR (Vol 21) 1934 Lah 449 : 35 PLR 443 : 155 Ind Cas 554 (DB).

——Mahant, if can be sued in representative capacity.

There is nothing to prevent a mahant being sued in his representative capacity. AIR (Vol 21) 1934 Nag 222 : 31 NLR 113 : 152 Ind Cas 362.

——Election of mahant—Omission to call general body ot gaddinashins—Whether vitiates the election.

Each religious institution has its own usage as regards succession to mahantship.

But mere omission to invite the general body of gaddinashins would not by itself vitiate an election otherwise valid. AIR (Vol 20) 1933 Lah 916: 36 PLR 129 : 149 Ind Cas 1187 (DB).

——Alienation by manager of branch institution — Suit for ejectment of representatives of alienee, by the Mahant of parent institution— Mahant has locus standi to claim possession. AIR (Vol 16) 1929 Lah 647 : 11 LLJ 243 : 122 Ind Cas 83 (DB).

——Abdication by Mahant does not necessarily deprive him of the private properties. AIR (Vol 13) 1926 Cal 1092 : 96 Ind Cas 30 (DB).

——Mortgage by Mahant—Alienee must prove necessity therefor. AIR (Vol 9) 1922 Oudh 142 : 8 OLJ 395 : 66 Ind Cas 415.

——Transfer, power of — Superior and subordinate mutt. relation of — Election of Mohunt — Custom governing mutt —Conditional decree giving possession till a mohunt is duly installed, if to be passed.

A Mohunt of a mutt cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto.

Where one mutt is subordinate to another in the sense that the latter has the right of nomination of the Mohunt of the former, the Mohunt of the former mutt cannot by a deed of transfer alienate his rights in favour of the Mohunt of his superior mutt. There is no fixed rule which regulates the relation between a superior and a subordinate mutt. Even if a mutt is subordinate to another, it must be governed by its own rules of management. (1907) 8 CLJ 499 (505).

9. Management.

See also N. 16.

(a) General.
(b) Committee.
(c) Scheme.
(d) Priest.

(a) General

——Choultry founded by zamindar, owner of impartible estate, outside zamindari transferred —Trusteeship of choultry does not pass to transferee as annexe to zemindari.

Where an impartible estate is transferred to a stranger in whose hands the estate will not continue to be impartible, the trusteeship of religious institution founded by the owner cannot pass as an annexe to the impartible estate even though so long as the original family held the zamindari, the trusteeship vested in the zamindar for the time being.

In a claim by a transferee of zamindari to be trustee of a choultry founded by the original family of zamindars in 1875 or 1877 and situate outside the zamindari on the ground that the office was an annexe to the zamindari, it was found that subsequent to the original founder only two persons had held the zamindari in succession and were also the trustees and there was no documentary evidence as to the devolution of trusteeship :

Held that these facts were not enough to presume that the intention of settlor was that her trusteeship should vest in the zamindar for the time being or that a usage had sprung up to that effect which could be recognized by a Court of law. AIR (Vol 33) 1946 Mad 5 : 1945-2 MLJ 264 : 58 MLW 474: 1945 MWN 582 : 222 Ind Cas 360 (DB).

——Arrangement between rival claimants is trusteeship—Enforceability—Suit.

Arrangements between persons claiming to be joint trustees which defines the manner in which they are to carry out the duties of the trust are really in the nature of schemes framed for the management of the trust if they are conducive to the smooth administration of the affairs of the trust and will be binding upon the parties thereto and their representatives till modified either by common consent or in some manner known to law ; and it is, therefore, not correct to regard an action to enforce such an agreement as an action for specific performance of contract.

Such arrangements for management of an institution are not in any sense an alienation of the office of a trustee or delegation of the duties of the office inasmuch as ex hypothesi, the arrangement is made between persons who are jointly entitled to act as trustees, and are, therefore, enforceable by the Court. AIR (Vol 23) 1936 Mad 14: 43 LW 222: 70 MLJ 262: 1936 MWN 346 : 160 Ind Cas 511 (DB).

——Abuse of trust by trustee.

A mere abuse of trust by the trustee for the time being cannot affect the validity of an endowment where there is no question about its being a real and valid endowment originally ; but when the question is whether the endowment is real or fictitious, the mode of dealing with it by its donors and successors must be an important matter for consideration. AIR (Vol 20) 1933 Pat 6 : 11 Pat 701 : 14 PLT 509 : 141 Ind Cas 157 (DB).

——Provision for definite purpose connected with temple, and rest to be appropriated with discretion to archakas for other purposes not made definite — After meeting first purpose rest of produce of grant has to be presumably utilized equally between the other purposes. AIR (Vol 17) 1930 Mad 466 (DB).

——De facto trustee— Power to dismiss hereditary servants.

A de facto dharmakartha of the temple is not entitled to call on the dancing girls to whom lands were granted as a sarva dambala inam land before the Permanent Settlement for rendering service, to perform service and on default to dismiss them and appoint others in their place. The position might be different if at the time of dismissal, the de facto trustee had completed his right as trustee by prescription. AIR (Vol 13) 1926 Mad 496: 50 M L J 282 : 94 Ind Cas 489.

——A distinction may exist between the management and spiritual headship in certain cases but it is doubtful whether, when the office is only one, it can be split up into two. AIR (Vol 12) 1925 Mad 800 : 48 MLJ 299 : 21 MLW 587 : 90 Ind Cas 106 (DB).

——Quaere—Whether an order passed on an application to fill a vacancy or a trustee is appealable. AIR (Vol 12) 1925 Mad 175 : 80 Ind Cas 615.

——Contracts by the shebait of a Thakur in respect of dedicated property entered into as shebait do not terminate on the death of such shebait and can be enforced by the successor of shebait. A I R (Vol 7) 1920 Cal 848 : 24 CWN 879 : 59 Ind Cas 126 (DB).

——Terms and conditions of the foundations not known —Legal inferences as to title and management of property.

Where there is no evidence as to who founded a religious endowment or as to the terms or conditions of the foundation, the legal inference is that the title to the property or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. (1904) 8 CWN 809 : 6 Bom L R 765 : 1 ALJ 585 : 32 C 129 (139) : 31 I A 203 (PC).

——Hereditary office Trusteeship vested in several persons—Management by turns— Effect of adverse possession.

Where there were two branches consisting of four members, each of the branches being entitled to management in rotation or by turns of a public temple or religious institution, and the four members of the junior branch transferred their right to a turn of management to a member of the senior branch, and such member enjoyed the turn of the transferors for a period of nineteen years, he acquires a right by prescription and the right of the junior members to a turn of management is barred either under Art. 124 or 127 or 142. Possession of office by one trustee during his turn is neither exclusive of, nor adverse to, the other trustees. The acting or executive trustee for a year or period holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. But where the members of the junior branch are excluded and their turns are exclusively taken by a member of the senior branch, the enjoyment by the other members of the senior branch with knowledge that the junior branch is excluded is not for the benefit of such junior branch and each member of the senior branch holds the office during his turn on behalf of himself and the other members of the senior branch and to the exclusion of the junior branch. Where under such circumstances the office of trustee and the properties of the temple have been, for more than 12 years, held and possessed by the members of the senior branch as a whole body, such possession is adverse to the members of the junior branch as a body and the rights of the latter will be, by the operation of S. 28, extinguished. Where several trustees enjoy the office by turns a right to manage by turns is not acquired by them merely by the operation of limitation. (1903) 13 MLJ 341 : 27 M 192 (201, 202) (DB).

(b) Committee.

— Committee of management, appointed trustee and administrator of property having power to appoint shebait — Committee can maintain suit challenging alienation of debottar property by person alleging himself to be shebait.

Where under the deed of trust, the committee of management was appointed trustee and the administrator of the property also having power to appoint a shebait under certain contingencies, and the shebait was only looking after the service of the temple and the duties that appertained to it :

Held, that the committee could maintain a suit for a declaration that the vendee had acquired no title by the sale-deed executed by the vendor in respect of the debottar property alleging himself to be the validly appointed shebait. AIR (Vol 33) 1946 Pat 347 : 12 B R 339 : 223 Ind Cas 201 (DB).

——Powers of — Budget allotment by Committee — Trustee, if bound to make good excess amount spent.

There is no doubt that the temple committee have the power of general superintendence over the endowments for the purpose of seeing that the endowments are appropriated for the purpose for which they were granted. They have also the power of appointing trustees or managers and of calling for accounts from them and scrutinise the accounts. It may be they also possess the power of calling for budgets every year and of passing them with or without modification. The mere exceeding of the budget allotments by the trustee or manager is not in itself a sufficient ground for compelling the trustee or manager to make good the excess amount spent by him though for a purpose binding on the temple. AIR (Vol 24) 1937 Mad 970:1937 M W N 970 : (1937) 2 M L J 660 : 46 L W 782 : 174 Ind Cas 166.

— Temple committee meeting without notice to members is invalid — No analogy between directors of a Bank or Company and members of Temple Committee.

It is against all principles and utterly detrimental to the proper management of temples to hold that a temple committee without any proper notice to the members of the committee can convene a meeting without giving, in the notice convening it, any particulars as to the business to be done at the meeting and that it can take up any question it likes without previous notice so as to make it binding upon the whole committee. To hold that an important matter like the dismissal of a trustee or the appointment of additional trustees could be disposed of without any notice to the other members of the committee would be a very dangerous proposition to be laid down :

There is hardly any analogy between the directors of a bank or corporation or company the members of which are appointed by the general body of shareholders for carrying on the internal affairs and the members of a temple committee who are elected by the worshippers and appointed to supervise the affairs of the temple. AIR (Vol 15) 1928 Mad 372 : 51 Mad 68 : 27 M L W 159 : 1928 M W N 208 : 54 M L J 140 : 109 Ind Cas 317 (DB).

——Village temple—No trustee or manager — Management vests in community of worshippers—They can sue under C. P. C., O. 1, R. 8.

Although notionally held by the deity and although it has been said that the deity represented by the idol can own the property, in fact the right to possess the property must be in some human being or beings. If there is a trustee or a manager, that trustee or manager is the human being who can sue for possession. But if there is none the answer must depend on the circumstances of each bequest or trust. Such a body as inhabitants of a village or worshippers at a particular shrine is ordinarily represented by a manager, or a trustee or a committee or some elected or nominated representatives of that kind. But, if no such representative has been nominated, the right of possession would vest in the general body, and the general body can sue. If there is a trustee or other properly constituted representative, then individual worshippers cannot sue for possession. AIR (Vol 10) 1923 Mad 276 : 17 M L W 147 : 1923 M W N 84 : 32 M L T 133:44 M L J 116: 71 Ind Cas 463 (DB).

——Articles purchased for worship of idol in temple —Suit on account of price of articles—No decree can be passed against temple property. AIR (Vol 8) 1921 Mad 597 : 13 M L W 323 : 62 Ind Cas 423.

——Temple Committee can appoint trustees.

On resumption of a religious endowment owing to to mismanagement, a temple committee was appointed for satisfactory arrangements for the due performance of the services of the temple. Appointment of a trustee by the committee to manage the temple and the properties in such a case is valid as the Government can invest the temple committee with that power. AIR (Vol 7) 1920 Mad 542 : 12 M L W 324 : 59 Ind Cas 183 (DB).

——Temple committee — Power to dismiss the moktesar of a temple — Onus of proof.

The plaintiff, a moktesar of a temple was dismissed by the temple committee constituted under the Religious Endowments Act, 1863, and was displaced in his appointment by others. He sued the committee for a declaration that

the plaintiff was entitled to his office of moktesar and the appointment of the new moktesars was illegal.

Held, decreeing the claim, that the powers of appointment and dismissal with which the defendants as a committee were vested were exercisable not in their own interests, but in the interests and on behalf of the Devasthanam whereof they were trustees. They were, therefore, not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution. The appointment of the plaintiff by the committee, therefore, implied that his tenure of office was to continue so long as its continuance was not inconsistent with the interests of the Devasthanam.

Held, also, that the onus was on the plaintiff to show that the committee had not, in dismissing him, acted on a bona fide belief that the dismissal was necessary in the interests of the Devasthanam, but had been actuated by some other and improper motive. (1906) 8 Bom L R 407 : 30 B 508 (515) (DB).

——After the passing of the Act XX of 1863 the Government is not competent to remove a trustee or superior of a durga. Where an institution falls under S. 3 the committee appointed for its supervision has the right to dismiss the trustee for misconduct and the fact that Government has resumed an inam granted in its favour and substituted a money allowance instead does not deprive the committee of its jurisdiction to dismiss a manager. (1905) 15 M L J 26 (27).

——Temple committee—Election of member — Disqualification — Madras Rules, Rule No. 19 – Act XX of 1863, S. 8 — Travelling allowance, payment of — Onus of proof.

In order that a candidate may be declared disqualified within the meaning of Rule 19, it must clearly appear that money or other valuable consideration was given in return for votes, i.e., that such consideration passed as the result of a bargain. Where the evidence in the case showed that the candidate paid 'travelling allowances, cart hire, etc.' for his voters, i.e., to people who had gone to the polling place for the very purpose of voting for that particular candidate and for him alone :

Held, that such evidence implied a previous understanding as to what their vote were to be; and that the payment in the circumstances could hardly be treated as otherwise than in return for the votes. The onus is on the candidate to show by accurate information that the payments were such as would not bring him within the disqualifications mentioned in Rule 19. (1904) 15 M L J 449 (456):29 M 166 (DB).

(c) Scheme.

——Scheme for election of dharmakarthas of temple, setting out qualifications of persons entitled to vote —One qualification being that they must be "Vaishnavas of Tengalai sect"—Untouchables, if included.

A scheme of administration framed for temple provided that the management shall be carried on by the dharmakarthas, that the dharmakarthas and the members of the Board shall be elected. Then followed a clause which set out the qualifications of persons entitled to have their names registered in the list of voters. One of them was that they must be Vaishnavas of the Tengalai sect :

Held, that these words included persons belonging to that sect even if they were untouchables :

Held also, that the existence of a strong sentiment against the participation of untouchables in the management of temples was in no way relevant in the matter. This did not destroy their legal rights. A I R (Vol 25) 1938 Mad 571 : 47 L W 480 : 1938-1 M L J 530 : 1938 M W N 376 : 182 Ind Cas 78 (DB).

——Scheme for administration of private trust—Suit for.

In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or mal administration of the deity's estate as to have a proper scheme for management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined. A Civil Court is competent to entertain a suit, the object of which is to have a scheme established for the adminstration of a private debutter. A I R (Vol 24) 1937 Cal 338 : 41 C W N 728 : I L R (1937) 2 Cal 105 : 172 Ind Cas 161 (DB).

——Clause providing for an application to Court in respect of the scheme is ultra vires.

A general clause in the scheme providing for application to the Court with regard to the scheme is ultra vires. It is not the function of a Civil Court to concern itself with the management of any institution except in so far as it is permitted by the Civil Procedure Code.

Where scheme for a temple provided "liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof" and archakas of the temple applied to the Court to direct the trustee to pay them their salary due for seven months.

Held, that the archakas' remedy was by a suit. A I R (Vol 13) 1926 Mad 557 : 94 Ind Cas 554 : 50 M L J 409 (DB).

——Swetambaris in actual management—To fight a common enemy, Swetambaris joining the Digambaris — Digambaris given a turn of worship — Right of management of Swetambaris not affected.

The Swetambaris had all along been in the actual management of the temple and idol. Their title and right of management had been exclusive. At the commencement of 20th century, the management of the temple, although nominally in the hands of Swetambaris, had been in fact usurped by the servants of the temple who for many years had exercised independent control and had become perfect masters of the situation. They set their employers at defiance and to consolidate their own position tried to play off the Digambaris against Swetambaris. The two sets united to face a common enemy and in order to deprive the servants of the temple the power they had usurped the Digambaris at the instance of Swetambaris agreed to co-perate with the result that a joint committee of equal numbers of Swetambaris and Digambaris was formed to undertake the management of all affairs. This committee acting on behalf of both sects took proceedings against the servants and reduced them to the position of servants of both. A scheme was framed whereby the worship of the idol was to be performed by both sects in turns according to a regular time table which allocated precisely the same length of time for worship to each sect. The two sects managed the temple through their committee, and worship was carried by each sect in accordance with its own ceremonies and observances as prescribed by the time table. After some years a quarrel arose between the two communities over the plastering of the idol.

Held, that the Swetambaris were entitled to the exclusive management of the temple and that plea of estoppel had no reference to that position. The digambari right to the time table was not a matter of favour. It was a matter of right capable of being enforced in execution. The Swetambaris were, however, to make no claim to the collection of moneys and offering made by worshippers during the Digambari period of worship. A I R (Vol 16) 1929 P C 261 : 1929 M W N 929 : 25 N L R 163.

——Scheme of management—Alteration.

Suit will lie where there is no provision for application. AIR (Vol 9) 1922 Mad 413 : 70 Ind Cas 579 : 1922 M W N 477 (DB).

—— Hindu temple—Costs.

Their Lordships of the Privy Council in modification of the scheme settled by the Madras High Court, settled a new scheme providing inter alia that all surplus income should be invested for the benefit of the temple and that no immoveable property of the temple, including lands held on mortgage, etc., is to be given on lease for more than five years, mortgaged or sold by the Vicharanakarta except with the sanction of the District Court, with liberty reserved to the Vicharanakarta and any person interested from time to time to apply to the High Court for any modification of the scheme that may appear to be necessary or convenient. Costs of all parties ordered to be out of the funds of the Devastanam. (1907) 9 Bom L R 588: 17 M L J 236: 30 M 138 (142, 143) : 2 M L T 119 : 11 C W N 442 : 34 I A 78 (P C).

——Scheme of management—C. P. C. (old), S. 539.

It is competent for co-trustees of a public religious institution to settle by arrangement among themselves a scheme of management by each of the co-trustees in rotation whether emoluments are attached to the office or not. Such a scheme ought to be upheld as being an equitable and proper arrangement by a court acting under S. 539, C. P C. But such a scheme is only subsidiary to the interest of the institution, and the arrangement for such a scheme may be set aside when it is injurious to the interests of the trust institution. (1903) 13 M L J 341 : 27 M 192 (198) (DB); *See also* 20 M 283 (288, 289) : 33 I A 139 : 10 CWN 825 : 3 ALJ 707 : 8 Bom LR 498 : 4 G L J 189 : 16 M L J 265 : 1 M L T 327 (PC).

(d) Priest.

——Religious assembly — High priest — Removal from office — Election — Voters, qualification of — Meetings, notice of—Quorum — Majority how determined.

To validate the removal of a high priest from his office by a majority of a religious brotherhood, it is necessary first to ascertain the voters and their qualifications secondly, to determine whether steps have been taken to enable the brotherhood to express their decision and thereby to determine whether a majority have expressed their wish in favour of removal. The qualifications of voters may depend upon membership of the brotherhood, age, sect and residence. A question may also arise whether a member or a family is the unit for this purpose. In order that the decision of members assembled at a meeting may be operative, it must have been convened after sufficient notice and due proclamation. The decision of the majority must be determined by reference to votes given at the meeting and cannot be made to depend upon views indicated subsequently in the course of a suit brought to contest the validity of the removal. Whether the quorum is necessary to legalise the decision of the meeting must depend upon the custom of the brotherhood in the absence of statutory provision or express direction in that behalf by the founder. (1910) 12 CLJ 497 (503, 504) : 8 Ind Cas 124 (DB).

——Priests, right of — Obligation to employ a specified priest - Semble.

The obligation to employ a specified priest is rather a matter of conscience than a juristic obligation forceable in a Court of law. (1906) 11 CWN 147 : 4 C L J 537 (543) (DB).

10. Manager.

See also N. 9.

——Mismanagement — Manager, if can be removed by means of application for execution.

In the absence of a provisions in the conditions of management that the manager would be liable to be removed on his failure to perform the conditions, action cannot be taken to remove him even on proof of his mismanagement by means of an application for execution. AIR (Vol 24) 1937 Lah 490 : 174 Ind Cas 574.

——'De facto' manager — Whether can sue for possession of trust property in name of idol.

A suit for possession of trust property can be brought in the name of the idol by a person who is the 'de facto' manager of the temple, in spite of the contention of the defendant that the plaintiff is not a 'de jure' manager of the temple and this holds good in case of public as well as private trust. AIR (Vol 24) 1937 Oudh 69 : (1936) OWN 728 : 12 Luck 331 : 164 Ind Cas 919.

——Who can sue.

A suit can be brought in the name of an idol by a person who is not a 'de jure' manager but is a 'de facto' manager. AIR (Vol 23) 1936 All 653 : 1936 A WR 412 : 1936 ALJ 515 : 162 Ind Cas 346 (DB).

—— Manager—Validity.

Where there is no right of beneficial enjoyment but the office-holder is a mere manager like a bare trustee, an alienation by him is void 'ab initio.' 1934 MWN 1205 (DB).

——The powers of the manager of a mutt are something more than those of a trustee of a temple in respect of borrowing money for trust and charging it on trust property. AIR (Vol 13) 1926 Mad 1199 : 97 Ind Cas 433.

——Manager has right, to apply for partition where the God is a co-sharer. AIR (Vol 9) 1922 All 26 : 66 Ind Cas 550.

——Katlai Manager—Suit for share in tasdik amount against Temple trustees—Limitation.

It is reasonable to presume that the defendants predecessors were appointed not merely trustees of the temple but also for the receipt of the kattalai due from Government to be paid over to the managers of the kattalai. (1910) 20 MLJ 374 (377) : 1910 M W N 389 : 8 MLT 130 : 6 Ind Cas 781 (1).

—— Idol — Statements by Manager, when and how far binding.

The property dedicated to a temple belongs to the idol or deity, and the idol or deity can be bound only by such statements of its manager as are made by him within the scope of his authority. A statement made by the trustee who happens also to be its agent or manager at the time of the suit that property dedicated to it was his private property is not a statement made by him as agent and cannot bind the idol or deity or its representative. (1908) 19 M L J 305 (307) : 4 MLT 417 : 4 Ind Cas 164 (DB).

——Right to appoint.

According to Hindu Law, when a religious endowment has been founded, the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition. 1907 AWN 210 : 4 ALJ 565 : 29 All 663 (666, 667) (DB).

——Temple manager—Nature of office—Devolution in favour of several—Management by turns—Renunciation by some in favour of another — Effect given by others—Validity—Family arrangement.

The manager of a temple absolutely dedicated to the public worship of the deity in whose honour it was founded, is by virtue of his office, the administrator of the property attached to it and is in the position of a trustee as regards such property. But such manager is, as regards the service of the temple and the duties which appertain to it, in the position of the holder of an office or dignity. Where such office becomes vested by descent in more than one person,

it is not improper for the parties interested, in order to avoid confusion or an unseemly scramble, to arrange among themselves for the due execution of the functions belonging to the office in turns or in some settled order and sequence. Such an arrangement does not amount to a breach of trust or to an improper delegation of the duties of a trustee. Where, on the death of a former manager, the office devolved by inheritance on his male descendants by his two wives (viz., on four sons as representing the senior branch and on four other sons as representing the younger) and one member of each branch took the management for one year in turns until 19 years before suit when the members of the junior branch renounced their claim in favour of the respondent, a member of the senior branch, and the appellant and the other two members of the senior branch gave effect to it for the said period of 19 years :

Held (1) that the unbroken usage of 19 years was evidence of a family arrangement between all the parties; (2) that such arrangement was perfectly proper or conducive to the due and orderly execution of the office; (3) that it was one which the Court would have sanctioned on application made; (4) that it was competent to the parties interested to make such arrangement without application to the Court; (5) that the arrangement must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested; and (6) that it was not open to the appellant who had taken the benefit of it to disturb or set it aside at his mere will and pleasure. (1906) 3 ALJ 707 : 10 C WN 825 : 29 Mad 283 (288, 289) : 8 Bom LR 498 : 16 MLJ 265 : 1 MLT 327 : 4 CLJ 189 : 33 IA 139 (PC).

——Temple committee, duties of — Appointment of Manager—Business done by circulation - Validity.

The committee as a body constituted under statutory authority should, in the absence of the specific provision in the statute, follow, as far as practicable, in the transaction of its business, the usual procedure adopted by public bodies entrusted with duties more or less of a public character. The committee should, therefore, ordinarily transact its more important business (such as the appointment of a trustee) at a meeting held after due notice to the members. But the committee should not be looked on strictly as a corporation so that all the technical rules applicable to such bodies in England should not be applied to it. The transaction of such more important business otherwise than at a meeting is therefore, not void, and is capable of being adopted and approved of by other members who may not at first have agreed to it.

Semble :—The exercise of minute control by the committee over the details of the manager's action in administering the trust is hardly consistent with the respective responsibility imposed on the trustee and the committee by Act XX of 1863. Prima facie it is the duty of a paid trustee to keep the accounts of the trust, or at least to supervise the keeping of such accounts. Where, on papers being sent in circulation, three members of the committee gave their votes to the defendant for his appointment as manager and the other did not then assent, but subsequently accepted his appointment :

Held, that the defendant was validly appointed. (1905) 15 MLJ 185 (186, 187) (DB).

——Hereditary office — Managership of a bathing ghat.

The office of managership of a bathing ghat is not a hereditary one passing like the office of mahant of a mutt from Guru to Chela. (1904) 1 ALJ 44 (47) (DB).

——Temple Trustee or Manager — Personal liability of Manager - C. P. C., S. 583 — Decree reversed on appeal—Restitution.

Where the manager of a temple obtains a decree for payment of money and after realizing the same in execution pays the sum so realized to the Temple Committee, but the original decree is reversed on appeal, restitution cannot be enforced against him by arrest. The private property of an individual cannot be taken in execution of a decree against him in his capacity as manager or trustee of a temple (except in respect of a liability arising by his breach of trust) just as the property of the temple cannot be taken in execution where the decree against him is in respect of his personal debt. (1904) 14 MLJ 377 (378) (DB).

11. Mosque.

See also Ns. 5 and 20 and Muhammadan Law.

——Residue to be enjoyed by Mutwalli is a valid condition.

Where the author of the trust provided that the income of the shops should be first applied to the upkeep of the mosque and then if there was any residue towards the remuneration of the mutwalli.

Held, that there was nothing illegal in such a trust. But if the order had been changed the situation would have been entirely different. A I R (Vol 11) 1924 Lah 459 : 6 LLJ 155 : 80 Ind Cas 324 (FB).

12. Mutt.

See also N. 8.

——Permanent lease by Matadhipathi or general mutt property is valid for life-time of grantor though not for benefit of mutt. AIR (Vol 17) 1930 Mad 422 : 1929 MWN 840.

——Temple and mutt as independent institutions — Head of mutt having acted as trustee of temple for 80 years — Head of mutt dismissed — Trusteeship of temple was held not lost.

A temple and a mutt were two independent institutions. The known history of the temple went back only about 80 years. During this period the head of the mutt always acted as the manager or trustee of temple. As each swamy died, the senior of the swamiyar initiated by him succeeded to the two offices. The mutt was in a Native State and the temple was in British India. In these circumstances, the Native State-Government dismissed, the head of the mutt.

Held, that as the proposition that the dismissal caused the loss of his office as trustee of the temple also was penal in its nature it must be proved strictly, and that as there were no similar instances known in the past history of the temple the dismissal from the headship of the mutt should not involve the loss of the trusteeship of the temple. A I R (Vol 12) 1925 Mad 800 : 21 M L W 587 : 48 M L J 299 : 90 Ind Cas 106 (DB).

——Head of Mutt is not a 'trustee' in the English sense of the term though answerable as a trustee for maladministration.

It is to be remembered that a "trust" in the sense in which the expression is used in English Law, is unknown in the Hindu system, pure and simple. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, the agent is only the manager and custodian of the idol or the institution. In no case is the property conveyed to or vested in him; nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration. A I R (Vol 9) 1922 P C 123 : 15 M L W 78 : 3 Pat LT 245 : 26 C W N 537 : 20 A L J 497 : 24 Bom L R 629 : 30 MLT (PC) 66 : 48 IA 302 44 Mad 831 : 1921 MWN 449 : 41 M L J 346 : 65 Ind Cas 161.

——Head of a Mutt—Status and position of—Trustee or life tenant—Control of corpus and income

Per Benson J.—It cannot be predicated of the head of a Mutt, as such that he holds the properties constituting its endowments as a life tenant or as a trustee. The incidents attaching to the properties depend

in each case on the conditions on which they were given, or which may be inferred from the long continued and well established usage and custom of the institution.

Per Wallis J. — Heads of Mutts cannot be regarded as trustees of mutt endowments except in so far as it may be shown that any particular endowment was granted on trust. As regards Mutt properties with reference to which no specific trust is established as above indicated the rule laid down in 27 M 435 is the correct one to apply. Where gifts are given to heads of Mutts without any specific trust the inference suggested by the circumstances of the case and by usage is that it is not intended to fetter the donees by any trusts in dealing with the gifts as to make them accountable in a court of law as to the manner of dealing with them.

Per Sankaran Nair J.—The Pandara Sannidhi or Head of a Mutt as such is neither a trustee nor a life tenant. He may well be a trustee as regards some properties and not trustee as regards others. He cannot alienate the land, but is bound to pass it on to his successor. He is under legal obligation to maintain the Mutt; to support the disciples and to perform indispensable ceremonies. These items form a charge on the income and the surplus which are at his entire disposal. He cannot be compelled by law to appropriate the surplus for any specific purpose, nor can he be required to spend anything out of it. He may accumulate the entire surplus and leave it to his successor.

Semble : But it may be open to the other members of the Mutt to check any expenditure incurred by the head for purposes entirely repugnant to the character of the institution if it would diminish the fund out of which they have to be maintained and educated, and the necessary expenses paid e.g., payment of Government revenue, etc.

Per Sankaran Nair J. — Obiter : It is possible that the relation of the head of the Mutt to the other members thereof might vary in different Mutts. In the absence of any evidence to the contrary the properties consisting of the gifts, purchases are not held as trust property. But a plaintiff may establish that the property is trust property and the onus will lie on him to do so. (1909) 33 M 265 : 19 M L J 778 : 7 MLT 1 : 5 Ind Cas 4 (14, 15) (FB).

——**Head of a Mutt also trustee of a Devasthanam— Breach of trust — Suit to remove head of Mutt from trusteeship C. P. C., S. 539.**

A suit for a declaration that defendants are not lawful trustees of an endowments, for their removal from the management, and for the appointment of a new trustees for the administration of the trust falls within S. 539, (C. P. C. 1882).

Where a person who is the head of a Mutt and also trustee of a Devasthanam by reason of his headship of the Mutt is guilty of waste and mismanagement of the trust, it is open to a court of equity to interfere and exercise its jurisdiction in order to make whatever arrangements may be required for carrying out the objects of the trust, e.g., by the appointment of a proper trustee and the like (1909) 19 MLJ 772 (777): 6 MLT 193 : 3 Ind Cas 255 (DB).

——**Heads of mutt - Powers of alienation — Debt when binding on mutt properties or its income in the hands of the successor.**

Per Benson J. — Heads of the mutts cannot bind the corpus or the income of the mutt property after the debtor's lifetime unless the debt is incurred for purposes necessary for the maintenance of the mutt as such.

That a Pandara Sannidhi or the head of a mutt should maintain a certain amount of state is no doubt true, but such maintenance should be out of current income and should not be considered a sufficient reason for encumbering the mutt property or binding the income in the hands of the borrower's successor.

Per Wallis J. — Heads of mutts cannot in any view exceed the powers of a limited owner under the Hindu law as defined in Hanooman Prasad's case. (6 M. I. A. 393) with regard to their dealing with property in their possession and enjoyment as such heads.

A mutt had an annual income of Rs. 20,000 of which a sum of Rs. 10,000 only was required for the purposes of the mutt. The balance was available for the personal expenses of the head of the mutt. The head of the mutt borrowed Rs. 1,500 for meeting expenses incurred by him during a journey of 10 or 14 days he had to make through a distance of 60 miles. The total expenditure incurred by him for the purpose was Rs. 1,800.

Held, that the debt cannot be regarded as in any sense necessary for the maintenance of the mutt and cannot, therefore, bind the mutt properties or its income in the hands of the successor. (1906) 17 M L J 40 (41, 42) (DB).

——**Debt incurred by holder — Binding character of — Decree, form of.**

The estate belonging to a mutt is liable in the hands of its holder for debts incurred by his predecessor in title for purposes necessary for the maintenance of the institution, even though the debts were not made a charge on the estate by the predecessor, just as much as the estate of an infant is liable for a contract by his guardian even without any express charge over the estate.

Held also : That the decree of the lower appellate Court limiting the liability of the estate to the income of the mutt property was the proper decree to be passed. (1907) 17 M L J 553 : 31 Mad 47 (48, 49) : 3 M L T 95 (DB) ; See 14 M L J 105 : 27 M 435 (440, 441) (DB).

——**Decree against head of mutt in a suit on pronote — Compromise de ree — Executi n, objection in by successor as to the binding nature of decree — Sishyas or disciples, position of — Practice—Parties.**

A decree obtained against the head of a Mutt as representing the mutt, whether it is a decree on contest or on compromise, or whether it is in a suit on a pro-note executed by the Head himself or otherwise, is binding upon his successor in office, and the successor cannot impeach it in execution proceedings. The proper remedy for the successor is to have it set aside in a suit brought for the purpose and for adequate reasons.

Obiter : — The Sishyas or disciples of a mutt are not co-owners of the Mutt along with its head; nor have they such interest in the mutt property as will entitle them to be made defendants in a suit to recover money or property from a Pandara Sannadhi. (1906) 16 M L J 415 (417) : 29 Mad 553 (DB).

——**Headship of mutt Corporation sole — Lunacy, effect of—Vacancy —Powers of Mattadhipati—Idol, consecrated—Juridical person.**

The head of a mutt being a corporation sole does not forfeit his position by his subsequent lunacy. He is not a mere trustee and his subsequent lunacy does not create any vacancy in his office. A debt incurred by the head of a mutt, though proper and appropriate with reference to the head who incurred it will not bind the property of the institution in the hands of his successors if the debt is not shown to have been incurred for a purpose necessary for the maintenance of the institution as a mutt.

Per Subrahmanya Aiyar, Offg. C. J.—The law gives heads of mutts full power of disposition over what remains of the income after defraying the established charges of the institution while in respect of the corpus it treats the individuals composing the line of succession as if they were tenants for life. In the case of mutts the ideal person is the office of the spiritual teacher (Acharya) which, as it were is incar-

nate in the person of each successive swami who for the time is a real owner and not a mere trustee The consecrated idol in a Hindu temple is a juridical person.

Per Bhashyam Aiyangar, J. — Property of a mutt like the benefice of a bishopric of the Christian Church is substantially inalienable. The head of a mutt has absolute dominion over the revenues accruing during his life time subject however, to the limited burden of maintaining the mutt. (1904) 14 M L J 105 : 27 M 435 (439, 456) ; See 33 M 265 (277) : 19 M L J 778 : 7 M L T 1 : 5 Ind Cas 4 (FB).

——In the case of mutts the custom governing the particular establishment has to be proved. (1907) 8 C L J 499 (504).

——Lunacy of Head of Mutt — No forfeiture — See (1904) 14 M L J 105 : 27 M 435 (443).

13. Property

See also N. 1, 5 and 20.

——Shares purchased with money from dharam khata, if religious property.

Where shares are purchased from dharam khata and there is no evidence that the ownership in the fund has been divested, the fact that the dividends on these shares were spent for charitable purposes is not enough proof of the dedication of the corpus to charity. AIR (Vol 28) 1941 Lah 347 : 43 P L R 489 : 197 Ind Cas 481 (DB).

——Temple—Offerings and Dakshnas, division of.

Offerings as well as cash paid as Dakshna during Archana in the temple belong to Archakas and Kavalkars have nothing to do with them. Persons carrying the idol during processions are entitled only to what remains of the offerings at the time of the procession but not to cash Dakshna which belong to Archakas. 1937 M W N 975.

——Right to possession of properties attached to office goes with right to possession of office. Where the right to sue for possession of office is barred, the possession of properties cannot be dissociated therefrom and independently dealt with. AIR (Vol 22) 1935 Mad 449 : 1935 M W N 503 (DB).

——Properties vested in an idol may be lost by the adverse possession of another and the possession of an out-and-out purchaser from the manager of an idol will be adverse to the idol even if the sale be affected for an unauthorised purpose. AIR (Vol 20) 1933 Pat 6 : 11 Pat 701 : 14 Pat L T 509 : 141 Ind Cas 157 (DB).

——Property acquired by sadhu is religious property in chela's hands.

If a sadhu acquires property and does not devote it to religious purposes, he remains absolute arbiter of the disposal of the property, but if the property has once passed to a chela, in virtue of his being chela it is only reasonable to hold that the chela must treat the property as religious. 102 Ind Cas 893 : 9 L L J 276 : AIR (Vol 14) 1927 Lah 757 (DB).

——Properties acquired from the income of debutter property are impressed with trust for the benefit of the deity. 96 Ind Cas 30 : AIR (Vol 13) 1926 Cal 1092 (DB).

— Mohini allowance is an income of kattalai. 91 Ind Cas 720 : 1925 M W N 774 : AIR (Vol 13) 1926 Mad 113 : 49 M L J 520 (DB).

14. Religious institution

See also N. 11, 12 and 19.

— Bequest to charity—Charity meaning of—Held on facts that Es'ean community being good charity bequest made to it was valid.

A purely religious body is not, as such, a charity. For example, a nunnery, which does not indulge in either teaching or nursing, or, in some way, helping external humanity along its thorny path, is not a charitable institution. If the members are merely engaged in working out their own salvation, they are not within the conception of charity. If, however, they do good works of a charitable nature, such as nursing the sick or teaching the ignorant, they are charities even if their motive in doing those good works may be to further their own salvation. Where a community is a teaching organisation, then, unless it is teaching something unlawful, it is a good charity :

Held, that the Es'ean community though a religious sect or body having most curious doctrines of its own, being a teaching organisation was a good charity and therefore the bequest to it was a good charitable gift. The mere fact that one could not understand its teachings which were not unlawful or did not agree with its teaching, though understanding it, could not make it any the less 'charity.' AIR (Vol 33) 1946 Bom 495 : 48 Bom L R 323 : 227 Ind Cas 336.

——Law applicable.

The Courts should be slow to apply to an institution a rule not collected from its own constitution or practice as proved in evidence; unless it be written large in the conduct and history of the "fraternity," the greatest doubt must be thrown upon it. AIR (Vol 32) 1945 Sind 57 : ILR (1945) Kar 40 (DB).

— The usage of an institution cannot be altered by mere custom for one or two generations. 98 Ind Cas 442 : 1926 M W N 793 : AIR (Vol 14) 1927 Mad 50 : 51 M L J 652 (DB).

15. Right to worship

See also N. 2.

——Suit to decide certain provisions of will made by founder entitling descendants to the right of worship and palas—Some of parties dying pending suit—Property in hands of Official Trustee pending order on the question of succession Official Trustee should treat heirs of deceased as entitled to palas and make them payments accordingly pending the decision. AIR (Vol 24) 1937 Cal 382 : 172 Ind Cas 545.

——Where by custom a right to perform puja by turns was conferred to Brahmins only.

Held, that a transfer of such a right in favour of a non-Brahmin is not valid. 97 Ind Cas 332 : 6 Pat 245 : 1926 P H C C 349 : AIR (Vol 14) 1927 Pat 7 (DB).

— Right to Pala or turn of worship is transferable and partible. 97 Ind Cas 332 : 6 Pat 245 : 1926 P H C C 349 : AIR (Vol 14) 1927 Pat 7 (DB).

——Debutter — Pala of worship — Transfer 'inter vivos'—Benefit of Thakur—Transfer to co-shebait.

Where by an arpannamah the owners of a turn of worship of an idol transferred the same to a co-shebait, the latter being, owing to his place of residence and other advantages, better able to perform the shebait than themselves : Held—that the transfer which was inter vivos was in the special circumstances of the case justified. (1909) 13 C W N 1084 : 36 C 975 (977) : 3 Ind Cas 76 (DB).

——Right of pala or turn of worship—If heritable and devisable—Alienation of right of worship.

Under the present Hindu Law, alienation of the right to worship is allowed only when (1) it is in accordance with the wishes and intentions of the founder of the endowment or (2) it is justified by the usage or practice in the family. Originally partition and alienation alike of the right of worship were forbidden. Custom and convenience, however, intervened and the right to partition of a right of worship came to be recognised. (1906) 11 CWN 782: 34 C 828 (834, 835).

——Temple—Puja in—Persons entitled to do puja.

The Badves are responsible for the due performance of the Puja, and the Badves have the right to bid the

Pujaries and Shewadharies to perform their duties. (1902) 4 Bom L R 582 (584).

——Dharmakarta — Powers of, to increase route of procession or curtail it.

The claim to have the procession of an idol carried though a particular street being one to worship an idol at a particular place is cognisable by a Civil Court. Though the Dharmakarta of a temple may increase the circuit of the procession of idol, he cannot omit from such procession and street though which according to mamool the procession has always passed. (1901) 11 M L J 215 (226, 227).

16. Shebait.

See also N. 1, 5, 10, 17 and 21

——High Court has no power to grant an application by a shebait to sanction alienations in respect of debuttar property on the ground of necessity. ILR (1937) 2 Cal 133: 41 CWN 627.

——Where property is absolutely dedicated to family idol, the founder divests himself of all r gh and title thereto and by appointing himself and his family members in succession to be Shebaits becomes functus officio. AIR (Vol 13) 1926 Cal 1083: 54 Cal 30: 30 CWN 930: 44 CLJ 479: 98 Ind Cas 684 (DB).

——Neither-shebait nor donor of accretions can alter an existing line of shebaits — Accretions to existing foundation are not new endowment.

Apart from a usage or a consensus of opinion among those interested in the worship of the idols in favour of such a course, a shebait is impotent of his own will and pleasure to alter the line of shebaits laid down by the founder or by the common law of India.

Neither does a donor of accretions to the property of an idol already consecrated and installed possess any such right. The donor, of course, may create a trust whereby the trust property may be managed by any person whom the donor elects to appoint for the purpose, whether the trust be of a religious character or not; but such a trustee does not become ipso facto a shebait and entitled to hold the sacred office of serving the deity. The donor of accretions to the estate of an idol already in existence, except in the special circumstances is neither entitled nor competent to appoint a shebait of such property. The persons who, subsequent to the foundation, furnish additional contributions do not thereby became joint founders; their benefaction is regarded as nothing but an accretion to an existing foundation. AIR (Vol 13) 1926 Cal 561: 53 Cal 251: 96 Ind Cas 45.

——Shebait in a position in which he cannot discharge duties of office properly—He can be removed from office.

The grounds for removing a Shebait from his office may not be identical with those upon which a trustee would be removed in England. The close intermingling of duties and personal interest which together make up the office of Shebait, may well prevent the closeness of the analogy but as part of the office it is indisputable that there are duties which must be performed that the estate does need to be safeguarded and kept in proper custody and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal. AIR (Vol 9) 1922 PC 235: 41 MLJ 68: 26 CWN 133: 30 MLT (PC) 24: 48 IA 258: 48 Cal 1019: 19 ALJ 773: 23 Bom LR 913: 34 CLJ 86: 14 MLW 104: 1921 MWN 554: 2 PLT 725: 62 Ind Cas 76.

——Lessee sub-letting property—Lessor not objecting—Presumption is, it is a permanent lease.

A lease of land was granted in 1824 under a rent note which provided for a payment of a yearly rent and that if the rent was not paid, the lessee should be at liberty to remove the structure which he might have made on the property. The lessor never raised any objection when the lessee sub-let the property, on various occasions, viz., 1872, 1883 and 1900.

Held, the lease was a permanent lease which could only be terminated if the rent was not paid. The disability of a shebait to make the permanent grant is not absolute. Under special circumstances it must be presumed that the grant would be valid beyond life of the grantor if a long time has elapsed after the grant. AIR (Vol 9) 1922 PC 163: 42 MLJ 501: 26 CWN 473: 20 ALJ 371: 35 CLJ 421: 24 Bom LR 584: 1922 MWN 319: 30 MLT PC 268: 46 Bom 481: 49 IA 54: 66 Ind Cas 162.

——Shebait failing to nominate a successor—Who should manage - Adverse possession.

The devolution of the trust upon the death or default of each trustee depends upon the terms under which it was created or the usage of the particular institution where no express trust deed exists. When the worship of an idol is founded, the office of shebait is vested in the heirs of the founders in default of evidence to show that he has disposed of it otherwise. Hence where a shebait appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management, reverts to the representatives of the founder even though the endowment has assumed a public character.

Quaere.—Whether any arrangement made by a shebait authorising two persons to hold office jointly is operative in law. The right of a person lawfully entitled to the office of a shebait may be extinguished by adverse possession. (1909) 11 CLJ 2 (12, 13): 3 Ind Cas 408 (DB).

——Debts incurred by shebaits—Liability of estate.

The liability of the estate of an idol for wrongs committed by its shebait in the reasonable management of its property is analogous to the liability of a corporation for wrongs committed by its agents in the course of their employment and for the apparent furtherance of its purposes. (1908) 12 CWN 550: 35 C 691 (695): 7 CLJ 514.

——Shebaitship—Hereditary shebaitship— Validity of disposal by will—Usage—Family customs—Held by Maclean C. J. and Mitra J.

In the absence of any local usage or family custom and where no case of necessity or clear benefit to the idol has been made out, a shebait of a private debutter is not entitled to dispose of his office of hereditary shebaitship by his will.

Held by Woodroffe J.—That the question of usage did not affect the matter and that the office of shebaitship could not be alienated by will. (1908) 35 C 226 (230): 12 CWN 323: 7 CLJ 315 (FB).

——Successive shebaits form, in effect, a continuing representation of the property of the idol. (1908) 9 C L J 597 (601) : 12 C W N 739 (DB).

——Shebaits—Representation in suit by person acting under the authority of shebait—Res judicata.

A decision obtained in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the debutter estate under an arpannammah from the shebait and who in fact did represent the debutter estate, is binding on a succeeding shebait. (1908) 12 C W N 739 (743) : 9 C L J 597 : 6 M L T 364 : 4 Ind Cas 81 (DB).

——Decree against shebait—Construction.

Where a decree for mesne profits following a previous decree for recovery of possession of immoveable property was passed against one P, who was described therein as "shebait P".

Held—That the decree should be taken as made against the idol, the suit having been defended on behalf of the idol and for its benefit. (1908) 12 CWN 550 (556, 557) : 35 Cal 691 : 7 C L J 514 (DB).

——Shebait right—Transfer of.

Shebaiti right cannot be transferred even to a co-shebait or to one who is next insuccession. (1907) 12 C W N 98 (102) (DB).

——Shebait, representative character of — Res judicata

A judgment obtained against a former shebait is binding upon succeeding shebaits who in fact form a continuing representative of the idol's property. (1907) 11 C W N 489 : 6 C L J 404 (408, 409) (DB).

——Shebait, powers of — Personal decree against shebait—Proceedings against debutter estate in execution—Claim on behalf of idol allowed — Compromise binding debutter estate — Legality — Prudent managership.

Per Mukerjee J. — A shebait has no proprietary interest in endowed property and it cannot be sold in execution of a decree against him personally. But although it is not competent to a shebait to alienate endowed property by way of mortgage or sale for satisfaction of his debt yet he is authorised to deal with the endowed property for its benefit and preservation, and especially for the purpose of defending it from hostile litigious attacks. The test to be applied is : whether the transaction was for the benefit of the estate. If A in the execution of a decree against B (here the shebait) attaches property of C (The Thakur), as the property of B, C (here the shebait of the Thakur) may not always find it profitable to take the chances of litigation, and it might be a prudent act on his part to settle the matter with A. If C happens to be an infant and D or (even B himself) his guardian D or B may be for the benefit of his ward, adopt previously the same course, and if that transaction is a prudent and beneficial one it would bind the estate of the minor (Thakur). There is no difference in principle if the judgment-debtor is himself the shebait or guardian.

Held—Per Curiam — That in the circumstances of the case, the compromise made by the judgment-debtor binding the debutter estate was binding on the estate, being on the whole beneficial to it. (1907) 6 C L J 442 : 11 C W N 261 : 34 C 249 (256).

——Bond debt contracted by shebait personally partly for the use of the idol and partly for his own use—Liability of trust property.

Plaintiff, who was the shebait of an idol, borrowed in his personal capacity a certain sum of money from defendant. It was recited in the bond and found by the Courts below that the money was required to pay a personal debt and for supplying the idol with bhog. Defendant having obtained a money decree, sold in execution thereof the debutteri property. Plaintiff, in his capacity of shebait, brought the present suit to set aside the sale.

Held by Maclean C. J., (agreeing with Rampini J.) that the trust property could not be sold in execution in the previous suit, as the decree was against the present plaintiff personally ; that S. 244, C. P. C., was no bar to the present suit, inasmuch as it was brought by the shebait to set aside a sale of trust property in execution of a money-decree passed against him in his private capacity.

Per Gupta J. — The trust property was liable only to the extent of supplying the idol with bhog. (1902) 6 C W N 663 (667) (DB);

See also 14 M L J 105 : 27 Mad 435 (439) : 2 C L J 448 (458, 459).

——Expenditure more than income — Items of reimbursement—Limitation.

The right of indemnity is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. A shebait is entitled to be reimbursed all sums properly expended by him in the preservation of the trust estate, as for instance all moneys paid in respect of Government revenue and the like, and all moneys properly expended by him in defending his position as shebait when challenged unsuccessfully by other claimants. (1878) L R 7 C D 504, ref. to.—together with moneys properly expended by him in performing the obligations imposed upon him by the trust deed. Where the income of the trust estate was calculated to be Rs. 10,000 a year and the trustee received during the whole period of his incumbency only Rs. 5,000 a year owing to the wrongful acts of respondents and consequently was driven to spend more money than the income in the reasonable expectation that on the cessation of the wrongful acts of the respondent or on the interposition of the Court the income would be sufficient to defray the expenditure incurred in the meantime in maintaining the religious observances prescribed by the founder of the trust.

Held — (1) That under the circumstances the trustee's personal estate was entitled to be reimbursed the amount spent out of it for the trust. (2) That a suit for reimbursement on the shebait's death by his heirs if brought within six years from the shebait's death, was within time. (1901) 7 A L J 125: 7 M L T 63 : 14 C W N 261 : 20 M L J 171 : 11 C L J 220 : 12 Bom L R 257 : 37 Cal 229 (234) : 37 I A 27 : 5 Ind Cas 404 (PC).

17. Succession.

——Succession to property from guru to chela—Presumption.

Where succession to property has been throughout from guru to chela to the exclusion of natural heirs, the presumption is that the property is of a religious nature and has been dedicated to religious use. AIR (Vol 21) 1934 Lah 68 : 154 Ind Cas 357 (DB).

——Deed by Bengali Hindu not well versed in Urdu —Words 'pisran, warisan, kaymokamian'— Whether limit trusteeship to male line of descent.

Where a deed of endowment to a family deity was executed by a Hindu of Bengal with no good knowledge of Urdu and the deed contained the words 'pisran, warisan, kaymokamian', to limit trusteeship of the endowment :

Held that in view of the facts of the case, the said words limited the trusteeship of the endowment to the male line of the donor's descent and it was sufficient to exclude even the donor's daughters from trusteeship. A I R (Vol 19) 1932 Pat 265 : 140 Ind Cas 673.

——Question of inheritance to office of Mahant is matter of custom.

As a general rule property given for the maintenance of religious worship and charities connected with it is inalienable except for the necessary purposes of the religious institution. But the question of how the inheritance to the Office of Mahant and the consequent interest in the Matt property is to be settled is a matter of custom in each particular case. Ordinarily the presumption would be in favour of the Mahant to nominate his successor either by a will or by a written declaration. A I R (Vol 18) 1931 Bom 79 : 32 Bom L R 1381.

——Line of succession—Right of founder to alter.

After a complete dedication, the founder cannot make any change in the order of succession of shebaits unless he has made a reservation to that effect in the deed of dedication. (41 C L J 22, not followed).

The texts of Hindu Law which would seem to suggest that the donor exercises a sort of supervision over the shebaits' rights and duties and can remove a shebait during his life-time if he be not competent, refer to public and charitable endowments and not to dedications made to family idols.

The shebaitship is ordinarily vested in the heirs of the founder in default of evidence that he has dis-

posed of it otherwise or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution. Where the founder has not laid down an order of succession of shebaits in the deed of dedication, he can certainly confer a shebaitship upon some person other than the person carrying on the sheba. But it is not the law, nor is there in the ruling of the Privy Council in 52 I. A. 245 to suggest that even if the line of succession of shebaits is laid down in the deed of endowment, it could be altered by the donor during his lifetime. AIR (Vol 18) 1931 Cal 329 : 34 C W N 1087 (DB).

—— Where in a suit to establish hereditary right to an office, the right is not proved, but only possession is proved, and no prayer for injunction to restrain defendant from interference is made, no injunction can be granted as in cases of suits for possession of immovable property. A I R (Vol 15) 1928 Mad 1139 : 110 Ind Cas 411 (DB).

——The constitution of a particular shrine must govern the succession and the mere fact that a certain chela has succeeded to one of the shrines enjoyed by his guru does not ipso facto entitle him to succeed to another, also enjoyed by his guru. A I R (Vol 11) 1924 Lah 170 : 5 L L J 543 : 80 Ind Cas 496 (DB).

——Succession — Self-constituted sangat cannot regulate—Power of worshippers.

A mahant is the head of any Hindu Dera or religious institution, and succession to the office may be hereditary in which case the successor would be a mahant. The only law as to mahants their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony. A self-constituted sangat cannot exercise supervision or control over the mutt or mahant. A custom entitling the worshippers to control the appointment or succession of mahants or to remove them without invoking the aid of law must be proved. (1922) 65 Ind Cas 842 (DB) (Lah).

——Succession to the office of Mahant — Minor appointed as disciple to succeed to office—Appointment is not invalid, because predecessor of the then mahant is alive.

It is not uncommon in the case of celibate ascetics that a minor is taken as a disciple in order that he might succeed to the office of mahant after the death of the then mahant. A I R (Vol 9) 1922 Oudh 142 : 8 O L J 395 : 66 Ind Cas 415.

—— Appointment by the head of a Mutt of his successor, in his own personal interest is invalid. A I R (Vol 8) 1921 P C 84 : 39 M L J 98 : 44 Mad 283 : 48 I A 1 : 25 C W N 145 : 13 M L W 301 : 18 A L J 1041 : 1920 M W N 371 : 57 Ind Cas 564.

—— Evidence of dedication—Self acquired property.

Properties dedicated to the office of Granthi of the darbar sahib are inherited by the person who succeeds to the office. But properties acquired by the Granthi out of his own income and which are not dedicated to the office descend to his natural heirs. Where properties descend from one granthi to another to the exclusion of natural heirs, the presumption is that they were dedicated to religious uses. A I R (Vol 8) 1921 Lah 337 . 1 Lah 540 : 59 Ind Cas 734 (DB).

——Darbar Sahib at Amritsar — Office of Granthi—Succession to.

The office of a granthi is religious and not secular, and in order to be qualified for the office it is necessary that the candidate must be a good Sikh and a properly initiated Singh.

The office is not descendible by inheritance and therefore a son, as a mere son of the previous office-holder, is not entitled to succeed.

Initiation as a Chela is a necessary condition for the appointment of a granthi. The other necessary conditions, which are to follow, are nomination, election and installation. AIR (Vol 8) 1921 Lah 188 : 48 P L R 1921 : 59 Ind Cas 721 (FB).

——Trusteeship, succession to.

Where there is dedication of a property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs. Semble. — Where the question as to succession to endowed property arises between rival claimants to the shebaitship against another who is already in possession and capable of performing the functions of the office, not between the heirs of the dedicator, this ordinary rule of Hindu Law does not apply. (1910) 7 A L J 430 (435) (DB).

——In the case of mutts there is no uniform custom applicable to all mutts so far as the question of succession to the Office of Mahant is concerned. (1908) 8 C L J 499 (504, 505).

——Hindu Law—Will.

In the absence of any direction to the contrary in the will, the right of inheritance to the shebaitship follows the same line as the right of inheritance to immovable property. (1908) 8 C L J 369 (426) (DB).

——Lashari Vaishnavas — Chela, nomination — Bhandara ceremony.

In the Asthal Raghubi Chak alias Rampati of the Lashari Vaishnavas on the death of a mahunt a chela succeeds if there is one, and if there be more than one, a successor is appointed by the mahuut from among the only chela of the deceased mahunt to succeed his guru by the due performance of ceremonials and when he has performed the sradh and cremation ceremonies of the deceased, he is entitled to succeed, as mahunt in preference to a gurubhai of the late mahunt, even though the bhandara ceremony has not been performed by him. The bhandara is purely a formal ceremony which neither confirms nor creates title. (1907) 5 C L J 360 (377) (DB).

—— In the absence of express directions by the founder of an endowment, the right to nominate the manager reverts to the heirs of the founder on failure of the persons expressly appointed. (1906) A W N 178 : 28 A 689 (690) (DB).

——Succession - Mahant —Chela's right of succession—Alteration.

The right of succession to the property left by the deceased head of a religious institution depends upon custom and practice which must be proved by evidence in each case. (1903) 7 C W N 145 (147).

18. Suit.

See also N. 7 and 9 (b) and Civil P. C., S. 92.

——Suit about debutter property in personal capacity is not maintainable.

A suit instituted by a person with respect to debutter property in his personal capacity and not as a trustee or shebait is not maintainable. AIR (Vol 33) 1946 Cal 123 : 49 Cal W N 810 (DB).

——Right of suit — Suit for ejectment in individual capacity.

Possession cannot be granted as manager of temple. AIR (Vol 31) 1944 Bom 245 : 46 Bom L R 441.

——Who may sue.

Whether a Hindu or a Jain temple can or cannot be regarded as a juristic person or legal person as a matter of construction of a document, if a transfer is made in favour of a temple, it may be and can be construed as a transfer in favour of the idol or a transfer in favour of the manager of the temple for the benefit of the endowment. Hence one of the managers is entitled to file a suit to eject a trespasser. A I R (Vol 28) 1941 All 290 : 1941 O W N 731 : 1941 A L J 397 : 1941 A W R H C 195 : 195 Ind Cas 500.

——Suit by shebait—Suit dismissed for default—Restoration application by new shebait — Change in shebait—Effect.

No doubt the right of filing the suit is in the shebait and not in the idol. But the shebait is only the representative of the idol just as a guardian is the representative of a minor. The minor is the real plaintiff and not the guardian or next friend who may be changed. So the real plaintiff must be held to be the idol and not the shebait who is suing in his name. That being so, the real plaintiff is not changed because a new shebait has come on the scene. In this view, an application for restoration under O. 9, R. 4, Civil P. C. is maintainable by the new shebait. AIR (Vol 25) 1938 Cal 547 : 42 C W N 806 : 177 Ind Cas 401 (DB).

——Suit by representatives of one sect of Brahmins claiming right to use and also exclusive title to property — Right to exclusive title denied — Court, if precluded from granting relief which plaintiffs were entitled to as members of sect.

A certain temple was a public endowment dedicated to the use of the entire Brahmin community. Plaintiffs instituted a suit for themselves and as representatives of the Brahmin Vadagalai Sri Vaishnavite community against the temple represented by the dharmakarta asserting a claim to use the Mantapam and claiming also in addition a right to the exclusive title and ownership of the Mantapam :

Held, that the fact that the exclusive title and ownership of the Mantapam was denied and negatived did not preclude the Court from granting the relief which the plaintiffs were entitled to get as members of the Vadagalai community for the use of the Mantapam. A I R (Vol 25) 1938 Mad 270 : 179 Ind Cas 900.

——Trust for maintaining of choultry and for building temple—Scheme suit by two members of public.

Under a will, a trust was constituted and the purposes of the trust were two : (1) the establishment of a feeding choultry, and (2) the construction of a Vishnu temple. The main object of the trust was established to be for maintaining the choultry. It was also established that the temple was not built. In a suit by two members of the trust with a view to framing a scheme for administration of the trust, it was contended that the suit was not maintainable by the plaintiffs at all, as only part of the trust that was or could be operative owing to the financial condition of the settlor's estate was the feeding choultry, that the plaintiffs were not poor people and, therefore, not directly interested in the choultry. As to the temple, they said that was matter for the Hindu Religious Endowments Board :

Held, that any member of the public who was interested in the building of a Vishnu temple such as the plaintiffs were, was entitled to bring this scheme suit. Having brought this scheme suit in right of their interest in having the trust relating to the temple carried out, it would then become necessary for the Court to consider the trust as a whole. It would be idle and a waste of the Court's time to split the trust into two, restricting these plaintiffs to the litigation of matters relating to the temple and leaving somebody else to litigate matters so far as the feeding choultry was concerned at some subsequent date. The suit was, therefore, maintainable. A I R (Vol 23) 1936 Mad 495:1935 M W N 1172:165 Ind Cas 63 (DB).

——Who may sue.

A person without legal right, but in actual possession of a mutt or any other endowment is entitled to maintain a suit for recovery of possession appertaining to it, not for his own benefit, but for the benefit of the mutt or endowment. A I R (Vol 22) 1935 Cal 623 : 158 Ind Cas 544.

——Who may prosecute.

Under S. 92, Civil P. C., the Local Government may appoint the Collector to prosecute a particular suit though it has invested the Legal Remembrancer generally with the duties elsewhere discharged by the Advocate-General under that section. A I R (Vol 18) 1931 P C 121 : 1931 A L J 369 : 35 C W N 699 : 53 C L J 537 : 33 Bom L R 968 : 1931 M W N 662 : 34 L W 63 : 61 M L J 402 : 53 All 910 : 58 I A 460 : 132 Ind Cas 745.

——Suit for possession of office — Court has only to consider if plaintiff has title to be restored to office, and not if his removal was proper.

Where a suit is brought by the Mahant of a religious endowment, removed from office on the ground of unfitness, to be restored to possession, the Court has not to consider the question whether the persons who took upon themselves the right to remove the plaintiff from his office were legally competent to do so but, the broad question, whether the plaintiff had any title to be restored to the possession of his office. The onus is upon plaintiff to satisfy the Court that he has a subsisting title to the endowment and if he fails to do so, the Court is bound to refuse to give him any relief. AIR (Vol 9) 1922 Pat 346 : 3 Pat L T 114 : 6 P L J 408 : 63 Ind Cas 849 (DB).

——'Shebait' or trustee is proper person to defend a suit against debattar estate—Decision in suit binding on successive shebaits. A I R (Vol 8) 1921 Lah 79 : 63 Ind Cas 454.

——Scheme Suit—Effect of — Bar to subsequent suit by trustee to establish—Private rights — Hereditary rights to trusteeship—Proof — C. P. C. (Act XIV of 1882), S. 539 New Code, S. 92.

A scheme once settled under by Court in respect of a public trust cannot be altered except by the Court and then only on substantial grounds; and consequently, a scheme framed by a Court under S. 539 (of Act XIV of 1882) is a bar to a subsequent suit by a trustee who was not a party to the scheme suit, to establish his private right with reference to the trust, which if established, would interfere with a charitable scheme settled by Court. The erroneous order of Court refusing to make him a party to the previous scheme suit cannot give the private individual a right to due which he otherwise would not have had. His only remedy, if any, would seem to be to induce the collector to ask for a modification of the Courts scheme under S. 92 of the new Code. (1911) 21 M L J 952 : 36 Mad 364 : 10 M L T 358 : (1911) 2 M W N 387 : 12 Ind Cas 449 (DB).

——Suit for removal of trustee — If carries with it the right to possession of lands attached to the mosque.

A right to sue for the removal of the trustee of a mosque and for an injunction restraining him from performing his duties does not necessarily carry with it the right to possession of the lands attached to the mosque. (1910) M W N 770 : 9 M L T 106 : 8 Ind Cas 525 (DB).

——Scheme suit—Jurisdiction original, of High Court over scheme suit as regards moffusil temple : — See 20 M L J 387 (392): (1910) M W N 14 : 7 M L T 292: 5 Ind Cas 729.

——Suit by worshippers against temple trustees and their aliences for declaration that alienation is invalid, and for possession—Decree, form of.

In a suit by the worshippers of a temple to have the alienation of trust property by some of the defendants, trustees, to the other defendants declared invalid, and for possession to the trustees, the proper decree to be made, if the Court be of opinion that the alienation is invalid, is to decree possession to those defendants who are trustees. And the trustees need not be referred to a separate suit for

the purpose. As the trustees will hold possession not on their own behalf but only as trustees, no injunction restraining them from alienating is necessary. (1910) 8 M L T 114 : 20 M L J 151 : 5 Ind Cas 901 (901) (DB).

——Suit against shebaits for rent.

All shebaits should be parties — See. (1908) 35 Cal 182 (184) : 12 C W N 160.

——Suit relating to—Parties—Shebaits — Several — Death of one—Survival of right—Suit for possession on rejectment — Conversion of into one for redemption if and when allowable — Co-shebaits made defendants — Refusal to join as plaintiffs — Collusion when not proved or alleged.

Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit and such of them as refuse to join as plaintiffs, should be made defendants. All the trustees should ordinarily be co-plaintiffs and only such of them should be made defendants as are unwilling to be, joined as co-plaintiffs or have done some act precluding them from being plaintiffs, because where the administration of the trust is vested in several trustees, they all form as it were, but collective trustees and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately but all must join. Upon the death of one of several joint trustees, the validity of the exercise of the trust powers by the survivors depends upon the nature of such power; if these powers are coupled with an interest or are annexed to the office of the trustee, they will pass with the trust to the survivors, and can be exercised by them. As regards the members of a Mitakshara family who are joint shebaits, the right of shebaitship passes by survivorship; and consequently, upon the death of the original plaintiff, the right to prosecute the suit or an appeal preferred by him vests by survivorship in all his brothers and one of them is not competent to obtain an order for substitution as if he is alone entitled to the office of shebait. Although a suit brought as one for possession may, in the discretion of the court, where the circumstances of the case permit, be equitably converted into one for redemption which could only be allowed when the mortgage is a valid and binding one, a plaintiff must ordinarily succeed on the case he has made in the plaint and unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character. (1907) 5 C L J 527 (534, 535) (DB).

——Civil Procedure Code (Act XIV of 1882), S. 539 —Public, charitable and religious trust — Removal of trustee—Removal grounds of—Manager of temple, possession of — Jurisdiction, if trust disputed — Pleadings.

It is not essential to the maintainability of a suit under S. 539, C. P. C., that the existence of the public, charitable or religious trust alleged by the plaintiffs should be admitted by the defendant. In a suit under S. 539, the court has jurisdiction to make a decree for the removal of the trustee. The cases upon Sir Samuel Romilly's Act are not always applicable in cases of construction of S. 539, C. P. C. Persons who are officiating priests of a temple, carry on the worship in the absence of the high priest and receive maintenance from the income of shrine, as also persons who act as pandaras or guides and priests of the Pilgrims, have an interest in the trust within the meaning of S. 539, C. P. C., and are competent to maintain an action under that section. S. 539, C.P.C., is applicable when it is sought to remove the trustee from a religious office, if as the holder of such office he is called upon to exercise business functions either as trustee or as manager of temple funds and properties and thus necessarily possesses civil rights and consequent liabilities.

In the case of public temples, the ideal owner of the properties dedicated is the thakur; and the shebait or the high priest is merely the natural custodian of the properties, having no beneficial interest therein, and thus occupying the fiduciary position of a mere manager, subject strictly to the liabilities of a trustee. Although no proof can be admitted of any matter during the trial of a suit which is not noticed in the pleadings, yet where a trustee is sought to be removed under S. 539, C. P. C., by reason of his fraudulent conduct and improper behaviour, in illustration of which certain specific facts are alleged in the plaint, the plaintiffs are not precluded from producing evidence of other instances of misconduct and misbehaviour. Under S. 539, C. P. C., the court will not dismiss a trustee although he may have transgressed the strict line of his duty, provided there has been no wilful default but merely a misunderstanding; the court will, however, remove him if he has misconducted himself by dealing with the trust property for his own personal benefit or set up an adverse title to it. (1905) 2 C L J 460 (465, 466) (DB).

——Suits — Civil Procedure Code (Act XIV of 1882), S. 539 — Interest — Trustee—Breach of trust—Purchaser — Limitation Act (XV of 1877) Sch. II, Arts. 134, 144 — Shebait, powers of—Decree under S. 539, C. P. C., scope of.

In a suit under S. 539, C. P. C., where one of the plaintiffs was the shebait of a public religious and charitable trust, it was competent to the court to grant to the plaintiffs for the benefit of the cestui que trust, a decree for the cancellation of unauthorised and invalid leases of the trust property executed by the shebait and his predecessor and for recovery of possession by the existing shebait. Persons who are ex-officio concerned in the performance of the worship of a public idol and are entitled to maintenance from the temple funds, have an interest in the trust within the meaning of S. 539, C. P. C., and are competent to maintain an action under that section. Where X and Y instituted under S. 539 with the consent of the Advocate-General, a suit for setting aside certain improper alienation of debutter property and for other relief making A, the then shebait, a party defendant, and subsequently, A was transferred to the category of plaintiff under S. 32, C. P. C., the suit was maintainable at the instance of A without any fresh sanction of the Advocate-General. It was not necessary for A to verify the plaint. When a person has taken trust property from a trustee with full knowledge that it is property which the alienor was not competent to deal with, neither the trustee nor his successor is estopped from recovering the trust property for the benefit of the cestui que trust.

Where, however, there was an alleged trust which the trustees themselves were competent to terminate and the trustees, after having alienated the property sought to recover it for their own benefit, they would be barred by the doctrine of estoppel. A shebait has no more power to deal with debutter property than has the manager of an infant's estate and prima facie any permanent alienation made by him is bad in law and a breach of trust; but where necessity is established, a shebait can make such disposition or alienation as a prudent manager may for the benefit of the estate. (1905) 2 C L J 448 (458, 459) (DB).

—Suits — Code of Civil Procedure (Act XIV of 1882), S. 539 — Public charity — Jurisdiction — Stranger, eviction of—Interest in trust, what constr

tutes—Sir Samuel Romilly's Act (Statute 52, Geo. III, C. 181), Scope of — Reg. II of 1819, jurisdiction of Revenue authorities under — Resumption proceedings, scope of — Kanungoe—Inam.

It is not necessary, in order to make S. 539, C.P.C., applicable, that the existence of the trust for public charitable or religious purposes alleged by the plaintiff should be admitted, by the defendant. If the trust is disputed, the question must be decided by the court upon the evidence. The evidence however, must be strong and clear that the lands have been inalienably and in perpetuity dedicated by the founder for a public, charitable or religious purpose. When the jurisdiction of a court to take cognizance of a suit instituted before it is disputed the court must adjudicate upon the question; mere denial of jurisdiction does not oust it. In a suit under S. 539, C. P. C., a decree for ejectment cannot be made in favour of the plaintiff against the stranger to the oust who sets up a title hostile thereto. A suit, the sole object of which is to eject a trespasser or to recover possession of trust property from the hands of a person who has acquired it on the basis of an improper alienation by a trustee, does not fall within the scope of S. 539, C. P. C.

Per Mookeriee J.—The language, scope and object of Sir Samuel Romilly's Act are materially different from those of S. 539, C. P. C., and decisions upon the former Act cannot be safely relied upon in interpreting the latter. Persons claiming a title purely adverse to a trust are not proper parties to a suit for the execution of the trust. As the possession of an interest in the trust is an essential condition precedent to the maintenance of a suit under S. 539, C. P. C., the plaint ought to contain a specific statement of the grounds upon which such interest is claimed. A plaintiff merely as the heir of the trustee against whom misconduct is alleged, has not such an interest in the trust as would entitle him to maintain an action under S. 539, C. P. C. The interest referred to in the section must be an existing one and not a mere contingency like the possibility of a succession. If the trust to be administered is one for the feeding of wayfarers and the poor, it does not necessarily follow that every member of the public has an interest in the trust. Reg. II of 1819, conferred upon Revenue authorities jurisdiction to determine whether lands ought to be exempted from assessment of revenue on the ground that they constitute a valid rent-free grant; the question whether they had been absolutely dedicated for a public charitable purpose, is wholly foreign to such an enquiry. (1905) 2 C L J 431 (435, 436) (DB).

——Right of suit of trustee on mortgage created out of proceeds of property dedicated.

A successor in the office of trustee is entitled to institute a suit on the mortgage created, out of proceeds of property dedicated to the idol by the endower himself, during regime as trustee, in virtue of the instrument of trust. (1905) 15 M L J 323 : 7 Bom L R 869 : 9 C W N 914 : 2 C L J 182 : 8 Oudh Cas 297 : 27 A 581 (591) : 32 I A 172 (PC).

19. Temple.

See also Note 9.

——Temple—Dedication to the public—Proof.

Some of the tests for considering the question whether there should be a presumption of dedication are user by the public, worship by the public and offerings by the public. A I R (Vol 18) 1931 Bom 33 : 128 Ind Cas 891 : 32 Bom L R 1435.

——No presumption exists as to temple in Malabar being public or private.

It will depend on the facts proved in each case. AIR (Vol 15) 1928 Mad 879 : 113 Ind Cas 635 (DB).

——Stranger building structures to be attached to temple shows that temple is public. AIR (Vol 13) 1926 Oudh 578 : 97 Ind Cas 853 : 1 Luck 489 : 13 O L J 696 : 3 O W N 645.

——Where the son of the founder is shown in the map of the place to be the malik of the temple in accordance with possession, that would not show that the temple is not a public one. AIR (Vol 13) 1926 Oudh 578 : 97 Ind Cas 853 : 1 Luck 489 : 13 O L J 696 : 3 O W N 645.

——Residential apartments attached to temples—Public character not taken away.

Residential apartments are invariably attached to temples in India, which are merely for the purpose of affording rest and convenience to the worshippers resorting to the temple. The existence of such constructions would not in any way detract from the public character of the temples to which they happened to be attached. AIR (Vol 13) 1926 Oudh 578 : 97 Ind Cas 853 : 1 Luck 489 : 3 O W N 645 : 13 O L J 696.

——Temple dependent on mutt for succession to headship—Usage of temple alone is material.

Where a temple and a mutt are two independent institutions but the head of the mutt has always acted as the manager or trustee of the temple, the Court is not concerned directly with the mutt. But the Court has to determine the usage regulating the temple and if, for the purpose of determining this question, the Court has to look to the rules or law regulating the mutt such rules or law will have to be adverted to only to that extent. A I R (Vol 12) 1925 Mad 800 : 48 M L J 299 : 90 Ind Cas 106: 21 M L W 587 (DB).

——Notice to Temple Committee — Consequence of non-compliance not stated—Notice is sufficient.

Certain worshippers applied to the Court to fill up a vacancy as a temple committee failed to fill up the vacancy. Notice of the application was given to the members of the committee.

Held, that the omission in the notice to state specifically the consequences of the non-compliance of the notice was immaterial and that the notice of the application before the Court and the action contemplated in accordance with the scheme was a sufficient and valid notice to the committee. A I R (Vol 12) 1925 Mad 175 : 80 Ind Cas 615 (DB).

——Subject to special usages to the contrary the offerings to the deity in a temple do not become the property of the officiating priest but contribute to the maintenance of the shrine with all rights, ceremonies and charities. AIR (Vol 10) 1923 Cal 60 : 72 Ind Cas 1026 : 36 C L J 478 (DB).

——In Southern Presidency a temple built with prakarams and mantapams is presumed to be public.

In the Southern Presidency except perhaps the West Coast the presumption is that a temple built in the ordinary style with prakarams and mantapams is a public temple until the contrary is proved. The temple which was not connected with the residence of the defendant, who claimed it to be a private temple, occupied a large area of ground and numerous shrines were attached to it all being enclosed by a wall, members of the public had all along been invited and freely admitted to this temple for purposes of worship.

Held, all these facts afforded a prima facie inference of dedication of the temple to the public. (1921) 62 Ind Cas 655 : 40 M L J 289 (DB).

——Community, ill-defined — Title to particular office or emolument—Capacity to hold:

The whole of an ill-defined community, such as all the members of the Vadagalai community, wherever residing, cannot be entitled to any particular office in a temple or to any emoluments or perquisites thereof. (1902) 14 M L J 171 : 28 M 23 (24) (DB).

20. Trust.

——Will—Provision for building a matam for conducting poor feeding and supply of butter milk to poor persons—Public charity.

A provision in the will for building a matam for the purpose of conducting the poor feeding has the effect of constituting a public charity. Similarly, a direction for supply of butter milk to poor persons constitutes a bequest for a public charity. But a direction in the will that the money should be spent on the building of tomb and its maintenance does not constitute a charitable endowment. A I R (Vol 32) 1945 Mad 217 : (1945) 1 M L J 328 : 58 L W 160 : 1945 M W N 309 : I L R (1945) Mad 854 (D B).

——Temple—Light kept eternally burning before it —Whether proof of its being public temple.

The fact that some sort of light is kept eternally burning in the building will not by itself be sufficient to convert the building into a public temple, and is quite consistent with the idea of a private temple. A I R (Vol 23) 1936 Lah 744 : 38 P L R 289 : 164 Ind Cas 313 (D B).

——Private temple—Conversion into public endowment—Proof necessary — User by public.

User can convert a private temple into a public trust but that user must be unfettered and unrestricted by any act on the part of the owners of the temple. In other words, the owner or owners of the temple must allow the general public the free use of the temple at all hours of the day and night without let or hindrance and further the offerings made to the idol in the temple should be utilised for the upkeep of the temple. Before a private grant can be converted into a public endowment, that fact must be proved by cogent and very strong evidence. A I R (Vol 22) 1935 Oudh 96 : 11 O W N 1435 : 152 Ind Cas 861 (D B).

——Endowment — Deed providing for debsheba and for feeding of the poor and students — Trust, if private.

Where a deed of endowment provided that the whole of the income of the debuttar property should be wholly spent for the purposes of the debsheba and feeding of the poor and of students if the income increases.

Held, that the feeding of the poor and of students was really incidental to the main purpose of the endowment, namely, the puja of the deity and that the endowment was wholly of a private nature. A I R (Vol 20) 1933 Cal 519 : 60 C 538 : 37 C W N 181 : 144 Ind Cas 894 (D B).

——Temple — Presumption.

There is no presumption that any particular temple is public or private. Whether it is public or private depends on the facts proved in each case.

Held, on the facts that the temple was a public one. A I R (Vol 19) 1932 All 708 : 1932 A L J 886 : 143 Ind Cas 95 (D B).

——Tests.

One of the tests to determine whether an endowment a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment. A I R (Vol 19) 1932 Pat 177 : 13 P L T 256 : 11 Pat 594 : 133 Ind Cas 331 (D B).

——Private and Public Trusts.

No original declaration of trust — Part of Income of property set apart for charity by each successor — No trust is created in respect of the income so set apart. A I R (Vol 14) 1927 Mad 599 : 38 M L T 248 : 102 Ind Cas 473 (D B).

——Purpose of the trust must guide the Courts, not the view of the majority of worshippers.

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. The bond of union of a religious association may contain a power in some recognized body to control alter or modify the tenets or principles at one time professed by the association, but existence of such power must be proved. Although any man having a right to worship can bring a suit under S. 92, the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practices, retains the control and possession of the place of worship and its endowments. No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. A I R (Vol 13) 1926 Lah 100 : 7 Lah 275 : 27 P L R 115 : 94 Ind Cas 695 (D B).

——Proof of trust — Income applied to temple — No other evidence — Property is not trust property. AIR (Vol 8) 1921 Oudh 52 : 8 O L J 127 : 61 Ind Cas 956 (D B).

——Endowment to take effect after a life estate.

There is no objection to the limitation by a Hindu testator or settlor of a life estate followed by an endowment of property to religious or charitable purposes. 1908 A W N 132 (132, 133) : 5 A L J 256 : 30 All 288 (D B).

——Trust — Uncertainty — Income of villages to be applied to :"charitable purposes" at a dharamsala which the settler had founded.

By a deed of trust or bhentnama, the owner of seven villages settled the income thereof to the extent of Rs. 50 a month to be applied to "charitable purposes" at a dharamsala which he had founded. In course of time one of the villages mentioned in the deed of trust was alienated by a person who was at the time acting as trustee.

Held, on suit by the trustee to have the sale cancelled and to recover possession of the village — (1) that the trust was not void for uncertainty, and (2) that it was not competent to the court in the suit as framed to declare that the village in suit was charged with proportionate part of the total income of the seven endowed villages. 1908 A W N 34 (35, 36) : 30 A 111 : 5 A L J 23 (DB).

——Destruction of image—Effect of.

The destruction of an image does not destory the endowment. (1907) 8 C L J 369 (390) (D B).

——Trust estate — Debutter property—Alienability — Decree against, when can be passed.

Per Rampini J. — A debutter property, according to Hindu Law, is not absolutely inalienable. It can be alienated for legal necessity and therefore when a shebait as such trespasses on the property of another and so commits a tort and he is sued for and cast in damages the debutter property can be sold in execution of such a decree. Per Woodroffe J. — As the decree in question appeared to have bound the trust estate, the debutter property was liable. (1906) 10 C W N 1000 (1002) (D B).

——Creation of endowment — Essentials — Perpetuity, rule, contravention of — Scheme, framing of when.

In order to constitute a valid endowment all that is necessary is to set apart specific property for specific purposes and these purposes are clearly religious and charitable in their nature. The trust is not invalid merely because it transgresses against the rule which forbids the creation of a perpetuity. The trust does not become invalid by reason of the fact that there is no express gift to any specific idol or

that the gift of certain of the properties is to idols which are not existent, provided the testator clearly expresses an intention to bequeath certain of his properties to specific religious or charitable trusts, i. e., performance of Durga and Lakshmi pujahs which his executors and trustees are to carry out in the manner indicated by his will. The court will only frame a scheme when a testator having expressed a clear intention to create a trust has failed to indicate the means by which the trust is to be carried out. (1905) 9 C W N 528 (535) : 1 C L J 605.

21. Trustee.

(a) Removal and appointment of.
(b) Rights and powers of.
(c) Liability of.
(d) Transfer of office of trustee.
(e) Alienation by—see N. 1.

(a) Removal and appointment of.

——Trusteeship — Proof of—Intention of settlor.

The mere facts that after the original founder, his eldest son succeeded both to the zamindari and to the trusteeship of the choultry and that after him, his daughter did so and that a partition deed was executed under which a provision was made that if the trustees mismanaged the property, the Local Fund authorities should take over the management are not enough to enable the Court to presume that the intention of the settlor was that the trusteeship should vest in the zamindar for the time being or that an usage has sprung up to that effect which could be recognized by a Court of law; much less can the Court presume that even a stranger who becomes entitled to the zamindari is to be the trustee of the choultry. AIR (Vol 33) 1946 Mad 5 : 58 L W 474 : 1945-2 M L J 264 : 1945 M W N 582 : 222 Ind Cas 360 (DB).

——Removal of — Gross breaches — Prior meritorious acts—High standard of rectitude.

Services done by a trustee to the trust cannot be allowed to justify subsequent conduct on his part, amounting to misappropriation of trust funds and conversion of trust property to his own use.

The standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest and that standard must in all circumstances be maintained by the Courts if the safety of property held upon such trusts is not to be imperilled. AIR (Vol 18) 1931 P C 121 : 1931 A L J 369 : 35 C W N 699 : 53 C L J 537 : 33 Bom L R 968 : 1931 M W N 662 : 34 L W 63 : 61 M L J 402 : 53 All 910 : 58 I A 460 : 132 Ind Cas 745.

——Unless there is cogent reason to contrary, person having support from majority of community ought to be appointed as trustee for Parsi Fire temple in preference to one having no such support and fact that trustees ought not to be related to each other is not sufficient to disregard such wishes. AIR (Vol 16) 1929 Rang 221 : 7 Rang 561 : 121 Ind Cas 815 (DB).

——Power of nomination must be exercised in the interest of the institution.

In cases of powers of nomination given to trustees to appoint successors, they should be executed bona fide, in the interests of the trust and not to secure a personal advantage. The law applies a fortiori to cases of religious charitable trusts, where elements of personal advantage should find no place in the appointment, the benefit to the institution being the sole consideration. AIR (Vol 15) 1928 Mad 327 : 29 M L W 250 : 51 Mad 720 : 54 M L J 479 : 108 Ind Cas 305 (DB).

——Trustee empowered to appoint successor at his death—He appointing one inter vivos—Appointment is always revocable.

According to general principles, a religious office cannot, prima facie, be made the subject of alienation. The succession to such an office is governed in the first instance by the will of the founder, and, in the absence of direct evidence on that point, by usage of the particular institution from which the founder's will may be inferred.

Where the power is given to a trustee to appoint his successor "at the time of his death," there should, to make any appointment valid where it is by deed inter vivos to take effect at once, be proof that there were circumstances showing that the person making the appointment had a reasonable apprehension or death, and it is always subject to the condition that if the trustee making the appointment recovers the transfer is not to operate.

Where the deed constituting the trust clearly expresses an intention that the appointment should be made only at the testator's decease, the trustee cannot give the go-by to it by executing it without putting a revocable clause. Though the deed inter vivos to take effect after his death may satisfy the requirements, such a deed must always be subject to the controlling clause in the deed of trust. Such power of revocation can be implied from the terms of the deed, even though the express power of revocation is not reserved.

Srinivasa Aiyangar, J.—In the case of public trust, a power of appointment, unless there is something to the contrary in the instrument of trust itself, should be regarded as a power to be exercised at or about the time when the appointment is to take effect having regard to the state of things, then, and therefore any appointment so-called previously made is in its very nature revocable. AIR (Vol 15) 1928 Mad 327 : 51 Mad 720 : 29 M L W 250:54 M L J 479:108 Ind Cas 305 (DB).

——Power of trustee to appoint successor—Power of members to appoint new trustee — Constitution of association — Suit for removal of trustee — Decree appointing new trustee—Appointment of new trustee after decree by way of summons, legality of.

A suit was instituted in 1922 for removal of the trustees of the Burra Sikh Sangat and a decree was passed in 1923 appointing the Prabandhak Committee as the sole trustee. This Committee instituted a suit in 1924 for recovery of certain amounts from the old trustees. In 1925, a certain Act was passed by the Punjab Legislature for the Regulation of Sikh Gurdwaras in the Punjab and by that Act was set up a Central Board with certain functions by way of supervision and control of the Sikh shrines in that Province. In 1926, the Prabandhak Committee took steps to dissolve itself having, before it dissolved purported to transfer its functions to the Central Board which was set up by the Punjab Act. Subsequently, the members of the Burra Sikh Sangat held a meeting and appointed the Central Board under its old name as trustee. In 1928, an application was made in the suit of 1922 by the Board and certain members of the Sangat by summons to have the Board appointed trustee. This application was allowed. Thereafter an application was made in the present suit to substitute this statutory body as plaintiffs in the suit and they were substituted and the suit decreed. On appeal :

Held, (i) that the application made in 1928 in the suit of 1922 which had come to an end in 1923 was entirely out of order and the Court had no jurisdiction to make any order upon the summons which was a crude evasion of S. 92, Civil P. C. ;

(ii) that the statutory Board was not validly appointed as a trusee as the Shiromani Gurdwara Prabandhak Committee and had no power to appoint the Board as its successors and there was nothing to show that the constitution of the Sangat was such as to empower its members to appoint a trustee at a meeting;

(iii) that the plaintiffs had, therefore, no right to sue.

The right of a trustee to nominate his successor is a right which must be derived from some special provision either in the deed of settlement or in the rules of the foundation or in the custom of the society or otherwise. AIR (Vol 18) 1931 Cal 281 : 52 C L J 78 : 130 Ind Cas 866 (DB).

——Temporary appointment — Legality of.

Per Wallis, C. J. (Semble) — A temple committee has power to appoint a trustee temporarily.

Per Sadasiva Aiyar, J.—Subject to this qualification that temporary appointments should only be made in emergencies and for different periods or as long as a different state of circumstances exist or till the committee have had a reasonable time to fix upon a suitable person to fill up the vacancy permanently with a free-hold right, the making of temporary appointments is not within the legal powers of the committee members. AIR (Vol 8) 1921 Mad 114 : 13 M L W 153 : 61 Ind Cas 783 (DB).

——Appointment of new trustee.

Held that Section 14 of Act No. XX of 1863 confers no powers upon the Court to appoint a new trustee, manager or superintendent of a religious endowment. If it is necessary to invoke the aid of the Court for the purpose of appointing a new trustee the proceedings provided by Section 539 of the Code of Civil Procedure must be resorted to. (1908) A W N 101 (102).

——Powers of — Removal and appointment of Trustees—Temporary Trustees, appointment of—See (1906) 16 M L J 435 (438, 439) : 29 Mad 534 : 1 M L T 127.

——Durga — Power of Government — Resumption of inam—Substitution of money allowance, effect of.

After the passing of Act XX of 1863 the Government is not competent to remove a trustee or superior of a durga. Where an institution falls under S. 3, the committee appointed for its supervision has the right to dismiss the trustee for misconduct, and the fact that Government has resumed an inam granted in its favour and substituted a money allowance instead, does not deprive the committee of its jurisdiction to dismiss a manager. Such redemption and substitution of money allowance is not intended to be a punishment of the trustee, but is only a precautionary measure to render a malversation by the trustee more difficult. (1904) 15 M L J 26 (27) (DB).

——Temple committee — Dismissal by — Validity of complaints against trustee — Inquiry by Committee—Evasive conduct of trustee.

Where trustee of a temple, being called upon by the district committee to answer to certain alleged charges, against him, did not obey the order and otherwise acted so evasive that the committee reasonably believed him to be guilty and dismissed him from trusteeship:

Held that he could not claim restoration to the office, even though he might prove all the charges to be unfounded. (1901) 11 M L J 236 (237) (DB).

(b) Rights and powers of.

——Rights of.

The trustees of a religious endowment cannot appropriate the property and defeat the trust by failing to carry out its provisions and misappropriating the profits of the property for a period of years. AIR (Vol 31) 1944 All 1: 1943 ALJ 535: 1943 AWR HC 269: ILR (1944) All 20: 211 Ind Cas 157 (DB).

—— Power to take loan—One of trustees, if can execute promissory note on behalf of institution.

There is no rule of law which requires the trustees of an institution actually to sign a promissory note. It is enough if those trustees who do not sign have authorised the transaction.

Where one of the trustees of a temple with the authority of other trustees incurs a loan for the purpose of the institution and the loan is ratified after it was incurred by the Hindu Religious Endowment Board itself and it is not clear whether the temple committee was in existence either when the loan was incurred or when it was ratified, in the face of ratification from so high an authority, there can be no ground for holding that the debt was in any way improper from the point of view of the temple and a decree can be passed on the basis of the promissory note against the temple, and the non-ratification by the temple committee cannot be a bar. AIR (Vol 29) 1942 Mad 92: 54 LW 470: 1941 MWN 876 (2): 1941-2 MLJ 587: 201 Ind Cas 227.

——Powers of trustee—Adverse possession.

Notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is well-settled law that a trustee has power to incur debts and to alienate the trust property to the same extent as the manager of an infant heir. His alienations can be justified by proof of necessity for the preservation of the endowment or institution.

Where the disposition by the trustee is of the "math and its properties" (which apparently means the institution itself), it is wholly void with the result, that the possession of the assignee would be adverse from the very start. Where the assignment is of the properties of the math, as distinguished from the institution, adverse possession will commence from the cessation of the office of the alienating mahant. If a suit by the predecessor is barred, his right is extinguished and the succeeding trustee is equally without title. When the disposition amounts to a negation of the trust, the statute would run from the very date of the alienation. AIR (Vol 25) 1938 Mad 415: 1938 MWN 105: 47 LW 165: (1938) 1 MLJ 113: 183 Ind Cas 88 (DB).

——Suit by trustee for recovery of wakf property—Court cannot permit trustee to raise money by mortgaging the property, in part or whole. AIR (Vol 17) 1930 Rang 211.

——Shwe Dagon Pagoda—Under scheme framed by late Court of Recorder of Rangoon in Civil Regular Suit No. 139 of 1884, property within precincts of Pagonda grant is vested in trustees and they have sole right to repair buildings such as Zayats.

The by-law of the trustees however mentions that a register shall be kept by them for the purpose of requesting the original donor and his representatives and descendants to undertake the repairs. The maintaining of such register is purely a matter of grace on the part of the trustees and the High Court has no power to act as a Court of appeal or revision from any decision which the trustees might make as to what name should be entered in the register. AIR (Vol 16) 1929 Rang 214: 7 Rang 231: 118 Ind Cas 629 (DB).

——Lease by trustee of endowed properties, is valid for his life-time or the period of his holding office.

It is quite common for persons in the position of trustees of religious and charitable endowments to make lease of such property. These can be recognised as being valid for the life of the lessor or the trustee or what is equivalent to his life his continuance in the trust and to construe words apparently wider in import as limited to the lifetime of the lessor qua trustee. Where there are no extravagant words in the instrument indicating a permanent lease such as mulgeni, etc., or other technical phrases of that import the transfer should be deemed to end at the trustee's death or his ceasing to hold office. Courts should strive, where they can, to put a liberal construction upon the instrument ut res magis valeat quam pereat so as to uphold it and carry into effect

the intention of the parties. AIR (Vol 11) 1924 Mad 827: 47 MLJ 256: 95 Ind Cas 845 (DB.

——Trustee's powers of alienation over corpus—Trustee's position—'Necessity', meaning of.

An alienation of temple property as a permanent lease at an unvarying rent or a fixed premium is not sustainable, though it is a house site and was not producing any income before the date of alienation, and the fact that the alienation is in favour of a charitable institution or for the supposed good of the public is irrelevant to the consideration of the question.

Obiter—A shebait is in a position analogous to that of the manager of an infant heir; and he cannot alienate the corpus of the estate unless for sufficient necessity. A decree can also be passed against the corpus of the property. A necessity justifying alienation of rent and income will not be such as will justify an alienation of the corpus. Alienations of the corpus ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple. The requirements of daily worship, of buildings suitable for the carrying on of such worship and even of the essential festivals intended to cultivate the religious emotions of the section of the public for whose benefit the temple is dedicated may afford grounds for the alienation of part of the corpus. Necessity as regards a human infant and an idol will vary. Observations in 27 M. 435 and 465 commented on and doubted. (1910) 20 MLJ 969 (975, 976): 34 Mad 535: 9 MLT 83: (1911) 2 MWN 154: 9 Ind Cas 281 (DB).

——Trustee—Power of alienation—Mokurari pottah

The power of the Mohunt of the endowment for the time being to alienate debutter property is, like the power of the Manager of an infant heir, limited to cases of unavoidable necessity, and, apart from such necessity, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the Mohant. A mokurari pottah or permanent lease granted by the Mohunt of the endowment for the time being on the most favourable construction, enures only for the life-time of the grantor. (1909) 14 CWN 1: 11 Bom LR 1234: 36 C 1003: 6 ALJ 857: 10 CLJ 284: 19 MLJ 530 (545): 36 IA 148: 4 Ind Cas 449 (PC).

[On appeal from 3 C L J 306: 10 C W N 738 (743, 744): 33 Cal 511.]

——Permanent lease by trustee — Validity of—Ejectment and compensation—T. P. Act, S. 108 (i).

A permanent lease by a trustee of a religious endowment at a fixed rent in the absence of special circumstances of necessity for the same is not valid in law. A lessee who constructs a building in virtue of the lease is not entitled to any compensation, but is merely entitled to remove the building. (1908) 19 MLJ 208 (209): 5 MLT 220: 4 Ind Cas 1129 (DB).

——Trustee's power of alienation—Permanent lease by trustee void and not voidable—Adverse possession—Acceptance of rent—Effect of.

A permanent lease of debutter property is void if not executed for legal necessity. (1907) 12 CWN 63 (64) (DB).

——Trustee, suit by, against co-trustee—Dharmakarta's legal position—Change of Namams—Introduction of new idol—Breach of trust.

A suit by a Dharmakartha of a temple against his co-dharmakarthas for an injunction restraining them from changing the form of, or in any way interferring with, the Tengalai namams in the temple and directing them to remove from the temple a copper image of Vedanta Desikar is one relating to the property of the temple vested in the trustees and is cognizable by a civil Court under S. 11, C. P. C. (O.C.).

Per Miller J,—The stone and chunam namams are part of the property of the temple vested in the trustees, and their removal or alteration is an interference with plaintiff's right of property. In all temple matters the only safe guide is usage, and if this usage of the institution is Tengalai in character, the trustee of the institution has, at any rate without sufficient cause or excuse, no power to proclaim a wholesale alteration of the form of naman usually displayed in the temple a change in the predominating influence therein. Such a departure from usage is not prima facie within the power of the trustees and any trustees making such departure will be restrained by the civil courts. A trustee is within his powers in introducing a portable image of Vedanta Desikar to be used, if necessary, in processional ceremonies especially where no temple funds are spent on the making of such image. Where there is already an image of Vendanta Desikar in the temple, the introduction of a portable image is not a sacrilegious act. A recent innovation is not the same thing as acting in contravention of established usage.

Per Wallis J.—Whether Dharmakarthas of a Hindu temple are trustees in whom the temple properties are vested or they are merely managers, it may in practice be necessary for civil courts to deal with them as trustees of the general body of the temple worshippers. If the Dharmakarthas commit a breach of trust cognizable by a civil court they may be restrained at the suit of the other Dharmakarthas or worshippers. A suit is not necessarily a suit of civil nature so as to be cognizable by civil courts merely because the facts constituting the cause of action are alleged to amount to a breach of trust. If such facts relate merely to religious rites or ceremonies, such questions may be determined by the civil courts provided any right to property or an office depends on them; vide S. 11, C. P. C., Explanation. It is not the law that temple trustees hold on trust to provide for carrying on public worship at the temple according to mamool or usage of the institution and that every departure from such usage is a breach of trust for which they can be sued in a civil court. The right of a worshipper to worship at a given temple is a civil right recognized by courts. Such right of worship may be enforced at the suit of a person proving himself entitled to worship and will also be protected in various ways. The introduction of new idols or other objects would only be restrained when they interfere with the form of worship for which the temple is dedicated. Other innovations, whether by way of commission or omission, provided they are serious, will give rise to a civil suit for the removal of trustees. A court ought not to direct the removal of a Vadagalai idol from a temple in which the predominating ritual is Tengalai on the ground that it is an unauthorised innovation unless it is shown that the introduction of the idol will interfere with the prevailing form of worship. Although the putting on or taking off of such things as namams is ordinarily not a matter of a civil nature yet a wholesale substitution of Vadagalai emblems for Tengalai emblems in a Tengalai temple may be regarded as an interference with the rights of property of the Tengalais and therefore cognizable by a civil court. Where a temple in which the predominating ritual is Tengalai, it must be presumed that it has been dedicated to the worship of the Tengalais largely, if not exclusively, and the Tengalais will have a right to object to any alteration in the temple structure which would affect its character as Tengalai institution. (1907) 17 M L J 1 (8, 9) : 30 Mad 158 : 2 MLT 69 (DB).

——Trustee, power, of, to create service tenure in perpetuity—How for binding on successors—Termination of tenure—Notice—Sufficiency.

A trustee has no power to grant the trust lands on service tenure and bind his successors in perpetuity except on very special grounds. But where the grant has been acquiesced in by successive trustees for a long period, the possession of the tenant can be terminated only by sufficient notice. A patta given at the end of the fasli indicating the change in the conditions of the tenure even for the existing fasli is not a sufficient notice. (1905) 28 M 391 (392, 393) (DB).

——Temple trustee—Creation of additional trusteeship by hereditary trustees —Validity—Practice—Parties—Worshippers, joinder of, in suit for declaration possession and damages—Misjoinder.

The hereditary trustees of a temple have no power to add to their number by taking in other people as additional trustees even though it be highly beneficial to the trust to do so. Persons interested as worshippers in a public religious institution may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties acting to the injury of the institution, if, in the opinion of the court, such joinder is called for in the interests of the trust. Even though the joinder of certain persons in their capacity as plaintiffs was bad, their Lordships allowed their names to stand on the record on the ground they were interested in the institution as worshippers, but refused additional persons any relief in respect of possession and damages as prayed for in the plaint. (1905) 15 M L J 475 : 29 M 106 (110) (DB) ; See also (1905) 29 M 534 (538, 539) : 1 M L T 127 : 16 M L J 435.

——Kattalaigar's right to subscribe solely — Worshipper's rights—Trustee's powers.

Any worshipper is entitled to take part in the worship in a temple at any time or at any festival, and for that purpose to subscribe towards the funds necessary for the performance of the festival, and even though sufficient funds have been already subscribed for, to require that his subscription may also be utilized for that purpose ; but no one and no special body of worshippers can claim the right to subscribe the funds necessary for a particular festival to the exclusion of other worshippers. The trustees are competent to arrange with any worshipper permanently for the supply of funds to conduct a festival; and if others also subscribe in addition, the festival can be performed on a grander scale. (1905) 15 MLJ 458 (460) (DB); See also (1909) 19 M L J 743 (746) : 7 M L T 248 : 5 Ind Cas 76.

——Trustee's powers—Kattalai, manager of—Alienations and obligations contracting of—Validity—Permanent lease—Improvement.

According to the Indian Common Law relating to Hindu religious institutions such as the present the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be treated with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions. It is no part of the manager's duty to effect improvements with reference to existing endowments when the funds in his hands do not admit of it, nor is he called upon to enter into transactions for the purpose of augmenting the funds of the institution. He cannot in any manner subject the institution in his charge to duties obligations and burdens to which, with reference to the nature of the foundation or otherwise, the institution is not inherently or necessarily subject.

Held, that where a kattalai and a mutt were tenants in common in the melwaram due from a village, an arrangement by which the manager of a kattalai undertook to collect the whole melwaram and be himself responsible to the mutt for its half is neither binding upon the kattalai nor enforceable. (1904) 27 M 465 (475, 476) : 14 M L J 81 (FB).

——Trustee's power to grant permanent lease—Regulation, VII of 1817 (Madras)—Obiter.

It would be breach of duty on the part of a trustee of a religious endowment to "create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a veriable rent from time to time," unless there were special circumstances of necessity to justify it. (1904) 27 M 291 : 14 M L J 200 : 8 C W N 545 (549) : 31 I A 83 (PC).

——Temple committee—Possession of properties of temples governed by the Act—Right of trustees as against Temple committee.

The trustee or manager of a temple governed by the Religious Endowments Act, XX of 1863, is entitled to the possession of the temple properties as against the Temple committee. (1903) 26 M 243 (note) (244 note) : 6 M L J 14.

——Trustee's powers to alter the purpose for which the institution was founded—Usage how far evidentiary of the purpose—Duty of court to support usage—Trustee's duty.

The principles which govern the regulation of religious trusts in England by the Court of Chancery will mutatis mutandis govern religious trusts in this country. Where an institution exists for the purpose of religious worship, but the exact form of worship or the class for whose benefit it was established cannot be discovered from the instrument at all, the court can find no other means of deciding those questions than through the medium of an inquiry into what has been the usage of the worshippers in respect thereto and if the usage is a lawful one, it is the duty of the court to support that usage in the suit legally instituted of any person interested. It is not in the power of managers of the institution to alter the purpose for which it was founded or to say to the worshippers that the managers have changed their opinion and that the worshippers should come to the place of customary worship, unless they conform also to the alteration. It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is guilty of a breach of trust, and still more so if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the court to establish it. (1902) 12 M L J 360 (364, 365) (FB).

(c) Liability of.

——Promissory note by trustee—Liability — Decree against temple properties.

Where a trustee borrows money for purposes of the trust by executing a promissory note, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property. The liability is restricted to the personal promise of executant trustee to pay. A I R (Vol 29) 1942 Mad 198 : 54 L W 472 : 1941 M W N 877 : 1941-2 M L J 568 : 201 Ind Cas 332.

——Co-trustees—Liability for negligence—Liability for not recovering arrears of rent.

Where the greater part of the arrears due from tenants is interest and not principal, trustee landlord should not be held liable for not recovering the entire arrears from the tenants.

Trustees are liable not only to account for the moneys that have actually come into their hands but also for moneys which might have come into their

hands if they had acted with due diligence and without gross negligence, and in all cases they would be liable for the result of their gross negligence. But where there are a number of trustees and where there is such disunion among them that however much a particular trustee or trustees are honest, diligent and willing to discharge their duty, it is practically impossible to carry on the management properly, the trustees could not be made jointly and severally liable for the impossibility of the management which has been the result of their disunion rather than gross negligence or wilful default. AIR (Vol 21) 1934 Mad 115: 38 L W 902: 57 M 315 : 1933 M W N 1433 : 148 Ind Cas 1155 (DB).

——Trustee buying goods for temple necessity—Temple funds are liable.

Although there is a great distinction between a mutt and a temple there is no distinction between the borrowing powers of a swami of a mutt and the borrowing powers of the trustee of a temple.

Where the trustees of a temple purchased goods on credit, not for their private purposes but in the discharge of the duties under which they lay in the performance of the worship and feeding of the worshippers and the goods so bought were legitimately applied for these purposes, the temple funds in the hands of the trustees are liable for the price of the goods so bought. AIR (Vol 17) 1930 Mad 1009 (DB).

——Trusteeship not a place of prestige or power—It is a place for service and sacrifice.

It is highly regrettable that trusteeships of temple and similar institutions should be looked upon as places of prestige and profit and that people should be found who are desperately anxious to be elected to such places or to continue to stick to them in spite of the onerous and serious responsibilities thereof. The true spirit in which such offices should be accepted or retained is the spirit of service and sacrifice in the interests of the public and of the institutions. So long as such offices are regarded not as posts of duty and responsibility, but as opportunities of personal aggrandisement, the affairs of such institutions are bound to be unsatisfactory. In this view, no doubt, schemes under which there should be candidates for trusteeship and elections to such offices are largely incompatible with the true spirit that should prevail, but it is the dream of democracy that there may be candidates who are pressed by public opinion to accept office if elected and that there may also be elections which truly reflect the highest principles of election. AIR (Vol 12) 1925 Mad 1070 : 1925 M W N 505 (FB).

——Trustees—Purchase by one of several, in his own name—Presumption.

Where one of several trustees purchases property in his own name in the absence of anything to show that he purchased it as trustee, the presumption is that he purchased it for himself. (1909) 19 M L J 311 (314, 315) (DB).

——Bond to maintain accounts.

A trustee of a Durga is bound to maintain accounts; and if the institution falls under S. 4 of Act XX of 1863, he is bound also to submit the accounts to the committee. (1908) 18 M L J 205 (209) : 31 Mad 212 (DB).

——Trustee—Personal liability of — Debts incurred by trustee.

A creditor who advances money to a trustee for the purposes of the trust can prima facie hold the trustee personally liable, leaving the latter to his own remedies, if any, against the trust property. (1907) 17 M L J 615 (616).

(d) Transfer of office of trustee.

——Charitable institution created by zamindar of impartible estate — Transfer of estate to stranger—Trusteeship, if passes.

When the impartible estate is transferred to a stranger in whose hands the estate will not continue to be impartible, the trusteeship of a religious or charitable institution cannot be held to pass as an annexe to the impartible estate even if one takes it that so long as the original family held the zamindari, the trusteeship vested in the zamindar for the time being. AIR (Vol 33) 1946 Mad 5: 58 L W 474: 1945-2 M L J 264: 1945 M W N 582 : 222 Ind Cas 360 (DB).

——Where an office of trustee is transferred by the Board and the Committee for a present payment of a certain amount in cash and a promise to make an yearly payment of a certain sum, the transfer amounts to a transfer of the office of a trustee for a monetary consideration which is opposed to public policy and cannot be recognised as being in accordance with law. It is not as if appointments of this kind are permitted by custom; and even if there is such a custom, such a custom could not be recognised by law. A I R (Vol 25) 1938 Mad 713 : 47 L W 529 : (1938) 1 M L J 517 : 1938 M W N 393 : 177 Ind Cas 823 (DB).

——Religious office—Release to next man entitled—Validity of.

A renunciation of a non-hereditary religious office (viz., a trusteeship of a private temple) which vested in the senior member of a family by virtue of a partition deed, in favour of the next senior is invalid in the absence of any rule of succession to the office binding upon the members either existing before or made at the time of partition. (1910) 20 M L J 654 (655, 656): 7 Ind Cas 971: 8 M L T 325: (1910) MWN 716 (DB).

(e) Alienation by.

See N. 1.

RELIGIOUS ENDOWMENTS ACT (20 of 1863).

See also (1) Hindu Law — Religious Endowment.
(2) Madras Hindu Religious Endowments Act, 2 of 1927.
(3) Religious Endowments.

——Preamble.

——Preamble—Applicability.

The Religious Endowments Act does not apply to an endowment which is not a public one. A I R (Vol 28) 1941 Pat 260 : 7 B R 897 : 22 P L T 699 : 195 Ind Cas 313 (DB).

——Preamble — Meetings of Temple Committee — Adjournment—Adjournment of meeting for want of quorum without notice is invalid.

Where there is no quorum, the assembled members have no power to adjourn the meeting unless at any rate notice of the adjournment is given to all the members. If no notice of the adjournment is given to all the members the adjourned meeting held afterwards is invalid. There being no special rule, the case must be decided on general principles. The mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustee of the suit Temple were to be made and is not sufficient. With certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of the meeting and its purposes. AIR (Vol 10) 1923 Bom 272: 73 Ind Cas 178: 25 Bom LR 315 (DB).

——S. 3.

——S. 3 — Applicability — Mosque in which the trusteeship has not been hereditary at any time.

Where it is clear that the person in management of a mosque, to which the provisions of Madras Regulation VII of 1817, were applicable is not a hereditary trustee and there is no evidence that the trusteeship of the mosque has ever been hereditary the right to nominate the trustee, manager or superintendent for

the institution must be deemed to have vested in the Government or any public officer when the Religious Endowments Act (XX of 1863), came into force and S. 3 of the Act would therefore apply to it. A I R (Vol 34) 1947 Mad 333 : (1947) 1 M L J 107 : 60 L W 84 : 1947 M W N 124.

— Ss. 3, 4, 7 — Committee appointing mutawalli— Effect of — Whether can sign cheques—Power to incur necessary expenditure—Acts not detrimental to endowment—Whether constitute mismanagement —Diversion of funds to charitable purposes—Power of the committee to do so.

H dedicated his properties to the service of God, by a document variously described as a tawliatnama, a deed of appropriation or a deed of trust creating an endowment popularly known as the Hooghly Imambara. Two mutawallis were appointed by the creator of the endowment by the deed executed by him in the year 1806. The net income of the endowed properties was divided into nine different shares, three of these shares were devoted to religious purposes; two shares were to be applied to the remuneration of two mutawallis and the remaining four shares were to be spent for secular purposes specifically mentioned in the deed of endowment. The properties which came to be known as the kharif towliat properties, which escheated to the Government after demise of H were, by virtue of an arrangement made by the Government, treated as appanage to the three-ninths share mentioned above :

Held (i) that when mutawalli has been appointed by a committee under Religions Endowments Act, it would not be right to hold that the trust or waqf properties vested in the mutawalli and that he alone was competent to sign cheques and that the committee was not competent to sign them ;

(ii) regard being had to the different allocations of funds of the endowment providing for expenditure for purposes not specifically mentioned in the deed of endowment or not provided for by the Government in the matter of distribution of funds, the payments out of the fund (three-ninths share) could not be said to be an act of diversion of funds by the committee appointed under the Act seeing that payments were being made on account of a settlement of dispute with a person who was asserting his right to be a mutawalli with the power to nominate or appoint his successor to the mutawalliship :

(iii) it could not be held that there was any diversion of funds by the members of the committee which made them liable to answer a charge of malfeasance, or breach of trust. Nor could it be said that a diversion of funds entailed the removal of the members of the committee under whose direction the funds were diverted. The objects of the endowment included religious as well as charitable purposes. Religious purposes do not exclude charitable purposes; and there is nothing in the Indian statutes or in the rule of the Muhammadan law which draws a clear cut distinction between the religious or pious purposes on the one hand, and charitable purposes on the other. If there was a surplus remaining after detrayal of the expenditure for the purposes specifically mentioned in the deed of endowment, a surplus out of the three-ninths share allocated to religious and pious purposes and a surplus out of the income of the secular properties known as the kharif towliat properties made by the orders of the Government, an appanage of the three-ninths share, there should not be any bar to the diversion of funds of the nature arising for consideration. AIR (Vol 21) 1934 Cal 348 : 58 C L J 356 : 150 Ind Cas 124 (DB).

——Ss. 3, 7, 12 — Committee's power to appoint mutawalli — Position of mutawalli — "Manager, trustee, and superintendent," meanings of — Difference between the powers under Muhammadan Law and Religious Endowments Act (XX of 1863), regarding the appointment of mutawalli.

The object of Act XX of 1863 was to relieve the Board of Revenue and the local agents from all duties imposed by Bengal Regulation XIX of 1810 in respect of superintendence of religious establishments, the appropriation of their endowments, the preservation of buildings connected therewith, and the appointment of trustees and manager, or connected in any way with the management of such establishments; and by the provisions contained in Ss. 7 and 12, all those duties in the case of religious endowments to which S. 3 applied, were fully transferred to the committee appointed by the Local Government "to take the place and to exercise the powers of the Board of Revenue and the local agent." The effect of the enactment was to confine to the committee the same duties and responsibilities, and enable them to exercise the same powers as the Board of Revenue, and the power to suspend or remove a mutawalli for just cause, which was properly incident to the principal duties and responsibilities of the Board of Revenue under Bengal Regulation XIX of 1810. By the provisions of the Act, as contained in S. 12, applicable to cases coming within S. 3 of the Act, the committee was to be appointed for the superintendence of the religious establishment and for the management of its affairs; the powers of the committee were not merely powers of supervision and control. The trustee, manager or superintendent of the religious establishment appointed by the committee could have no possession strictly so called. The property was vested in the committee; the trustee, manager or superintendent could have no legal property vested in him, he being only an agent or servant of the committee. The committee could always, under the law, take over such custody or management from the trustee, manager or superintendent appointed by it, provided they act in the interest of the institution.

The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms, 'manager' 'trustee' or 'superintendent,' clearly showing that the expressions are used to connote one and the same idea of management.

The powers of the committee appointed under Act XX of 1863 are not the powers exercisable under the general Muhammadan law in the matter of appointment of mutawallis, and not the powers exercised by the creator of the endowment himself but by the power vested in the Ruling Power, the power exercised by the Board of Revenue under Bengal Regulation XIX of 1810, and the power conferred upon the committee under the Religious Endowments Act (XX of 1863). The mutawallis appointed under the Regulation have no power to appoint their successors. AIR (Vol 21) 1934 Cal 328 : 58 C L J 333 : 38 C W N 214 : 61 C 80 : 149 Ind Cas 1215 (DB).

——S. 3—Status of mutwalli.

The position of a mutawalli appointed by the committee is that of a servant of the committee and he cannot have what is called a free hold in his office. In all cases falling under S. 3, the mutawalli cannot claim the same position as a trustee under S. 4 and it cannot be claimed by the mutawalli that the committee has no power in them to dismiss him but has to seek the intervention of the Courts in that behalf. AIR (Vol 21) 1934 Cal 328 : 53 C L J 333 : 38 C W N 214 : 61 Cal 80 : 149 Ind Cas 1215 (DB).

——S. 3—Condition for exercise of powers by committee.

To give jurisdiction to a temple committee to appoint a trustee or to file a suit requiring accounts from the trustee or directing transfer of property to trustee appointed by them, it must be shown that the case fell under S. 3. AIR (Vol 17) 1930 Mad 292:

52 Mad 945 : 30 M L W 509 : 1929 M W N 714 : 57 M L J 448 : 120 Ind Cas 739 (DB).

——S. 3—Essentials for application — Essentials for invoking S. 3 laid down.

Before S. 3 can be invoked, there should be two conditions satisfied, namely that not only Regulation VII of 1817 should be applicable, but also that at the time of the passing of the Act the nomination of the trustee, manager or superintendent should be vested in or exercised by the Government or any public officer, or such nomination should be subject to the confirmation of the Government or public officer. AIR (Vol 17) 1930 Mad 292: 52 Mad 945 : 30 M L W 509 : 1929 M W N 714 : 57 M L J 448 : 120 Ind Cas 739 (DB).

——S. 3 — 'Public officer' — Public officer means public officer under Government of Madras.

The words "public officer" must, having regard to the other sections of this Act and to the provisions of Regulation VII of 1817, mean public officer under the Government of Madras and not a public officer anywhere even outside British India, or a public officer outside the control of the Government of Madras. AIR (Vol 17) 1930 Mad 292 : 52 Mad 945 : 30 M L W 509 : 1929 M W N 714 : 57 M L J 448 : 120 Ind Cas 739 (DB).

——S. 3 — 'Religious establishment' — Kattalais are "religious establishment."

The word "religious establishment" in S. 3 covers the case of kattalais and unless the kattalia itself was such that its trustee was to be nominated by the Government or a Public officer or the nomination was subject to be confirmation of the Government or a Public Officer, S. 3 could not apply to the kattalais.

Devasthanam Committee was held to have no right of supervision over the kattalais. AIR (Vol 10) 1923 Mad 209 : 16 M L W 340 : 31 M L T 217 : 1922 M W N 704 : 70 Ind Cas 598 (DB).

——Ss. 3 and 14 — Rules for guidance of trustee — Dismissal of trustee.

Per Napier, J.—A Temple Committee has power to frame rules for the guidance of trustee, but the rules should not infringe on the rights of the trustee arising by virtue of his trust and power of management. The rules should not reduce the trustee to the position of a servant of the Committee. Any such rule is ultra vires. A Committee can investigate charges against a trustee and failure of the latter to attend and to offer explanations amounts to breach of duty. Before his dismissal on this ground he should be given an opportunity to defend himself. AIR (Vol 5) 1918 Mad 816 : 5 L W 672 : 38 Ind Cas 695 (DB).

——Ss. 3 and 13, 14 — One trustee hereditary—Rest appointed by Committee—Right to call for accounts.

Per Wallis, C. J. — A temple of which one of the trustees is a hereditary trustee and the other trustees are appointed by the Committee comes under S. 3 of Act XX of 1863. Some of the decisions have unduly fettered the powers of the Committee which it was intended by the Legislature it should possess, viz., those conferred on the Board of Revenue by Reg. VII of 1817.

Per Seshagiri Aiyer, J.—It is doubtful if the decisions that lay down that no account can be called for from hereditary trustees are right. Nature and scope of territorial jurisdiction discussed. AIR (Vol 4) 1917 Mad 551 : 39 Mad 700 : 30 M L J 29: 19 M L T 25 : 3 L W 43 : 32 Ind Cas 211 (DB).

——S. 3 — Trustees appointed by Government — Rights of Committee.

In a suit by a temple Committee for a declaration that the suit temple was subject to its control and should be managed by a trustee appointed by it, the committee must prove that the right of appointing trustee vested in it. The fact that Government officials exercised supreme control over the management of the temple would not suffice. In the absence of the evidence of the fact that Government appointed the trustees it is insufficient to prove the right of appointment, because, under the Common Law, the sovereign has the right to appoint trustees when there were not found persons competent to make such appointment. A wrongful assumption by the Government of the power to appoint a trustee, is not sufficient to bring the temple within S. 3. AIR (Vol 3) 1916 Mad 475:2L W 371:28 Ind Cas 833 (DB).

——S. 3—Temple committee — Power to appoint additional trustees.

A Temple Committee appointed under Act XX of 1863 has a discretionary power to appoint additional trustees to a temple under its superintendence and and such appointments can only be questioned on the ground that the power was not exercised reasonably and in good faith. A I R (Vol 2) 1915 Mad 1067 (1) : (1915) M W N 280 : 28 Ind Cas 556 (DB).

——Ss. 3 and 4—Suit against trustee or manager for removal.

The legislature could not have intended that where there is a Committee appointed under S. 3 which controls the trustee, manager or Superintendent, a suit may be instituted not merely against the Committee, but independently of the Committee against the trustee, manager or Superintendent for his removal. The circumstance that a Committee has been appointed under S. 3 and the Committee has worked for many years without protest and challenge is prima facie evidence that the endowment is of the character described in S. 3 of the Act. (1913) 40 Cal 323 : 17 C L J 183 : 16 Ind Cas 908.

——Ss. 3 and 4 — Burden of proof — Admission in prior litigation—Effect.

The plaintiff must prove that the plaint temple fell under S. 3 of the Act and the onus is not shifted by the mere fact that the defendant admitted in some criminal case and in a petition to the Devasthanam Committee that the temple was subject to the Committee. (1909) 6 M L T 282 : 4 Ind Cas 1062 (DB).

——S. 4.

——S. 4 — Temporary appointment of trustee, validity of.

The Act does not lay down that the appointment of a trustee must be for life and a temporary appointment of a trustee for some years is valid. AIR (Vol 27) 1940 Mad 823 : (1940) 2 M L J 5 : 1940 M W N 695: 52 LW 185 : 191 Ind Cas 410.

——S. 4 — Filling up vacancy—Temporary manager —When can be appointed.

The District Judge would have jurisdiction to appoint a temporary manager of trust property under S. 5 of the Act, only in the case where a vacancy has occurred in the office of trustee to whom such property shall have been transferred under S. 4 of the Act. Where the District Judge does not at all consider the question of the applicability of S. 5, his order is open to revision by High Court. A I R (Vol 8) 1921 All 351 : 43 All 50 (DB).

——Ss. 4 and 5 — Vacancy — Appointment of new trustee by District Court.

The District Court cannot appoint trustees under S. 5 of the Act when vacancy occurs in the office of the trustee unless the property is actually transferred to the former trustee, under S. 4 of that Act, by the Board of Revenue, or by Government. (1910) 14 CWN 1104 : 7 Ind Cas 164 (DB).

——S. 5.

——S. 5—Applicability.

Section 5 only applies where there is a vacancy existing at the time the application is made and only in cases where there were trustees, managers or supe-

rintendents under the control of Government at the time of passing of the Act. It does not apply in applications for removal of trustee and appointment of another. A I R (Vol 22) 1935 All 273 : 1935 A L J 311 : 1935 AWR 118 : 157 Ind Cas 202 (DB).

——S. 5 — Temporary manager — Court when can appoint.

When a District Judge, without enquiring whether property was or was not under the management of any trustee, manager or Superintendent at the time when the Act was passed and was transferred to such trustee, etc., by the Local Government, passed an order appointing the Collector as temporary manager :

Held, that the order was without jurisdiction and was liable to be set aside. AIR (Vol 8) 1921 All 351 : 18 A L J 897 : 2 U P L R (All) 275 : 58 Ind Cas 162 (DB).

——S. 5—Appeal.

No appeal lies from an order under S. 5 of Religious Endowments Act. A I R (Vol 8) 1921 All 348 : 43 All 55.

——S. 5—Temple committee's power — Dismissal of Dharmakartha—Grounds for—Validity.

Under powers vested in the Temple Committee under Act XX of 1863, they cannot dismiss a Dharmakartha for not voluntarily rendering accounts or for failure to voluntarily furnish security or mere absence from the temple locality. An illegal order of dismissal cannot be validated by subsequently calling for accounts or for security. (1913) 24 M L J 358 : 18 Ind Cas 58 (DB).

——S. 5 — District Court if may appoint a trustee pending decision of Civil Court, in all cases.

District courts have no power, upon a vacancy occurring in the office of the trustee of a religious endowment, to appoint a trustee under S. 5 unless the endowed property has been actually transferred to the former trustee under S. 4 by the Board of Revenue or Government.

Section 5 contemplates the temporary appointment of a manager by the court pending the decision by a civil court of the title of any other applicant to the office. (1910) 14 C W N 1104 : 7 Ind Cas 164 (165) (DB).

——Ss. 5, 14— Suit to remove Mahant on account of misfeasance — Receiver, Court's power to appoint when right of succession not in dispute — C. P. C. (Old), S. 539.

In a suit brought under the Religious Endowments Act, a civil court has no power to appoint a receiver or manager of debutter property except under S. 5. A civil court has power under that section to appoint a manager only when there is a dispute as to the right of succession. A person electing to proceed under the Religious Endowments Act can be given only such special relief as that special statute says it may give. If he wishes for any relief beyond that, he should proceed under S. 539, C. P. C.

Section 5 is applicable whenever a vacancy occurs in the office of a trustee or manager of an endowment which has been transferred to a trustee or manager under S. 4 and a dispute as to the right of succession arises; and is not confined to vacancies caused by the death of the individual trustee or manager to whom the endowment has been transferred under S. 4. (1904) 8 CWN 404 (407) (DB).

——Ss. 5, 10—"Civil Court"—'Persona designata' — Vacancy in office of manager—Conditions precedent for a Judge to act under S. 5—Civil Procedure Code, (old) S. 622—Revision.

An applicant for appointment as Manager under S. 5 is "interested" in the temple within the meaning of S. 5 and is competent to ask the High Court to revise the order of the civil court. An order made by the civil court under the powers conferred by S. 5 is a judicial adjudication in the matter before the court and the High Court is competent to revise such an order.

The conditions precedent to the exercise of jurisdiction under S. 5 are— (1) The existence of a vacancy. (2) There should have been a transfer to the former trustee. (3) The existence of disputes antecedent to the proceedings in which the order is sought to be passed as regards the succession to the office. The dispute referred to in the section includes not only a dispute as to the right to succession but also one as to the person who is to succeed to the office. (1903) 26 M 85 (90).

——S. 6.

——Ss. 6, 14, 4 — Status of trustee — Dismissal — Grounds.

The status of a trustee is not that of a servant ; he can be dismissed only on good and sufficient grounds and after an enquiry into the facts, and a dismissal which is not so justified may be set aside by the Courts of law. Mere disobedience of committee's order by the trustee in the matter of his colleague's taking over charge is not sufficient reason for his dismissal. AIR (Vol 27) 1940 Mad 823 : (1940) 2 MLJ 5: 52 LW 185 : 1940 MWN 695 : 191 Ind Cas 410.

——S. 7.

——S. 7 — Madras Hindu Devasthanam Committee, power of.

The Madras Hindu Devasthanam Committee created under the Religious Endowments Act, 1863, can make the appointment of trustee for a term of years and is not bound to appoint a trustee for life. A trustee is not a servant of the Committee. A I R (Vol 28) 1941 Mad 546 : 54 L W 12 : 1941 M W N 647 : (1941) 2 M L J 35 : I L R (1941) Mad 942 : 196 Ind Cas 335 (FB).

——S. 7 — Powers of Devasthanam Committee — Nature of — Committee appointing Overseer and defining his powers by resolution — Resolution, if binding on trustees — Power of Committee to appoint additional trustees.

The management of temples is prima facie in the dharmakarthas and the Committee constituted under Religious Endowments Act of 1863, ought not to reduce them to the position of servants not to interfere with the management of the internal affairs of the temple. The Committee are not entitled to exercise their powers arbitrarily. But, on the other hand, it is open to the Committee to take all steps which may seem to them reasonably necessary for the due preservation of the properties of the institution and that in this respect the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing scheme of management. A Committee constituted under Religious Endowments Act of 1863 have all the powers which the Revenue Board had under Regulation VII of 1817 and in general terms, their powers can be described as powers of superintendence.

One of the trustees of a temple falling under S. 3, Religious Endowments Act of 1863, filed a suit asking for an injunction restraining an Overseer of the temple having been appointed thereto by the Madras Hindu Devasthanam Committee, from claiming joint possession and custody of the temple jewels, gold and silver articles and other movables of the temple along with trustees and from demanding delivery of the keys of the temple safes. In August 1933, the Committee passed resolution defining the rights and duties of the Overseer. It appeared in evidence that he had the powers specified in the resolution. In a resolution dated 11th March 1888, there was a specific direction that the room containing treasury, jewels and documents should be locked as usual with three

keys and each of them should remain in the hands of the two dharmakarthas and of the Overseer :

Held, that the resolution was of special significance and reading the resolution in the light of the directions contained in the High Court's judgment of 1876, it suggests that during such time as there was an Overseer holding office, nobody thought it improper or contrary to the usage of the institution that one of the keys of the temple treasury and jewels' safe should be in charge of the Overseer.

Held, also that the Overseer was as much an officer appointed by the Devasthanam Committee under its statutory powers as the trustees, and if the proper authority lays down certain functions as the proper functions of each office-holder, there was no legal objection to its so doing. The resolution was within the competence of the Committee. It was even within the powers of the Committee even to appoint additional trustees without bringing any charges against the existing trustees. A I R (Vol 24) 1937 Mad 327 : (1937) 2 M L J 477 : 46 L W 695 : 173 Ind Cas 381 (DB).

——S. 7—Death of a member of Committee pending suit — Abatement.

A suit by the surviving member of a committee appointed by the Government under S. 7 is maintainable. A committee is not ipso facto dissolved when one of its members dies during the pendency of the suit instituted by the committee. AIR (Vol 21) 1934 Cal 328 : 58 C L J 333 : 38 C W N 214 : 61 Cal 80 : 149 Ind Cas 1215 (DB).

——S. 7—Committee appointed under—Powers of — Corporations created for a specific purpose—Acts of — Legality—Tests.

The committees appointed under S. 7 are statutory bodies, and though they are not strictly corporations, their procedure in matters relating to management and administration should be governed by the rules applicable to regular corporations. The difference, however, between a statutory corporation and a corporation which is not statutory exists and must be recognized. The former has such rights and can do such acts only as are authorized directly or indirectly by the statute creating it; the latter, speaking generally, can do everything that an ordinary individual can do, unless restricted directly or indirectly by statute. Acts directly authorized are such things as may fairly be regarded as incidental to or consequential upon those things which are expressly authorized; and contracts entered into by a corporation created for a specific purpose are intra vires the corporation, although not expressly mentioned in the statute under which it takes powers. In determining, therefore, whether an act of a corporation is ultra vires or illegal, illegality approaches very near to, and in many cases is the same as ultra vires; and the question is whether a particular act of a corporation is within the competency and power of the corporation. Where the power to appoint is expressly conferred by the statute, the power to determine the terms of appointment must be held to be within the competency of the committee as a statutory corporation inasmuch as acts beneficial for the purpose of the control of the endowment — the specific purpose for which the corparation was created — are intra vires the corporation. A I R (Vol 21) 1934 Cal 328 : 58 C L J 333 : 38 C W N 214 : 61 Cal 80 : 149 Ind Cas 1215 (DB).

——S. 7—Powers of committee.

If a committee is appointed by the Local Government under Section 7 for the management of Trust property, it has all the powers which were formerly possessed by the Board of Revenue under the Bengal Regulation 19 of 1810, which was entrusted with all the reasonable powers which might be exercised for the benefit of the trust. It is within the competence of such a committee to grant a lease for more than a year of a portion of the Trust property which is not void merely because it is for more than a year. A. I. R. (Vol 9) 1922 All 417 : 44 All 677 : 20 A L J 697 : 68 Ind Cas 764 (DB).

——Ss. 7, 12 — Powers of Temple Committee — Vacancy—Effect.

The powers in a Committee are not suspended by the occurrence of a vacancy among its members. 34 Mad. 1, Diss. A I R (Vol 4) 1917 Mad 551: 39 Mad 700 : 30 M L J 29 : 19 M L T 25 : 3 L W 43 : 32 Ind Cas 211 (DB).

——Ss. 7, 9, 10 and 12—Temple — Originally subject to the Committee of one taluq — Lands assigned to another taluq in Rev. redistribution — Former Committee to have jurisdiction.

Where lands belonging to a temple were originally in one taluq and subject to the Devasthanam Committee of that taluq and later on for revenue purposes the lands were assigned to another taluq in another Dt., the first Devasthanam Committee continues to have jurisdiction over the temple. A I R (Vol 4) 1917 Mad 484:39 Mad 949 : 31 M L J 360: 36 Ind Cas 284 (DB).

——S. 7—Status of Committee—Suit by some only of the members.

The Committee under S. 7 is a corporation having a legal entity and is similar in all respects to every other corporation. If one member is dead the survivors can act until another is appointed. AIR (Vol 3) 1916 Pat 44 : 1 Pat L J 437 : 3 Pat L W 31 : 38 Ind Cas 13 (DB).

——S. 7—Death of any or all members.

The Committee appointed under S. 7 of Rel. Ends. Act does not cease if any or all the members die. It may remain dormant for a time but becomes active as soon as the other vacancies are filled up. The suit by the surviving members of such a Committee is maintainable. (1912) 39 Cal 304:12 Ind Cas 147 (DB).

——Ss. 7, 10—Corporations—Vacancy to be filled up —Manner.

Per White. C. J. — The law governing corporate bodies, with regard to the capacity of the members to act, is not applicable to the case of the statutory body appointed under the Act of 1863. The majority of the members originally appointed is insufficient to give full powers of the Committee to the surviving members.

Per Abdur Rahim J.—The legislature contemplated that the original number of members must exist to exercise the powers of the Committee under the Act. Some members of the Committee appointed under S. 7 of the Religious Endowments Act cannot fill a vacancy in the Committee; they can only appoint a day within three months for election. After this period Civil Court must be moved for filling the vacancy. 34 Mad 1 : 8 M L T 213 : (1910) M W N 608 : 20 M L J 814 : 7 Ind Cas 754 (DB).

——S. 7—Mutt—Powers of Committee.

Committee of Mutt appointed under S. 7 can sue a Tahsildar for accounts. (1909) 9 C L J 636: 2 Ind Cas 635 (DB).

——S. 8.

——S. 8—Election rules—One paper rejected—Fresh nomination papers should be called for.

Where, at certain election, three candidates are to be elected and only three nomination papers are received but one of them is rejected, fresh nomination papers should be called for and a meeting should be called for electing three candidates. AIR (Vol 26) 1939 Bom 335 : 41 Bom LR 524 : 184 Ind Cas 628.

——S. 8 — Election rules — Absence of signature on nomination paper—Signature subsequently put — Effect of.

If the nomination paper is not valid on the last day fixed for its receipt due to absence of the signa-

ture of the candidate, the signature subsequently put after that date cannot make it valid retrospectively and such a nomination paper would be out of time. AIR (Vol 26) 1939 Bom 335 : 41 Bom L R 524 : 184 Ind Cas 628.

——S. 8—Election rules — Signature on nomination paper—Mode of.

A signature by means of a stamp is sufficient where the document is required to be signed, and it is not necessary that the stamp should be the facsimile of the signature. Even a printed heading of the name of the party is a sufficient signature by him if the document is written in his hand. Nor is it necessary that the signature should be at the foot of the document.

A candidate to the election for trusteeship had himself put the rubber stamp impressions of his full name and addresses in the proposal and agreement clauses of a nomination paper. There was, however, no signature appended against the item "signature" in the nomination paper. One of the requirements of the nomination paper was that it should be countersigned by the candidate :

Held, that the nomination paper was proper and valid. AIR (Vol 26) 1939 Bom 335 : 41 Bom LR 524 : 184 Ind Cas 628.

——S. 8—Temple — Scheme for management framed by decree—Provisions regarding election of trustees and his qualifications for election made — Scheme empowering trustee, worshippers or voters of temple to apply to Court for determination, whether person nominated for election as trustee was eligible—Court held had power to determine that question and give direction accordingly—Relief asked need not be provided for in decree or asked for in separate suit. AIR (Vol 26) 1939 Mad 605 : 1939 MWN 1009.

——S. 8—Rules under — Adjournment of meeting — Notice is necessary—Contents of notice.

Where there is no quorum, the assembled members have no power to adjourn the meeting unless at any rate notice of the adjournment is given to all the members. If no notice of the adjournment is given to all the members the adjourned meeting held afterwards is invalid. There being no special rule, the case must be decided on general principles. The mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustees of the suit Temple were to be made and is not sufficient. With certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of the meeting and its purposes. AIR (Vol 10) 1923 Bom 272 : 25 Bom LR 315 : 73 Ind Cas 178 (DB).

——S. 8—Improper or unfit person appointed — Remedy for his removal.

If a District Judge appoints, against the clear intention of the Act under S. 8, an improper and unfit person by reason of his religious qualifications or moral conduct, such person could be removed by proceedings equivalent to proceedings by quo warranto in England. AIR (Vol 3) 1916 Mad 268 : 29 MLJ 671 : 18 MLT 469 : 2 LW 1099 : 31 Ind Cas 502 (DB).

——S. 9.

——S. 9—Insolvent appointed manager—Committee appointing undesirable person as manager ought to be removed from office.

The members of a Temple Committee under the Religious Endowments Act appointed as Manager of an institution which was under their charge, and which yielded a yearly income of two lakhs of rupees, a person who was an undischarged insolvent and who had been removed from Government service for a flagrant breach of the rules regulating the conduct of Government servants and imposed certain conditions on the appointment, namely that the manager should hold office for five years, that he should furnish security for Rs. 10,000 and that he should as soon as possible file a scheme suit :

Held, that the appointment was improper and that by such appointment they had rendered themselves unfit to carry out the responsible duties with which they were entrusted and that consequently they were rightly removed from their office by the District Judge.

Held, further that the conditions did not make any difference as they were illusory. AIR (Vol 13) 1926 Mad 500 : 23 MLW 339 : 94 Ind Cas 955 (DB).

——S. 10.

——S. 10 (as amended by S. 78 of Bengal Wakf Act) —Suit challenging appointment of Member of committee by wakf Board — Jurisdiction of Civil Court.

The Civil Court has jurisdiction to entertain a suit challenging the appointment of a member of a committee by the wakf Board under S. 10 of the Religious Endowments Act as amended by S. 78 of the Bengal Wakf Act. Under S. 10 of the Religious Endowments Act, the Civil Court was the appointing authority in certain circumstances, and all that S. 78 of the Bengal Wakf Act did was to substitute the Wakf Board as the appointing authority in those circumstances. The only change which S. 78 made was a change of the authority entitled to appoint. From that change it cannot possibly be inferred that it was the intention of the Legislature to oust the jurisdiction of the Civil Court in all matters arising under S. 10 of the Religious Endowments Act. Nor is the jurisdiction of the Civil Court in these matters ousted by reason of S. 92 of the Bengal Wakf Act.

What the wakf Board does when it appoints a person as a member of the Committee is what it is empowered to do under S. 10 of the Religious Endowments Act, as amended. Its order is an order under that Act and can never be construed as an order made under the Bengal Wakf Act. That being so, S. 92 cannot possibly apply to such an order. Further, in S. 10 of the Religious Endowments Act, the Legislature clearly says that if a certain state of facts exists and is shown to the Wakf Board to exist, then the wakf Board may proceed to fill the vacancy. In such a case it has always been held that the jurisdiction of the Civil Court is not ousted and the jurisdiction of the Board to act can be challenged. AIR (Vol 36) 1949 Cal 272 (DB).

——Ss. 10, 14, 18—Appointment of mutawalli — Power of District Judge —Necessity of suit.

Where there is a vacancy in the office of mutawalli and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the District Judge and a suit under S. 92, Civil P. C., is not necessary. The District Judge, as a principal Civil Court of original jurisdiction, has by virtue of his powers as a kazi has a general power of making the appointment. But where the question is of removal of existing mutawalli and the appointment of another in his place the proper remedy is a suit under S. 92, Civil P. C., or under Ss. 14 and 18 of the Religious Endowments Act of 1863. AIR (Vol 34) 1947 Nag 31 : 1946 NLJ 325 : 224 Ind Cas 338.

——S. 10—Revision.

The District Judge exercises judicial functions in making or refusing to make an appointment of mutawalli and his orders are subject to revision under S. 115, Civil P. C. A I R (Vol 34) 1947 Nag 31 : 1946 NLJ 325 : 224 Ind Cas 338.

——S. 10—Scope of —Vacancy—How to be filled up.

Section 10 refers only to the remaining members of the Committee and not the Committee. The reference in S. 10 to the remaining members emphasizes the fact that the remaining members are not the Committee and so it is not the corporate body of the

Committee that fills up this vacancy but the surviving members. Nevertheless, remaining members are a select body given statutory powers under the section to fill up the existing vacancy; so that the nature of this body is very similar to that of a corporation with one sole object and power. Hence the ordinary rule that the opinion of a majority suffices would prevail. It may be true that the power of the members is derived from the District Judge in the sense that they obtain the power to fill the vacancy in the event of the District Judge declining to do so; but their power is an alternative power and once the District Judge fails to exercise his power to fill the vacancy, the other provision of S. 10 operates under which the remaining members of the committee are empowered to fill the vacancy. AIR (Vol 24) 1937 Mad 597 : 1937 M W N 410 : (1938) 1 MLJ 386 : 172 Ind Cas 90.

——S. 10—Validity of election—Old voters list — Irregular procedure.

Per Kumaraswami Sastri J.— Where the validity of the list on which the election is to be held is in question and where the applications of persons who are qualified to vote and who claim to be enlisted as voters are not considered an election held on the basis of a list which was several years old would not justify the election as a valid one.

Per Curgenven J. — Unless there is some provisions to the contrary, the validity of the election depends upon the regularity of the procedure according to which it is held and not upon the results, which may by accident be the same if it had been regularly conducted. A I R (Vol 14) 1927 Mad 462 : 50 Mad 726 : 25 M L W 594: 1927 M W N 197: 38 M L T 253 : 53 MLJ 545 : 102 Ind Cas 270 (DB).

——S. 10—Election suit and petition—Suit for ordering election — Petition to contest election cannot be filed in the suit.

Where on the death of one member of the Committee, two interested persons filed a plaint with the District Judge's permission against the two remaining members as defendants, praying : (a) that the Court should direct the defendants to take proper steps for the holding of an election and fix a date within which the notices should be issued; and (b) that the Court should remove one or both of the members in case of default, and the suit was decreed. A petition to the Judge by one of the defendants subsequent to the election objecting to the validity of the election cannot be entertained as an application in the suit. (1926) 92 Ind Cas 902 (Cal) (DB).

——S. 10—Order under—Review—Inherent power.

There being no explicit provision in the Act for a review, a District Judge has no power to review an order passed by him under S. 10. Nor has he any inherent power to do so. A I R (Vol 6) 1919 Mad 244 : 37 MLJ 162 : 53 Ind Cas 56 (DB).

——S. 10—Scope of—Order after three months to fill up vacancy—Election by members — Order upholding election.

The object of S. 10 of the Religious Endowments Act is to prevent a deadlock in case the Committee do not do their duty in holding an election by ordering the remaining members to fill up the vacancy if the Court does not itself appoint; and where after three months the Court orders the remaining members to fill up the vacancy the Committee cannot elect. A I R (Vol 2) 1915 Mad 827 : 38 Mad 594 : 14 MLT 354 : (1913) M W N 842 : 25 M L J 536: 21 Ind Cas 451 (DB).

[On appeal see A I R (Vol 4) 1917 P C 71 : 40 Mad 793 : 40 Ind Cas 650.]

——S. 10 — Appointment of Committee member — R. 94, Civil Rules of Practice — No application — C. P. C., S. 115.

Neither R. 94 of the Madras Civil Rules of Practice (Moffusil) as to taking evidence nor S. 141, C. P. C., has application to proceedings under S. 10 by the District Court for the appointment of a Committee member. No revision under S. 115, C. P. C., lies against the order of the District Judge making an appointment under that section nor should a well considered order be revised under S. 15 of the Charter Act. A I R (Vol 3) 1916 Mad 268 : 29 M L J 671 : 18 M L T 469 : 2 LW 1099 : 31 Ind Cas 502 (DB).

——S. 10—Temple Committee — Vacancy— Election not held within three months — Order to fill up vacancy — Appointment by Committee — Order of appointment by District Court — Ultra vires—Revision —C. P. Code, S. 115.

Where on the occurrence of a vacancy in a Temple Committee, the remaining members of the Committee have failed to fill it up by holding an election as provided by S. 10 of Act XX of 1863 and they have been ordered to fill up the vacancy forthwith, they must themselves make the appointment. The Civil Court has no power after the expiration of the said three months, to direct the remaining members of the Committee to fill up the vacancy by election or to validate the appointment of the person so elected. If the Court does so, the order is without jurisdiction and is open to revision by the High Court under S. 115, C. P. Code. 6 M L J 1, Dissented from. A I R (Vol 4) 1917 P C 71 : 40 Mad 793 : 15 A L J 645 : 2 Pat LW 101 : 33 MLJ 69 : 26 CLJ 143 : 19 Bom L R 715 : (1917) M W N 628 : 6 L W 501 : 22 C W N 50 : 11 Bur L T 48 : 44 IA 261 : 40 Ind Cas 650.

[On appeal from A I R (Vol 2) 1915 Mad 827 : 14 MLT 354 : (1913) MWN 842 : 38 Mad 594 : 25 MLJ 536 : 21 Ind Cas 451.]

——S. 11.

——S. 11—Temple Committee members, if trustees—Contribution.

The members of a Temple Committee are not trustees; but if they usurp the trustee's functions they become liable as trustees de son tort for all acts of breach of trust. The law that the right of contribution as between co-trustees is not applicable to members of a Temple Committee, does not apply to such cases. (1912) 12 MLT 155 : 23 MLJ 278 : 14 Ind Cas 520 (DB).

——S. 12.

——Ss. 12 and 13 — Temple Committee — Management of temple — Archaka disobeying trustee under orders of Committee.

A Devasthanam Committee has no power to interfere with the acts of the temple trustee in a question of purely temporal honours to definite persons either under S. 16 of the Endowments and Escheats Regulation (VII of 1817) or under S. 12 of the Religious Endowments Act. An archaka of a temple is bound to obey the orders of the trustee and not those of the Committee in those matters. A I R (Vol 7) 1920 Mad 551 : 10 LW 616 : 54 Ind Cas 281 (DB).

——S. 13.

——Ss. 13, 14 and 18—Suit against co-trustee.

A trustee of a religious endowment constituted under the Act can sue his co-trustee for a breach of trust even without sanction under S. 18. The right to sue is given by the general law and is independent of the provisions of this Act. The decision of the majority of trustees binds the minority in matters connected with the management of the trust property but not in matters which are ultra vires and beyond the proper sphere of the trust. (1909) 19 MLJ 513 : 4 Ind Cas 874 (DB).

——S. 14.

1. **Appointed under the Act.**
2. **Appeal.**
3. **Grounds for removal of trustee.**
4. **Reference to arbitration.**

5. Scope of suit under this section.
6. Sanction for suit.
7. Suit to remove trustee.
8. To what endowments section applies.
9. Other illustrative cases.

1. Appointed under the Act.

——S. 14—"Appointed under the Act" scope of.

The words "appointed under the Act" in S. 14 apply not only to "the Members of the Committee, but also to the words trustee, manager or superintendent" and the section is to be read in the same manner as S. 5, Religious Endowments Act, in which a similar qualification is attached to the words "trustee, manager, or superintendent." Hence an application for removal of trustee and appointment of another is not governed by S. 14 in the absence of members of Committee as parties. A I R (Vol 22) 1935 All 273: 1935 A L J 311: 157 Ind Cas 202 (DB).

——S. 14 — Trustee, if should be appointed under the Act.

The words "appointed under this Act," in S. 14 refer only to the Committee and not to the trustee, manager or superintendent. The trustee or manager who can be sued under the Act, therefore, need not necessarily be a trustee or manager appointed under the Act. AIR (Vol 21) 1934 Cal 741 : 60 C L J 298 : 38 C W N 1056 : 62 C 125 : 153 Ind Cas 291 (DB).

2. Appeal.

——S. 14 — Scheme providing for District Judge exercising control over management—His orders are final.

Where a scheme of Management of a religious institution impliedly provided that the District Judge was also to exercise control generally in regard to any question of management that might properly be brought before him and the District Judge on application divided the offerings to the deity in a certain proportion among the claimants.

Held, that the District Judge was the final authority in the matter and no appeal would lie to the Hight Court from his decision. AIR (Vol 14) 1927 Bom 422 : 29 Bom L R 891 : 102 Ind Cas 659 (DB).

3. Grounds for removal of trustee.

——S. 14—Neglect of duty justifying removal.

Neglect of duty which justifies removal of a trustee must be of the same seriousness as misfeasance or breach of trust.

A trustee is not a servant of the Devasthanam Committee and is dismissible only after due inquiry into the facts of the trustee's conduct; the trustee must be given notice of any charges against him and afforded an opportunity to meet them; the facts justifying dismissal must amount to misconduct. The Committee do not represent the properties of the temple and are not entitled to possession of the temple or of its properties. The person who does represent the temple and the properties and in whom they are vested is the trustee appointed by the Committee. A I R (Vol 26) 1939 Mad 346 : (1939) 1 M L J 9 : 1939 M W N 702 : 184 Ind Cas 378.

——S. 14—Trustee—Removal — Custom — Requirements of meeting not followed — Removal, held invalid.

Custom to have member of founder's family as one of trustees—No such member available and plaintiff, stranger, appointed as trustee — Committee subsequently removing him at meeting and defendant, not member of founder's family appointed in his place — Requirements of meeting not followed — Removal of plaintiff and appointment of defendant, held invalid. A I R (Vol 26) 1939 Mad 346 : (1939) 1 M L J 9 : 1939 M W N 702 : 184 Ind Cas 378.

——S. 14—Trustee neglecting duties to be performed under trust setting up title in himself and selling portions of trust property as his own—Removal of trustee is proper.

Where one of the purposes of the waqf was to make provision for faqirs and dervishes and to arrange for their residence and comfort in a hostel, to perform certain services at the shrine, and in short to look after and maintain the mosque as a structure, and as place of worship with an inam to lead the prayers and it was found that every one of these duties had been neglected and that the trustee had not merely set up his own title to various portions of the trust property but he had also alienated various portions thereof asserting in the sale-deeds that the property was his :

Held, that the removal of the trustee was proper. AIR (Vol 15) 1928 P C 106 : 54 M L J 692 : 26 A L J 471 : 47 C L J 542 : 30 Bom L R 849: 32 C W N 769: 29 P L R 392 : 28 M L W 30 : 109 Ind Cas 52.

——S. 14 — Interest of trust not kept in view by defendant and his conduct not being such as to inspire confidence — Defendant should be removed from trusteeship. A I R (Vol 13) 1926 Lah 16 : 89 Ind Cas 429 (DB).

——Ss. 14 and 15—Temple Committee—Dismissal of trustee—Inquiry—Mode of —Circulation of papers—Suit for damages for wrongful dismissal—Defences.

A Temple committee has the power of suspending or dismissing a temple trustee for sufficient cause, but the power must be exercised at a meeting of the members of the Committee duly convened. An order of suspension passed on the opinion of the members recorded on papers sent to them for circulation is illegal and ultra vires especially if there were dissenting members. In a suit by the plff. trustee who was so suspended for a declaration that his suspension from the office was illegal and for damages it would not be a good answer to the suit to show that there were sufficient grounds for suspending the plff. A person in the enjoyment of a public office like that of a temple trustee is entitled to damages against co-operators who were parties to his wrongful removal from office. A I R (Vol 6) 1919 Mad 1182 : 41 Mad 357 : 33 M L J 660 : (1917) M W N 839 : 22 M L T 454 : 7 L W 85 : 43 Ind Cas 205 (DB).

4. Reference to arbitration.

——Ss. 14, 120 — Power to appoint a new trustee — C. P. C. S. 539.

S. 14 only empowers a court to direct the specific performance of any act by the trustee, manager or superintendent, or award damages or cost against such trustee, manager or superintendent, and to direct their removal. It confers no power on the Court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by S. 539 of the Code of Civil Procedure must be resorted to. (1908) 5 A L J 191 (192) : 1908 A W N 101 (DB).

——Ss. 14, 16 — Removal of trustee — Reference to arbitrator under S. 16.

The District Judge has jurisdiction to refer to an arbitrator the question of the removal of a trustee arising in a suit instituted under S. 14. (1902) 12 M L J 431 (432) (DB).

——Ss. 14, 16—Compulsory arbitration—Scheme.

Under S. 16 the District Judge has no power to refer the whole suit for decision to an arbitrator, though the Judge may refer any matter in difference in the suit for decision by an arbitrator. The District Judge cannot frame a scheme in a suit under S. 14. (1902) 12 M L J 40 : 26 M 361 (361) (DB).

5. Scope of suit under this section.

——S. 14—Suit under is a representative suit.

A suit under S. 14, Act 20, 1863 is as much a representative suit as one brought under S. 92, C. P. Code or one under O. 1, R. 8 of that Code, as it is equally brought in and as it affects the rights of all those interested in the religious endowment. All such interested persons become in the eye of the law parties

to such a suit. AIR (Vol 15) 1928 Mad 614 : 110 Ind Cas 894 (DB).

——S. 14 — A suit by a member of Committee for declaring resolutions to be invalid on the ground of non-service of notice comes under ordinary law. AIR (Vol 13) 1926 Cal 583 : 91 Ind Cas 352 (DB).

——S. 14 — Relief under Religious Endowments Act, S. 14 differs from S. 92, C. P. Code—Scheme can be made only under S. 92, C. P. Code, as also appointing a new trustee. AIR (Vol 12) 1925 Pat 544: 88 Ind Cas 1035 : 1925 P H C C 194: 4 Pat 741: 7 P L T 4 (DB).

——S. 14 — Where the object of the suit is to protect an endowment against misfeasance, breach of trust or neglect of duty, S. 14 is applicable.

Section 14 of the Act is general and it applies to endowments created both before and after 1863. AIR (Vol 12) 1925 Pat 544 : 88 Ind Cas 1035 : 41 Pat 741 : 7 P L T 4 : 1925 P H C C 194 (DB).

——S. 14—Scope of—Suit by worshipper to set aside alienation.

Section 14 of the Religious Endowments Act contemplates a suit instituted primarily against the trustee, manager or Superintendent of a mosque, temple or religious endowment or the members of any Committee appointed under that Act, and the only relief that can be asked for in such a suit is a decree directing the specific performance of any act by such trustee, manager, etc., a decree for damages and costs against them and a decree directing their removal. A suit for declaration of the invalidity of an alienation by the mutwalli of a mosque is maintainable at the instance of worshippers under O. 1, R. 8, without sanction under S. 92, C. P. C. A I R (Vol 6) 1919 Cal 179 : 23 C W N 115 : 49 Ind Cas 355 (DB).

——Ss. 14, 18—Suit instituted by four persons with leave of Court — Death of one pendente lite—Suit if abates.

A suit instituted by four persons under S. 14 of Act, XX of 1863 with leave of Court under S. 18 of the Act does not abate by reason of death of one of the plaintiffs during the pendency of such suits. 37 A 296, Diss. AIR (Vol 5) 1918 Mad 560 : 41 Mad 237 : 33 M L J 173 : (1917) M W N 740 : 41 Ind Cas 745 (DB).

——S. 14 — Suit under — Control of Board of Revenue.

In order that a suit or application might be brought under S. 14 of the Act, the endowment need not have been taken under the control of the Board of Revenue. The petitioner should bring a regular suit to establish his right to be appointed manager of the endowment. (1910) 14 C W N 1104 : 7 Ind Cas 164 (DB).

——S. 14—Jurisdiction of Civil Court—Pleading.

A Civil Court cannot act under S. 14 when the proceedings are instituted under the Act. (1910) 7 M L T 311: (1910) M W N 613: 6 Ind Cas 684 (DB).

——S. 14 — Suit of declaration maintainable when ancillary to suit for removal.

In a suit under the Religious Endowments Act, a prayer can be made that the property be declared to be that of the institution and that a mortgage over it be declared not binding on it, if such prayer is ancillary to the claim for the removal of the manager. (1901) 24 M 243 (245, 246) (DB).

6. Sanction for suit.

——S. 14 — When an individual worshipper can sue without sanction under this Section or S. 92, C. P. Code.

One consideration which is relevant in coming to a conclusion whether a personal right has been infringed so as to entitle a party to sue without reference to the other members of the community and without leave under S. 92 of the C. P. Code, or S. 14 of the Religious Endowments Act is whether, apart from the infringement of the right of the general body of worshippers, there is some damage to the plaintiff, special to and in which the other worshippers have no concern apart from the interest of every worshipper, to see that a trustee performs his duties properly.

The mere fact that in and for the purposes of giving relief to a plaintiff who has a cause of action personal to himself, the Court has to issue a mandatory injunction or give direction to the trustees, would not put the case within S. 92, C. P. Code, or S. 14 of the Religious Endowments Act. A I R (Vol 14) 1927 Mad 551 : 52 M L J 541 : 102 Ind Cas 328 : 38 M L T 288: 25 M L W 575 (DB).

——Ss. 14 and 18 — Suit to force trustee to perform duties.

Persons having interest in a temple can sue for a declaration that the trustee must carry out certain duties. Where individual persons claim, as citizens, rights of worship or performing certain festivals in a temple, no sanction of the Advocate-General or District Judge is necessary as the case is one for direction that the officer in charge of the trust should perform the duties according to usual practice (Mamool). AIR (Vol 4) 1917 Mad 868: 3 L W 512: 35 Ind Cas 88.

——Ss. 14 and 18—Public trust.

Where the object of a Dharmasala is that Granth should be read daily and no member of the Sikh community behaving properly can be excluded and where the Granth is to be remunerated partly at least from Government grants, it is a public institution. So a suit for the removal of the manager must have sanction according to S. 18. 181 P W R 1912 : 216 P L R 1912 : 17 Ind Cas 270 (DB).

——Ss. 14 and 18—Removal of trustee.

A suit for the removal of a trustee may be instituted with the leave of the Court under the authority of S. 140. (1911) 9 M L T 301 : 21 M L J 450 : (1911) 1 M W N 142 : 9 Ind Cas 168 (DB).

——Ss. 14 and 18 — Suit under the Act—Sanction—Permission under O. 1, R. 8 or S. 92, C. P. Code.

A trust governed by the Religious Endowments Act requires sanction under S. 18. Even if no such sanction is necessary, where other persons are interested, plaintiff cannot sue without permission under O. 1, R. 8 or S. 92. C. P. Code. (1910) 8 M L T 357 : (1910) M W N 500 : 7 Ind Cas 868 (DB).

——Ss. 14 and 18—Action against trustee—Sanction.

Under the Act sanction to institute a suit is required under S. 18 if the proposed action is against trustee, managers or Superintendents of a religious endowment in their capacity as such. There is no other provision in the act for the bringing of suits. (1909) 5 M L T 209 : 11 Cr L J 192 : 4 Ind Cas 1118.

——Ss. 14, 18 — Suit for declaration that plaintiff is to be appointed Manager in preference to defendants not maintainable — Misfeasance or breach of trust not alleged—Application for leave to institute suit.

A suit for declaration that the plaintiff is a more eligible man than the defendants to to appointed manager lies, in which no misfeasance or breach of form or neglect of duty is alleged against the trustees appointed under the Religious Endowments Act, maintainable under S. 14.

Held, that a preliminary application to the District Judge for leave to institute the suit was necessary under S. 18. (1907) 4 A L J 774 (775) : 1907 A W N 287 (DB).

——Ss. 14, 18—Scope of Act—Hereditary trustees—Sanction in favour of three persons to institute suit —Suit by one of them and two others (strangers).

Held, that a suit instituted by one of three persons to whom sanction was given to institute was good; and that the fact that two others joined the person to whom sanction was given as co-plaintiffs even

though no sanction was given to them specially do not make the suit bad. All endowments which were affected by Reg. XIX of 1810 whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863. For the operation of Act XX of 1863, it is immaterial whether the office of trustee or Manager is hereditary or not, and in either case, a trustee can be dealt with for misconduct. (1907) 34 C 587 (595) (DB).

7. Suit to remove trustee.

——S. 14—Suit under, if maintainable against person intruding into management without authority.

The remedy which is given under S. 14 which is a sort of a summary remedy is to be obtained only against those persons in whom the properties of the institution have been duly vested for the purpose of management. In a suit under this section, the Court has not to pass any order against a person who is alleged to have intruded into management without authority, but that the only question to be considered is whether a person in whom property has been vested should be removed for misfeasance or malfeasance. AIR (Vol 25) 1938 Bom 311 : 40 Bom L R 365 : I L R (1938) Bom 362 : 176 Ind Cas 145 (DB).

——S. 14—Suit for removal of trustee under S. 14 — Question as to validity of his appointment cannot be gone into.

The section clearly contemplates that there is a trust in existence and that the person in whom that trust vests is a validly appointed trustee or manager in respect thereof. It only deals with the condition under which a trustee or a manager could be removed from his office and makes no reference to the question of his appointment as such trustee or manager. If a suit is instituted for the removal of a trustee under this section, the only question with which the Court has to deal is whether the defendant has or has not been guilty of any misfeasance, breach of trust, or neglect of duty. If the plaintiffs' allegations as to the defendant having committed acts of misfeasance or breach of trust are proved. the Court may direct his removal from the office, but it cannot hold an enquiry into the question as to whether the original appointment was or was not valid. AIR (Vol 13) 1926 Lah 16 : 89 Ind Cas 429 (DB).

——S. 14—Sole surviving member of Committee — Suit for removal—Neglect of duty—Death of member pending litigation — Cause of action — Substitution of heir or members of new Committee—Suit against manager, trustee or Superintendent.

A suit was brought under S. 14 against the sole surviving member of a Committee appointed under S. 3 of the Act for his removal for neglect of duty.

Held, that the relief claimed was purely personal, and the cause of action did not survive against his heir on his death during the litigation. The members of the new Committee appointed after his death could not be substituted or added as parties. The suit against the trustee, manager or Superintendent, contemplated by S. 14 is a suit against a trustee, manager or Superintendent to whom the endowed property has been transferred under S. 4. (1913) 40 Cal 323 : 17 C L J 183 : 16 Ind Cas 908 (DB).

8. To what endowments section applies.

——S. 14—Applicability — Land not endowed for maintenance of temple — Charges on houses for recovery of money due to temple — If sufficient to make S. 14, applicable.

Section 14 of the Religious Endowments Act of 1863 would not apply to a temple for the maintenance of which no endowment in land has been made. A charge on certain houses for recovery of money due to the temple cannot make it an endowment of land to attract the applicability of S. 14. AIR (Vol 39) 1952 All 358 (DB).

——Ss. 14 and 18—Applicability—If restricted only to endowments created before the date of the Act.

There is no reason to restrict the applicability of Ss. 14 and 18 of Religious Endowments Act of 1863 only to endowments which were in existence on that date. AIR (Vol 36) 1949 All 612:I L R (1950) All 247: 1949 A W R 172 : 1949 A L J 80 (DB).

——S. 14—Endowments of public character coming into existence after 1863—Act, if applies.

In order to attract the operation of S. 14, all that is necessary is to show that the endowment is one to which Regulation XIX of 1810 could have been applied if it were still in force. The trustee, manager or superintendent to whom provisions of S. 14, Religious Endowments Act, are applicable is a trustee, manager or superintendent of a mosque, temple or other religious establishment to which the provisions of Regulation XIX of 1810 were applicable, that is, if the Regulation could have been applied to religious endowments which were created after the Regulation and if the Religious Endowments Act also applies to endowments which could have been brought under the operation of the Regulation if it were in force now, the Religious Endowments Act applies to religious endowments of a public character which came into existence after 1863. A I R (Vol 21) 1934 Cal 741 : 38 C W N 1056 : 60 C L J 298 : 62 C 125 : 153 Ind Cas 291 (DB).

——S. 14—Temples for the maintenance of which no endowment in land is made.

The provisions of S. 14 are not applicable to temples for the maintenance of which no endowment in land has been made. AIR (Vol 19) 1932 Oudh 152: 9 O W N 229 : 7 Luck 648 : 137 Ind Cas 42 (FB).

——Ss. 14, 18 — Scope of — Provisions of, when attracted.

All that is necessary to attract the provisions of Ss. 14 and 18 is to show that the endowment is of a nature that the superintendence of it could vest in the Board of Revenue under Regulation XIX of 1810 if it were in force. AIR (Vol 19) 1932 Pat 177 : 13 P L T 256 : 11 Pat 594 : 138 Ind Cas 331 (DB).

——S. 14 — "Any mosque" must necessarily mean not only mosques which were in existence in 1863 but mosques which are now in existence and relating to which a civil Court could give relief. AIR (Vol 17) 1930 All 577 : 124 Ind Cas 710 (DB).

9. Other illustrative cases.

——S. 14 — Evidence as to public character — Previous judicial proceedings wherein public character was asserted is relevant.

Where certain property was alleged to have been dedicated to public as temple property and its alienation by the manager was sought to be cancelled.

Held, that a previous judicial proceeding wherein the property was sought to be released from attachment by the heirs of the founder and was so released was a good evidence to establish its dedication to public. A I R (Vol 13) 1926 All 308 : 48 All 158 : 24 A L J 21 : 91 Ind Cas 871 (D B).

——S. 14 — Suit against Muttawalis — Inam granted to them for the performance of religious services — Service-holder is not liable to account — Trust property is divisible among such holders for better convenience. A I R (Vol 9) 1922 Mad 8 : 1922 M W N 74 : 15 M L W 241 : 42 M L J 272 : 67 Ind Cas 492 (D B).

——S. 14 — Decree, form of — Jurisdiction to appoint trustee — New trustee, appointment of — Muhomedan Law — Durga — Duties of trustee — Accounts, liability to keep — Married man, incompetency of, to be a Jainashin.

A trustee of a Durga is bound to maintain accounts, and if the institution falls under S. 4 he is bound also to submit the accounts to the Committee. Under

S. 14 the Court has jurisdiction to direct a competent person to appoint a trustee and to direct delivery of possession by the dismissed trustee to the person properly appointed. If there is no person competent to represent the trust, the proper course is to appoint a receiver and direct delivery of possession to him. So long as a trustee is in possession, whether before or after dismissal, he is liable to render accounts. A dismissed trustee is entitled to get a discharge and to be relieved of all obligations as a trustee by the court.

Quaere — Whether the court itself has jurisdiction to appoint a trustee. A married man is unfit to be a Jainashin of a Durga according to usage. (1908) 18 M L J 205 : 31 M 212 (213, 214) (D B).

——S. 18.

1. Applicability and scope of.
2. Appeal and Revision.
3. Costs.
4. Grounds for framing scheme.
5. Power of District Judge.
6. Sanction.

1. Applicability and scope of.

——S. 18 — In a suit against the sajjadanashin and mutawalli of a religious endowment charging him with not having discharged his duties, the plaintiffs are entitled to proceed either under S. 18, Religious Endowments Act or under the wider alternative of S. 92, Civil P. C. A I R (Vol 21) 1934 Pat 443 : 1 B R 205 : 153 Ind Cas 557 (D B).

——S. 18 — Section 18 does not require any elaborate inquiry and it is specially laid down there that the Court on a perusal of the application shall determine whether there are sufficient prima facie grounds for the institution of a suit. A I R (Vol 17) 1930 All 577 : 124 Ind Cas 710 (D B).

2. Appeal and Revision.

——S. 18 — Order refusing leave to institute a suit is not appealable. A I R (Vol 12) 1925 Pat 138 : 3 Pat 1018 : 7 P L T 424 : 92 Ind Cas 133 (D B).

——S. 18 — Preliminary enquiry — Order under — Revisions.

The District Judge can make preliminary enquiry as to the contents of the petition before passing an order under S. 18; he is not bound to act on mere perusal of the petition. Order of Dt. Judge under S. 18 is not subject to revision by High Court under S. 622, C. P. C. (1910) 33 Mad 492 : 7 M L T 126 : 5 Ind Cas 291 (D B).

——S. 18 — C. P. C., S. 2 — "Decree".

No appeals lie from an order granting leave to sue under S. 18. The order is not a decree within the meaning of S. 2, C. P. C. (1907) 34 C 584 (586) : 5 C L J 641 (D B).

3. Costs.

——S. 18 — Sanction under — Discretion of Court — Costs.

Section 18 of the Rel. End. Act gives the Court a very wide discretion in regard to matters coming under it and the mere fact that the District Judge has overlooked some of the serious allegations contained in the petition for sanction does not justify the High Court in interfering in revision with the order of the Lower Court.

In the absence of anything to show that the charges were unfounded and the petitioner acted negligently or inconsiderately with a view to annoy or harass and not bona fide in applying for sanction, the petitioner will be entitled to be paid his costs out of the trust property. A I R (Vol 3) 1916 Mad 384 : 2 L W 346 : (1915) M W N 274 : 28 Ind Cas 637.

4. Grounds for framing scheme.

——S. 18 — Where there is nothing to show that the puja has not been performed by the archakas, nor malversation is proved and the record does not show that the archakas set up any title in themselves to deal with the property as their private property.

Held, that there is no ground for a scheme being framed. A I R (Vol 15) 1928 Mad 401 : 106 Ind Cas 375 (D B).

——S. 18 — Ex parte sanction by the Advocate-General is no ground for a scheme being framed. A I R (Vol 15) 1928 Mad 401 : 106 Ind Cas 375 (D B).

5. Power of District Judge.

——S. 18—Powers of District Judge to remove mutawalli.

Powers of the District Judge to remove a mutawalli in miscellaneous proceedings on an application by one of the beneficiaries, are limited and defined by Ss. 18 and 14, Religious Endowments Act and S. 92, Civil P. C. Nor has he power to require the mutawalli of a private endowment to render accounts. AIR (Vol 25) 1938 Pat 537: 5 BR 143: 19 PLT 934: 178 Ind Cas 813.

6. Sanction.

——S. 18—Application for leave to sue must specify charges – Leave to sue all or any of the respondents is not proper.

In an application for leave to sue under S. 18 the applicant must give definite particulars of the charges he makes, and the order giving leave ought to refer clearly and specifically in those charges. A sanction, in general terms giving leave to sue any or all the respondents, leaving the petitioner to choose which of them they will proceed against, is improper as it supplies the petitioner with an instrument for extortion and makes it possible for him to let off the persons most responsible and get other members who are less guilty made to account severally for the trust property. AIR (Vol 11) 1924 Mad 644: 1924 MWN 51: 79 Ind Cas 953 (DB).

——S. 18—Suit by trustee against Kattalaidar — Sanction necessary.

A suit was brought by the general trustee of a temple against a subordinate trustee or Kattalaidar for the recovery of the balance of the amount due by defendant under the terms of his trust and not paid by him to the temple.

Held, that the amount not being an ascertained one and having to be determined by enquiry in the suit the case was within the mischief of S. 92 (d), C.P. Code, and the suit was bad for want of the sanction required by that section. If it be sought to recover it by way of damages, then the suit falls under S. 14 of the Religious Endowments Act, and is bad for want of the sanction required by S. 18 of the same. AIR (Vol 8) 1921 Mad 479: 14 MLW 238: 62 Ind Cas 911 (FB).

——S. 18—Suit for removal of trustees of wakf—C. P. Code, Ss. 92 and 93.

Suit for removal of trustees of wakfs requires sanction of the Advocate-General and not leave of Court under S. 18 of the Act. A person seeking relief under the Act can get only that much relief beyond which he must seek the help of C. P. Code, Ss. 92, 93, the proper parties to the suit being the trustees only. AIR (Vol 4) 1917 Cal 835: 35 Ind Cas 880 (DB).

——S. 18—Sanction granted to two persons—Suit by one.

Where sanction is given to two persons, one of them alone cannot sue without getting the sanction amended, the sanction being a condition precedent and the object of requiring sanction being to protect managers from vexatious suits. AIR (Vol 2) 1915 Mad 127: 38 Mad 1192: 27 MLJ 241: 26 Ind Cas 202 (DB).

——S. 18— Leave once refused whether may be subsequently granted.

The leave of the District Court under S. 18 of Act XX of 1863 once refused may subsequently be gran-

ted on a fresh petition to that effect on proper grounds. (1911) 2 MWN 167: 12 Ind Cas 128.

——S. 18—Leave to sue—Procedure.

A District Judge before granting or refusing leave to sue under S. 18 is not confined to the petition itself but may make an enquiry before passing his order. (1910) 33 M 412 (413): 7 MLT 126: 5 Ind Cas 291 (DB).

——Ss. 18, 14—Suit by trustee against co-trustee for breach of trust—Right of suit—Sanction under S. 18 not necessary—Majority and minority, powers of—When acts of majority binding on minority—Public and private trusts—Temple Committee, powers of.

Per Subrahmanya Aiyar, Benson, Bhashyam Aiyangar and Russel JJ. (Davies J. contra):

A trustee, even though he is a trustee of a public religious institution and even though he is one appointed by a Committee governed by Act XX of 1863, is entitled to sue his co-trustees in respect of breaches of trust once committed by the latter. Such a right of suit is one which is given by the general law and independently of Act XX of 1863; and no leave under S. 18 is necessary.

Per Benson, Bhashyam Aiyangar and Russell JJ.—The decision of the majority of trustees of a public trust, binds the minority in matters connected with the management of the trust property, but does not bind them in regard to matters which are ultra vires and beyond the proper scope of the trust.

Per Davies J.—Whatever may be the right of a trustee of a private trust to sue a co-trustee for a breach of trust, that right does not apply in the case of a trust of a public character such as a temple governed by Act XX of 1863. The proper course is for the dissentient trustee to sue under S. 14. A trustee of an endowment governed by Act XX of 1863 is subject to the control of the Temple Committee who can dismiss him for good and sufficient grounds without recourse to a civil suit. (1909) 19 MLJ 513 (515): 4 Ind Cas 874 (FB).

——S. 18—Mere perusal of application—Application for sanction against several trustees—General and no specific charge—Material irregularity Civil Procedure Code, S. 622.

Under S. 18 the Civil Judge is entitled to determine a petition under that section for removal of trustees, etc., merely on a perusal of the same. Where an application is made against several trustees, the application should clearly set forth the charges and the nature of the charges made against each of the trustees. Where a general petition is made against several trustees and no specific charge is made against each individual trustee a judge granting sanction on such petition acts with material irregularity and such sanction will be set aside under S. 622, C. P. C., if the irregularity should materially prejudice the trustees. (1905) 15 MLJ 221 (222).

——S. 18—Sanction—Condition precedent.

It is not a condition precedent that for the exercise of the jurisdiction to grant sanction under S. 18 that the Board of Revenue should have had management of the temple or that its Dharmakartas should have been under the Board's control. (1903) 26 M 166 (167).

——S. 18—Grant of leave to sue on application by unverified letter not presented to court by applicant or pleader—Civil Procedure Code, Ss. 622, 647—Omission to give notice of application to person intended to be sued.

Application to District Courts under S. 18 for leave to sue should be verified and presented by the applicant or his pleader. A grant of such leave on an unverified application not presented by the applicant or his pleader is a material irregularity within S. 622, C. P. C. Omission to give notice of such application to the person intended to be sued does not per se make the leave, if given, irregular. (1901) 11 MLJ 326: 24 M 685 (689) (DB).

——S. 18—Where suit sanctioned under S. 18, leave to sue in forma pauperis—C. P. C., S. 407.

Where a person got leave (under S. 18) leave can be given to sue in forma pauperis and Chapter XXVI, C. P. C., does not preclude him from suing in forma pauperis. (1901) 24 M 419 (420, 421) (DB).

——S. 18—Leave to sue not necessary to sue in High Court for neglect by trustee.

Leave is not required under S. 18 to sue a trustee for neglect of duty on the original side of the High Court. (1901) 11 MLJ 1: 24 M 219 (232) (DB).

RELIGIOUS FREEDOM ACT
See Caste Disabilities Removal Act (1850).

RELIGIOUS INSTITUTION
See Religious endowments.

RELIGIOUS OFFICE
See (1) Hindu Law—Religious endowment.
(2) Muhammadan Law—Waqf.
(3) Religious endowments.

RELIGIOUS PROCESSION
See (1) Criminal P. C., S. 145.
(2) Highway.

RELIGIOUS SECTS
See (1) Hindu Law—Applicability;
(2) Punjab Sikh Gurdwaras Act (8 of 1925), S. 2 (9).

RELIGIOUS TRUST
See (1) Religious endowment.
(2) Trust.

RELINQUISHMENT
See (1) Deed—Construction.
(2) Family arrangement.
(3) Hindu Law—Widow.
(4) Landlord and tenant.
(5) Registration Act, S. 17.

REMAINDER
See T. P. Act, Ss. 19, 21 und 24.

REMAND
See Civil P. C., Ss. 105, 107, 151 and O. 41, Rr. 23, 25.

REMAND TO POLICE CUSTODY
See Criminal P. C., S. 167 (3).

RE-MARRIAGE
See (1) Deceased Brother's Widow's Marriage Act (1921, 11 and 12 Geo. V, Ch. 24).
(2) Hindu Law—Widow.
(3) Hindu Widows' Re-marr age Act.
(4) Husband and Wife.
(5) Muhammadan Law—Guardianship.

REMISSION OF CONTRACT
See Contract Act, S. 63.

REMISSION OF RENT
See (1) Landlord and tenant.
(2) Local Tenancy Acts.

REMOVAL OF GUARDIAN
See (1) Civil P. C., O. 32, R. 9.
(2) Guardians and Wards Act (1890), S. 39.

REMOVAL OF TRUSTEE
See (1) Civil P. C., S. 92.
(2) Religious Endowment—Trustee.
(3) Trusts.
(4) Trusts Act (1882), S. 71.

RENNELL'S MAP
See (1) Evidence Act, S. 83.
(2) Landlord and Tenant.

RENT
See (1) Bengal Rent Act (10 of 1859).
(2) Bengal Rent Recovery Act, (8 of 1865).
(3) Landlord and Tenant.
(4) Local Rent Restriction Acts.
(5) Local Tenancy Acts.
(6) T. P. Act, S. 105.

RENT CHARGE
See (1) Landlord and Tenant.
(2) Local Tenancy Acts.

RENT-FREE GRANT
See (1) Grant.
(2) Landlord and tenant.

RENT-FREE TENURE
See (1) Landlord and ten nt.
(2) Land tenures.

RENT SALE
Se (1) Civil P. C., S. 65.
(2) Land lord and Tenant.
(3) Local Tenancy Acts.

RENT SUIT
See (1) Landlord and Tenant.
(2) Local Tenancy Acts.

REPEAL
See (1) General Clauses Act (1897), Ss. 6 to 8.
(2) Interpretation of Statutes.

REPEALING AND AMENDING ACT (10 OF 1927)
——S. 4
——S. 4 — Definition of 'attested" — Retrospective effect.
The amendment of the definition of the word 'attested' in Transfer of Property Act, introduced by Act (X of 1927), was intended to give the definition of 'attested' retrospective effect and the meaning of that amendment cannot be controlled by the general saving clause enacted in that and subsequent Acts. AIR (Vol 18) 1931 Nag 95 : 13 N L J 202 : 132 Ind Cas 449.

REPEALING AND AMENDING ACT (20 OF 1937)
——S. 4
——S. 4—'Applied' and 'incorporated,' meaning of.
The words "applied" and "incorporated' ot having been defined by the General Clauses Act or by the Act in which they have been used, they should be deemed to have been used in their ordinary sense and there is no reason to hold that the application of an enactment necessarily means the application of an earlier enactment to the later. AIR (Vol 26) 1939 Mad 21 : 1938 M W N 1105 (2) : (1938) 2 M L J 863 : 48 L W 813 : 40 Cr L J 224 : I L R (1939) Mad 87 : 179 Ind Cas 605 (DB).

REPEALING (PUNJAB LOANS LIMITATION) ACT (3 OF 1923)
Sec Punjab Loans Limitation Repealing Act (3 of 1923).

REPEALING ORDINANCE (1 OF 1946)
——S. 3
——S. 3 (a)—Scope and effect of—Tribunals created under repealed ordinance—Competency and jurisdiction of after repeal of Ordinances creating them.
The repeal of Ordinance 52 of 1944 by Ordinance 1 of 1946 did not affect the tribunal already constituted under Repealed Ordinance. The Second Special Tribunal at Lahore, therefore did not cease to exist after September 30, 1946, but was still in competent to try offences lawfully made over to it. AIR (Vol 34) 1947 Bom 361 : 49 Bom L R 352.

REPLY, RIGHT OF
See Criminal P. C., S. 292.

REPRESENTATION
See (1) Civil P. C., S. 2 (11), 47 and O. 22.
(2) Custom (Punjab).
(3) Evidence Act, S. 115.
(4) Hindu Law—(i) Joint Family.
(ii) Widow.
(5) Muhammadan Law—Co-heirs.
(6) Provincial Insolvency Act, Ss. 53 and 54.
(7) T. P. Act, S. 41.

REPRESENTATIVE
See Civil P. C., Ss. 2 (11), 47 and 50 ; O. 1, R. 8 ; O. 2, R. 11 ; O. 21, R. 22; O. 22, R. 3 and O. 30, R. 4.

REPRESENTATIVE SUIT
See (1) Civil P. C., O. 1, R. 8.
(2) Provincial Insolvency Act, Ss. 53 and 54.
(3) T. P. Act, S. 53.

REPUTE
See (1) Criminal P. C., Ss. 107 to 110.
(2) Evidence Act, Ss. 32 and 55.
(3) Penal Code, S. 499.
(4) Tort—Defamation.

REPUTED OWNERSHIP
See (1) Evidence Act, S. 110.
(2) Possession.

REQUISITION OF HOUSES AND BUILDINGS
See Defence of India Rules, R. 75-A.

RESCISSION OF CONTRACT
See Specific Relief Act, Ss. 35, 37 and 38.

RES IPSA LOQUITOR
See (1) Maxims.
(2) Penal Code, S. 304-A.
(3) Tort—Negligence.

RESERVE BANK OF INDIA ACT (2 of 1934)
——S. 8.
——S. 8 — Reserve Bank of India (Note Refund) Rules, 1935, R. 2 (e) — 'Mutilated note, meaning of.
Before a note can be described as a mutilated note, it is an essential condition that a portion of that note should be missing and if that condition is not fulfilled, it cannot be regarded as a mutilated one. AIR (Vol 32) 1945 All 29 : 1944 O W N 283 (2): 1944 A W R 262 : 1945 A L J 5 : I L R (1944) All 685:219 Ind Cas 134 (DB).

——S. 28.
——S. 28 — High Denomination Bank Notes (Demonetisation) Ordinance, (III [3] of 1946), cl. 6 — Scope of S. 39 explained — Meaning of "Exchange" in S. 39 and "be exchanged only on tender of Note for exchange" in cl. 6 stated—After commencement of ordinance holder of Bank note of high denomination cannot claim its discharge without complying with ordinance — Writ of mandamus on Bank to make unconditional payment held could not be granted under S. 45, Specific Relief Act.
No peculiar significance or special meaning attaches to the word "exchange."
Section 39, Reserve Bank of India Act, imposes on the bank an express obligation to honour its notes in coin whether they are legal tender or not and in the case of bank notes of Rs. 5 and upwards to supply coin or notes of lower denomination to the note tendered. The only discretion which the bank is 'given is as to the quantities of coin and notes repectively which it will give in exchange but it must give one or the other or both. The word 'exchange' is a word of wider import than the word 'pay.'
The words "be exchanged only on tender of the note for exchange" in S. 6 of Ordinance III (3) of 1946 mean "be exchanged in satisfaction of the promise to pay."
After the coming into operation of Ordinance III (3) of 1946 the petitioner presented to the Reserve Bank of India at Bombay a bank note of the denomination of Rs. 1000 and called upon the bank to pay him Rs. 1000 in discharge and satisfaction of the unconditional promise to pay to the bearer of the note as contained in the bank note. The bank declined to make payment and asked the petitioner to get the note exchanged by filling in the requisite declaration form as required by the Ordinance. In the petition filed by the petitioner under S. 45, Specific Relief Act, for a mandatory order on the bank to discharge and satisfy the unconditional promise to pay to the petitioner Rs. 1000 without imposing any condition :
Held that (1) Section 39, by the use of the word 'exchange' having expressly provided for the mode of discharging the obligation to pay under the bank

note, and the same having been modified by Ordinance III (3) of 1946, the petitioner could not claim its discharge without making the required declaration.

(2) That even assuming that there was an implied obligation to pay on the part of the bank apart from the provisions of S. 39, such obligation arose by virtue of the Act and could not be divorced from the Act itself. Such implied obligation was something "contained in the Act" within cl. 6 of the Ordinance which, therefore, must be deemed to have abrogated any such implied obligation in the same way as it abrogated the express one.

(3) That it could not be said in the circumstances that it was "clearly incumbent" upon the bank to make unconditional payment of the note. Hence a writ of mandamus could not be granted under S. 45, Specific Relief Act. AIR (Vol 33) 1946 Bom 510 (DB).

——S. 28 — **Two halves of note identifiable as parts of one—Refund claim for.**

When two halves of a currency note are identifiable as parts of the one note and the note is not a mutilated one, the application of S. 28 is not attracted and the currency officer should allow the claim for refund. AIR (Vol 32) 1945 All 29 : 1944 O W N 283 (2) : 1944 A W R 262 : 1945 A L J 5 : I L R (1944) All 685 : 219 Ind Cas 134 (DB).

——S. 39.

——S. 39 — **Construction and scope—"Exchange"—Implied liability of bank — If exists — High Denomination Bank Notes (Demonetisation) Ordinance (1946), Cl. 6 — Effect of — If abrogates liability of Reserve Bank to pay unconditionally — Specific Relief Act, S. 45—"Clearly incumbent."**

Section 39 of the Reserve Bank of India Act does impose on the bank an express obligation to honour its notes in coin whether they are legal tender or not, and in the case of bank notes of Rs. 5 and upwards to supply coin or notes of lower denomination to the note tendered. The only discretion which the bank is given is as to the quantities of coins and notes respectively which it will give in exchange, but it must give one or the other or both. The word "exchange" is of wider import than the word "pay." The words "be exchanged only on tender of the note for exchange" in Cl. 6 of Ordinance III of 1946 must mean "to be exchanged in satisfaction of the promise to pay." There is no room for any implied obligation arising by virtue of the statutory powers and duties of the Bank. Even if there be any, Cl. 6 of the Ordinance abrogates such an implied obligation as it abrogates an express one. It cannot be said that it is "clearly incumbent" on the bank to make unconditional payment of a high denomination note. Hence a writ of mandamus cannot be granted against the Bank under S. 45, Specific Relief Act, to make it discharge and satisfy the unconditional promise to pay the sum of Rupees one thousand contained in a thousand rupee note without imposing any condition on the holder presenting it. The statutory method of discharging the obligation of the Bank under the Reserve Bank of India Act having been modified by Ordinance III of 1946, no owner or holder of a high denomination note can claim its discharge from the bank without making the required declaration under the Ordinance. AIR (Vol 33) 1946 Bom 510 : 48 Bom L R 365 : 1946 Comp C 113 : 227 Ind Cas 450 (DB).

——Sch. 2.

——Sch. 2 — Suit by Bank on mortgage—Defendant applying to Board under Bengal Agricultural Debtors' Act and suit stayed on notice under S. 34 of the Act — Bank subsequently included in Sch. II of Reserve Bank of India Act — Subsequent award by Board — Plaintiff, applying to Civil Court to proceed with the case as bar under S. 34 had been removed :

Award, held illegal; it was the duty of the Court to proceed with the case when bar was removed and its jurisdiction did not depend upon plaintiff's application. AIR (Vol 28) 1941 Cal 442 : I L R (1941) 2 Cal 68 : 45 C W N 578 : 196 Ind Cas 266.

RESERVE BANK RULES

——R. 22.

——R. 22—**Appeal against dismissal — Evidence on which appellate authority can act.**

Since a right of appeal is clearly given in cases of dismissal of employee of Reserve Bank, there must be satisfactory evidence upon which an appellate authority can act. AIR (Vol 26) 1939 Rang 357 : 186 Ind Cas 339 (DB).

——R. 22 (iii) — The Reserve Bank of India cannot dismiss its employee at its pleasure, when once they take him into their services. When a servant, who is entitled to an enquiry under R. 22, sub-r. (iii) of Reserve Bank Rules is afforded an enquiry, it must not be wholly illusory. If he submits and explanation regarding the charges made against him, the Bank cannot take action till they are satisfied that the charge is proved. It is not enough that it is merely made and if it is proved they must be satisfied that the act forming the basis of the charge justifies them in taking disciplinary action. AIR (Vol 26) 1939 Rang 357 : 186 Ind Cas 339 (DB).

RES GESTAE

See Evidence Act, S. 6.

RESIDENCE

See (1) Civil P. C., Ss. 16 and 20.
(2) Criminal P. C., S. 488.
(3) Hindu Law—Maintenance.
(4) Madras District Municipalities Act.
(5) Muhammadan Law—Dower.

RESIDUARY LEGATEE

See (1) Prob. and Adm. Act, Ss. 105—111.
(2) Succession Act, Ss. 102, 103, 154, 166, 232 and 233.
(3) Will.

RES JUDICATA

See also (1) Civil P. C., S. 11.
(2) Evidence Act, S. 40.

——Execution proceedings—Order in execution for attachment—Judgment-debtor failing to raise plea of limitation or failing to appeal against order allowing execution — Effect — Execution ultimately dismissed for non-payment of process-fee — Property sought to be attached in later, application different from that in earlier—If removes bar — Identity of matter in issue to be looked at. See AIR (Vol 37) 1950 Hyd 15.

——**Execution proceedings—Omission to raise plea of limitation in earlier execution—Plea in later application—If barred.**

Where a judgment-debtor fails to raise a plea of limitation on receipt of notice of an execution petition, it is not open to him to raise such a plea in respect of a subsequent application. AIR (Vol 37) 1950 T C 79 (DB).

——**Nature and effect of plea—Jurisdiction to decide.**

A point as to res judicata is one which does not go to root of jurisdiction. The tribunal or Court may have and can have jurisdiction to determine the dispute between the parties. Nonetheless it may be barred from entertaining certain points of dispute or issues between the parties as being barred by res judicata, whether the particular point in dispute or issue is res judicata or not lies to be determined by the tribunal itself. 49 Bom L R 454 : AIR (Vol 34) 1947 Bom 413.

RES SUB-JUDICE

See Civil P. C., S. 10.

RESTITUTION

See Civil P. C., Ss. 47, 144 and 151.

RESTITUTION OF CONJUGAL RIGHTS

See also (1) Civil P. C., O. 21, R. 33.
(2) Criminal P. C., S. 488.
(3) Hindu Law—Marriage.
(4) Husband and Wife.
(5) Muhammadan Law—Marriage.

1. Apostacy.
2. Cruelty and ill-treatment.
3. Defence to suit.
   See also No 2.
4. Powers and duties of Court.
5. Proof of marriage.
6. Refusal of wife to live with husband.
7. Rights and duties of husband.

1. Apostacy.

——Apostacy of wife effect of.

A Mahomedan cannot get a decree for restitution of conjugal rights against a wife who was converted from Mahomedanism. 8 L B R 461 : 9 Bur L T 251 : 36 Ind Cas 279 : AIR (Vol 3) 1916 Low Bur 57.

2. Cruelty and ill-treatment.

——Defence—Danger to health of the wife.

A husband is entitled to the society and companionship of his wife but before a Court can be asked to compel a reluctant wife to return to her husband's custody it must be shown that there is no legal ground to justify the wife's refusal to live with her husband. One such ground is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. 15 P W R 1920 : 54 Ind Cas 383 : AIR (Vol 7) 1920 Lah 45.

——Defence — Cruelty — Civil and criminal cases against wife.

Where the husband had instituted various civil and criminal cases against his wife and has suspected her fidelity, the wife has reasonable ground for believing that her health and safety would be endangered if she returned to her husband's custody and plaintiff was not entitled to a decree for restitution of conjugal rights against his will. 40 All 332 : 16 A L J 132 : 44 Ind Cas 728 : AIR (Vol 5) 1918 All 235 (DB).

——Defence—Cruelty—Use of liquor.

That the husband was addicted to the use of alcohol and that he occasionally beat his wife when he was drunk, is no defence to a suit for restitution of conjugal rights where it is not proved that the husband is habitually the worse or habitually beats the wife or assaults her with brutality. 4 O L J 112 : 40 Ind Cas 674 : AIR (Vol 4) 1917 Oudh 404.

——Keeping a low caste mistress — Bona fides—Laches—"Legal cruelty"—English and Mahomedan law.

It is no defence to a suit by a Mahomedan against his wife for restitution of conjugal rights that the husband was keeping a low caste mistress, that there has been considerable delay in the filing of the suit and the same is not bona fide. A husband will not be deemed guilty of legal cruelty towards his wife, unless his conduct is such as to render future cohabitation more or less dangerous to her life, or limb, or mental or bodily health. There is no difference between the English law and the Mahomedan law in this respect. (1915) M W N 836 : 2 L W 894 : 30 Ind Cas 924 : AIR (Vol 3) 1916 Mad 707 (DB).

——Legal Cruelty—Effect of.

A husband is not entitled to a decree for restitution of conjugal rights even on terms of his going and living with his wife in her father's house where the danger and apprehension of cruelty and ill-treatment of the wife is not removed. 12 A L J 1065 : 25 Ind Cas 213 : AIR (Vol 1) 1914 All 452.

——Defence—Cruelty—Wife—Right to desert husband.

Cruelty in a degree which renders it unsafe to return to her husband justifies a desertion by a Hindu wife and is a good defence to a suit for restitution of conjugal rights. 12 A L J 995 : 25 Ind Cas 728 : AIR (Vol 1) 1914 All 308.

——When decree should be passed—Cruelty.

Where a legal cruelty is established a suit for restitution of conjugal rights ought not to be decreed. (1913) 18 Ind Cas 867 (All).

——Decree for—Whether granted despite plff's want of bona fides.

Courts will not be justified in refusing restitution to the husband because there was some sort of ill-treatment in the early stages of married life, especially when the parties have made up their differences and agreed to live together afterwards. Proof of recent ill-treatment alone would be a bar to relief. Suits for restitution by a husband would not lack in bona fides because he does not wish to pay separate maintenance allowance to the wife ordered by a Magistrate. The suit would have to be decreed if otherwise the husband is entitled. (1912) 16 Ind Cas 808 (DB) (Mad).

——Jurisdiction of Civil Courts — Defence — Shiah School.

The Civil Courts in India have the same jurisdiction as was exercised by the Khazi or the umpires. A plea of legal cruelty on the part of the husband is a valid defence to a suit for restitution of conjugal rights even among Shiahs. A plea of legal cruelty could be sustained only when there is actual violence of such a character as to endanger personal health or safety or where there is a reasonable apprehension of such violence. (1912) 15 O C 159 : 13 Ind Cas 609.

3. Defence to suit.

See also No. 2.

——Cause of action—Demand—What is a proper demand.

In suits for restitution of conjugal rights it is essential that previous to the institution of the suit there should be a demand for restitution in proper conciliatory form. A demand accompanied by a threat of legal proceedings is not a proper demand. AIR (Vol 7) 1920 Low Bur 22 : 12 Bur L T 120 : 54 Ind Cas 65.

——Defence to suit.

Where plaintiff after dismissal of suit for restitution of conjugal rights for not providing a house and not paying dower removed the defects before argument in appeal, plaintiff's suit should be decreed. AIR (Vol 3) 1916 Cal 223 : 32 Ind Cas 707 (DB).

——Defence—Suit by husband—Wife's ill-health.

Neither the ill-health of the wife nor the fact that the parents of the wife had at one time refused to give the husband the custody of his wife is a defence to suit for restitution of conjugal rights by the wife. AIR (Vol 1) 1914 Mad 108 : 26 M L J 363 : 24 Ind Cas 380.

——Defence—Non-payment of dower.

Where the marriage has been consummated non-payment of maintenance and dower is no defence to a suit for restitution of conjugal rights. (1913) 7 SLR 138 : 24 Ind Cas 881.

4. Powers and duties of Court.

——Decree—Injunction against parents of wife not to harbour her.

While decreeing suit for restitution of conjugal rights, the Court should not issue any injunction to the parents of the wife restraining them from keeping her under their roof. AIR (Vol 7) 1920 Bom 112 : 44 Bom 454 : 22 Bom L R 214 : 57 Ind Cas 571 (DB).

——Decree—Form of.

In a suit for restitution of conjugal rights the Court could give the plaintiff a declaration that the defendant was his wife and direct the other defendants, not to obstruct her in returning to her husband. It is not open to the Court to decree the hus-

band, possession of the wife but it should merely direct the wife to return to her husband. AIR (Vol 6) 1919 Cal 436 : 51 Ind Cas 583 (Cal.)

——Refusal of relief—Mere disagreement between husband and wife.

Mere disagreement between the families of husband and wife is no sufficient ground to refuse restitution of of conjugal rights, especially where the marriage had been consummated. A I R (Vol 6) 1919 Lah 447 : 182 P W R 1918 : 48 Ind Cas 231.

——Minor wife — Discretion of Court — Wilful refusal.

If one or both of the spouses, is or are, on account of minority or other reasons incapable of discharging the conjugal duties, the Court may refuse to grant a decree for restitution of conjugal rights. But the mere refusal of a minor wife is not sufficient ground for the dismissal of a husband is suit for restitution of conjugal rights. AIR (Vol 6) 1919 Lah 237: 23 P R 1919: 49 Ind Cas 698 (DB).

——Suit for—Injunction—Auxiliary relief — Court-fee and jurisdiction.

The valuation of a suit for restitution of conjugal rights against the wife and for an injunction against her relations is that for the principal claim viz., the restitution of conjugal rights the claim for an injunction being merely an auxiliary relief. A Munsif of the 1st class has jurisdiction to hear a suit of the above description valued at Rs. 200 for purposes of Court-fee and Rs. 1,000 for purposes of jurisdiction. AIR (Vol 6) 1919 Lah 134 : 21 P R 1919 : 49 Ind Cas 749.

——Reference to arbitration—Relief discretionary—Delegation by Court.

It is entirely within the discretion of a Court to grant or refuse restitution of conjugal rights. But the Court cannot delegate this right of exercising discretion to arbitrators nor can it refer the entire suit to arbitration. AIR (Vol 5) 1918 Lah 357: 80 PWR 1918: 78 P L R 1918 : 45 Ind Cas 163.

——Decree for—Discretion how to be exercised.

A Court has discretion to refuse a decree for restitution of conjugal rights but the refusal must be based on sound principles; a decree ought not to be refused for other causes than those which justify a wife in refusing to return to her husband. These latter include failure to pay prompt dower as in the case of a Mohomedan, cruelty, gross neglect of marital duties and connivance at the wife's adultery for a long period. A I R (Vol 5) 1918 Lah 298 : 67 P W R 1918 : 46 Ind Cas 112.

——Divorce when granted—Cruelty—Petty quarrels—Caprice.

A divorce cannot be granted on mere caprice or on petty quarrels not amounting to cruelty or ill-treatment. A I R (Vol 1) 1914 L B 257 : 7 Bur L T 16: 23 Ind Cas 380.

——When decree to be passed — Apprehension — Beach of peace.

Indian Courts should not pass a decree for the custody of a woman's person when the strained relations between the parties threaten a breach of the peace. 166 PLR 1913: 121 PWR 1913: 19 Ind Cas 475.

——Value of suit for jurisdiction.

In a suit for restitution of conjugal rights plaintiff may put his own valuation on the plaint and it is accepted for purposes of jurisdiction unless it s vitiated by some improper motive, e. g., a deliberate design to give the Court a jurisdiction which it has not. (1909) 11 Bom L R 1352 : 34 Bom 236 : 4 Ind Cas 836 (DB).

——Suit by husband—Discretion.

A Court is not bound to decree a claim by a husband for custody of his wife. Where the husband appeared to have ill-treated or deserted his wife or has been guilty of some other matrimonial offence, the Court should refuse to decree plaintiff's claim. 82 P R 1908: 8 P L R 1909 : 4 Ind Cas 650 (DB).

5. Proof of marriage.

——Marriage—Proof of factum and validity—Onus on plaintiff—Mahomedan Law.

In a suit by a Mahomedan husband for restitution of conjugal rights, if the wife denies that a valid marriage was performed, the plaintiff should establish, by legal evidence, either that his marriage was contracted with the consent of the girl's lawful guardian or that the girl herself having reached majority under the Mahomedan law contracted the marriage of her own account. A I R (Vol 3) 1916 P C 250: 6 L W 26 : 21 C W N 345 : (1917) M W N 261 : 10 Bur L T 79 : 36 Ind Cas 20.

——Proof of requirements of a valid marriage.

In a suit for restitution of conjugal rights by a Muhammadan husband against his wife requirements of a valid marriage must be established. The judgment of the Lower Court not stating who gave consent on behalf of the infant girl is defective. A I R (Vol 1) 1914 Cal 392 : 19 C L J 216 : 23 Ind Cas 921 (DB).

——Proof of marriage—Presumption.

In a suit for restitution of conjugal rights, very strict proof of marriage is essential, but in the absence of proof to the contrary, presumption as to the necessary marriage ceremonies will be raised from general evidence of marriage. AIR (Vol 1) 1914 Mad 219 : 23 Ind Cas 828 (DB).

6. Refusal of wife to live with husband.

——Consent of girl who had attained puberty—Burden of proof.

Under the Mahomedan Law although there is a presumption that a girl who had attained the age of 15 years has also attained puberty, there is no converse presumption that a girl who has not reached that age has not attained puberty. Where a Mahomedan sued for restitution of conjugal rights and the wife pleaded that the marriage was invalid in as much as she had attained the age of puberty before marriage but did not give consent.

Held, that as the deft. relied entirely on the legal presumption and not on the physical fact of puberty, the presumption of puberty did not arise as her age was less than 15. A I R (Vol 6) 1919 Cal 84 : 53 Ind Cas 94 (DB).

——Refusal of wife to live after puberty.

A Hindu girl married before puberty could not be compelled to live with her husband if after attaining puberty she is omitting to do so. 187 P W R 1912 : 215 P L R 1912 : 17 Ind Cas 254.

——Agreement to live apart—Law applicable to persons in determining marital rights and obligations.

A husband sued the wife for restitution of conjugal rights in 1903; in 1904 the suit was compromised and they agreed to live together "according to the custom of the world" which they never did. The husband again sued the wife in 1907 for restitution of conjugal rights.

Held, that the parties being Hindus the Hindu law applied under which any agreement between the husband and wife to live apart is forbidden and not therefore valid. Even under English Law, agreements providing for future separation are invalid though such agreements as provide for present separation are valid. (1910) 34 Mad 398 : 8 M L T 314 : 8 Ind Cas 412 (DB).

7. Rights and duties of husband.

——Liability of plaintiff to provide residence.

To succeed in a suit for restitution of conjugal rights the plaintiff must provide a suitable residence for his wife. AIR (Vol 6) 1919 Cal 1011 : 46 Ind Cas 491 (DB).

——Right of husband to use force.

Both under the English and the Indian law, although it is the duty of the wife to reside and co-

habit with her husband, the husband has no right to use force or violence to enforce this right even when the refusal of the wife is without reasonable cause. AIR (Vol 5) 1918 Sind 69 : 12 S L R 29 : 19 C L J 955 : 47 Ind.Cas 807.

——Grounds for refusal — Defendant minor.

Where in a suit for restitution of conjugal rights the defendant was found to have been a minor at the time of marriage and that the consummation had not taken place and that the plaintiff had neglected to assert his marital rights for a long time, it would be a proper exercise of discretion to refuse restitution. The grant of a decree for restitution of conjugal rights is discretionary with this Court. AIR (Vol 3) 1916 Lah 365 : 46 P R 1916 : 134 P W R 1916 : 148 P L R 1916 : 34 Ind Cas 538 (DB).

——Custody of wife.

Where for 15 years the husband never troubled about his wife, nor contributed to her support, never demanded her company and in any way performed or offered to perform any of his duties as a husband.

Held, that the husband cannot get Court's help as he had failed to take steps within reasonable time to assert his rights and take up his rightful position as husband and protector of the wife. 126 P W R 1909 : 125 P L R 1909 : 4 Ind Cas 974 (DB).

RESTORATION OF APPEAL

See Civil P. C., O. 41, R. 19.

RESTORATION OF PROPERTY.

See (1) Civil P. C., Ss. 47, 144 and 151.
(2) Criminal P. C., Ss. 517 and 522.

RESTORATION OF SUIT.

See Civil P. C.—(1) S. 151.
(2) O. 9, Rr. 4, 9 and 13.

RESTRAINT OF LEGAL PROCEEDINGS.

See Contract Act, Ss. 23 and 28.

RESTRAINT OF MARRIAGE.

See Contract Act, Ss. 23 and 28.

RESTRAINT OF TRADE.

See Contract Act, Ss. 23 and 27.

RESTRAINT ON ALIENATION.

See (1) Contract Act, S. 23.
(2) Deed—Construction—Will.
(3) Hindu Law—Will.
(4) T. P. Act, S. 10.
(5) Will.

RESTRICTION AND DETENTION ORDINANCE (3 of 1944).

——Whether ultra vires.

The reference to "the efficient prosecution of the war" in the Restriction and Detention Ordinance as well as in the order of detention must be understood in the light of the circumstances in which the Ordinance came to be passed. And as the efficient prosecution of the war was necessary for the defence of India, the Restriction and Detention Ordinance is not ultra vires the Governor-General in so far as it purported to authorise detention on the ground that the detenu was likely to act in a manner prejudicial to the efficient prosecution of the war. AIR (Vol 32) 1945 F C 18 : I L R (1945) Kar. F C 13 Sup : 49 C W N (FR) 56 : 24 Pat 187 : (1945) 1 M L J 365 : 47 Bom L R 396 : 46 Cr L J 559 : 1945 Pesh L J 18 : (1945) 8 F L J 40 : 47 Pun L R 90 : 80 C L J 1 : 1945 M W N 445 : (1945) F C R 81 : 219 Ind Cas 287.

——Ordinance is not ultra vires.

The Ordinance is not ultra vires merely because it legislates for detention for reasons connected with the efficient prosecution of war as Article 1 of List 1 of Sch. VII, Constitution Act, includes detention for reasons of state connected with defence and it is clear that action and conduct which are prejudicial to the efficient prosecution of war will, at the same time, jeopardise the defence of the country against aggression. A I R (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——Whether ultra vires.

The Restriction and Detention Ordinance cannot be assailed on the ground that the Governor-General is not entitled to promulgate an Ordinance bearing upon "preventive detention for reasons connected with the maintenance of public order" because that is exclusively a provincial subject. AIR (Vol 31) 1944 F C 86: 23 Pat 678 : (1944) 2 M L J 167 : 26 P L T 1: 48 C W N F R 121 : 1944 M W N 613 : 78 C L J 349: (1944) F C R 295 : 47 P L R 90 : I L R (1944) Kar F C 172 Sup.

——S. 3.

——S. 3—Governor acts as part of Provincial executive and not as contrast to it.

In every case the Governor either with or without his Ministers is the authority which has got to be satisfied before the powers are exercised under S. 3 of the Ordinance. But the Governor who has to be satisfied is a part of the Provincial executive and not in any way in contrast with or in contradistinction to the Provincial executive. AIR (Vol 33) 1946 Bom 32 : 47 Bom L R 675 (DB).

——S. 3—Order of detention bad—Subsequent order continuing it is equally invalid.

When the first order of detention is invalid the subsequent order must also as a necessary consequence be equally invalid, because all that the latter order does is to direct that the original order shall continue in force. Because if the original order is bad, the subsequent order directing it to continue cannot validate it. AIR (Vol 33) 1946 Bom 32 : 47 Bom L R 675 (DB).

——S. 3—Duty of detaining authority—Satisfaction.

When wide powers are given to the executive to deprive His Majesty's subjects of their liberty without the intervention of the Courts of Law, the detaining authority must consider each case with that care and caution which the exercise of so tremendous a power should call for. The satisfaction which the law requires on the part of the detaining authority before a subject can be detained is a reasonable satisfaction—A satisfaction not vitiated by any consideration which is foreign to the scope and object of Ordinance.

Where the minute written by the Governor's Secretary shows that the Governor was considering the use of the Criminal Tribes Act against the applicant and pending his decision on that question, he agreed to the detention of the applicant under Ordinance III of 1944, the mind was directed, not on the question of the security of the State or the efficient prosecution of war, but on the limited question as to whether the Criminal Tribes Act should be used or not against the applicant. It cannot, therefore, be held that the Govt. was reasonably satisfied as required under Ordinance III of 1944, S. 3. AIR (Vol 33) 1946 Bom 32 : 47 Bom L R 675.

——S. 3 — Order of detention — Validity — Person acquitted in regular trial—If can be detained.

It is a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain one under the Ordinance are mutually exclusive. If a person who is dangerous to public safety and maintenance of order, commits an offence, Government would be justified to prosecute him for the offence first and if for certain reasons such as want of evidence, the prosecution fails, it will be necessary to keep him in detention for public safety and maintenance of order, especially during the times of emergency. Hence, even if the evidence adduced at the trial is not sufficient to secure his conviction, the power of Provincial Govt. to order his detention is not lost, if it is reasonably satisfied that it is necessary to do so with a view to prevent him

from acting in any manner prejudicial to the public safety and maintenance of public order. AIR (Vol 32) 1945 Bom 533 : 47 Bom L R 669 : 47 Cr L J 297: 222 Ind Cas 267 (DB).

——S. 3 — Order of detention—Validity—Burden of proof.

If the order for detention is regular in point of form, an onus is cast on the person detained to show that it is, in effect, no order "made under or having effect under this Ordinance" either because the mind of the detaining authority has not been applied or because it is no order having been made by mistake or mala fides. AIR (Vol 32) 1945 Bom 533 : 47 Bom L R 669 : 47 Cr L J 297 : 222 Ind Cas 267 (DB).

——Ss. 3, 10, 11 — Governor's order for detention made regularly ex facie — Onus of showing contrary on person alleging it — Question of reasonable cause for detention to be decided by Governor—Court not entitled to examine material on which Governor's satisfaction is based—Order of detention not bearing seal of Provincial Government not invalid — Powers of rescinding order of detention—Fresh order for detention can be made when previous order cancelled—Ordinance applicable to persons already in detention —Ordinance not ultra vires. AIR (Vol 32) 1945 Pat 44 : 23 Pat 963 (FB).

——S. 3—Order for detention—Validity.

Where, in a case para. 1 of the order under S. 3, Restriction and Detention Ordinance, 1944, recites that the Governor is satisfied that it is necessary to "make an order" directing the detention of B and para. 2 states "Now, therefore . . . . the Governor of Bihar is pleased to direct that the said B be detained" the order is sufficient to make an order for detention of B. A I R (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 — Section 3 is not ultra vires by reason of fact that it amounts to legislation in matters enumerated in the Provincial List, Sch. 7, Govt. of India Act, viz., the maintenance of public order in a Province specified in Item I of the Provincial List, Sch. 7. AIR (Vol 31) 1944 Lah 142 : 45 Cr L J 711 : 213 Ind Cas 327 (FB).

——S. 3 (1) — Words "from acting"—Scope of.

The words "from acting" in S. 3 (1) do not indicate that the only persons against whom an order of detention may be made are persons considered to be actually acting in prejudicial manner at the time of making the order. They do refer to the persons who may act in such a manner in the future. A I R (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

—— S. 3 (1)—Order of detention under—Presumption — Onus is on the detenu to prove order is not what it purports to be.

An order of detention can be made by the Provincial Govt. under S. 3 (1) of the Ordinance and such an order being an executive action of the Provincial Govt., S. 59 (1), Constitution Act, requires it to be expressed in the name of Governor. Section 10 (3) of the Ordinance raises a presumption that an order purporting to be made by any authority in exercise of any power conferred by or under the Ordinance was made by that authority. Hence, in a case where a person is detained under S. 3 (1) of the Ordinance, the onus lies on the detenue to show that the order is not what it purports to be namely, an order made by the Governor.

Once it is presumed that the orders purporting to have been made by the Governor had been so made in pursuance of the provisions of the Ordinance, a very heavy burden lies on the detenu concerned to show that this apparent state of affairs, backed as it is by statutory presumption of correctness in its favour, is not the real state of affairs. Such a presumption is not rebutted by such vague and general allegations that the orders appear on a printed form, only the name of the particular detenu being entered therein or that the Governor is much too busy a person to apply his mind to individual cases of so many persons detained. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1) — Ordinance requiring Governor to be satisfied before taking action under S. 3 — Court is not entitled to ask whether materials are sufficient to satisfy a reasonable man.

When the Ordinance requires the Governor to be satisfied about the existence of particular state of things before taking action, it is for the Governor alone to decide in the forum of his own conscience whether he has reasonable cause to be satisfied. His mental state must be accompanied by an element of reasonableness determined, however, by himself i.e., his mind to him a kingdom is; Roma locuta causa finita est. When the Ordinance requires that an action by the Governor for detaining a person must be taken in good faith, a mere allegation of want of good faith cannot entitle the Court to examine the materials on which the Governor was satisfied of the necessity for detaining the detenu for the purpose of determining whether he acted in good faith or not. On any other view it would be sufficient for a detenu merely to allege want of good faith to force the Governor to disclose information which it may be vital to interest and safety of state should not be disclosed or allow the allegations to go unchallenged.

In Ordinance III of 1944, the wording is "is satisfied." Satisfaction must be interpreted as reasonable satisfaction but in case of such wording no objective test could be applied. The Courts are not entitled to ask whether the materials are such as would satisfy a reasonable man. The Court cannot possibly pronounce upon the reasonableness of the Governor's satisfaction when the reasons which actuated the Governor cannot be placed before it, or if they can be placed at all can be placed only in a partial form. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1) (b) — Arrest of B under Order No. 963-C — Petition by B under S. 491, Criminal P. C. — Rejection—Federal Court remitting the same—Cancellation of Order No. 963-C—Further detention of B under Order No. 3929-C — Proving of illegality of Order No. 3929-C held, necessary in order to release B—Court held was to consider not Order No. 963-C but application under S. 491.

B was arrested on March 27, 1942 under Order No. 963-C dated March 19, 1942 purporting to be made in exercise of power conferred by R. 26, Defence of India Rules. On April 23, 1943, the Federal Court decided that R. 26 was ultra vires. On April 28, 1943, a petition under S. 491, Criminal P. C., was presented to High Court on behalf of B. The petition was rejected on the ground that S. 10 (2), Restriction and Detention Ordinance, 1944, deprived the High Court of power to order the release of person detained by reason of an order purporting to be made under R. 26, Defence of India Rules. On May 23, the Federal Court set aside the order of the High Court and remitted the application. On July 3, 1944, Order No. 963-C was cancelled by Order No. 3928-C and B was further detained under Order No. 3929-C of the same date which was made by the Governor in exercise of the powers conferred on him by S. 3 (1) (b), Restriction and Detention Ordinance, 1944 :

Held, that as B was detained under Order No. 3929-C which ex facie was regularly made by the Governor in exercise of the powers conferred on him by S. 3 (1) (b), Restriction and Detention Ordinance, it was necessary for him to show that his detention in consequence of that order was illegal before the Court could order his release and that consequently, it would not suffice for him to attack the validity of the Order No. 963-C which was purported to be made

under R. 26, Defence of India Rules, as the High Court was not considering an application "against Order No. 963." The High Court was to consider an application made under S. 491, Criminal P. C., and was to decide whether B's detention was legal or illegal. Even if the High Court were to consider that Order No. 963-C was not a valid order, it could not make an unqualified order for the release of B. The best that High Court could do would be to direct his release unless he was being detained under some other order and there could be no doubt that he would continue to be detained under Order No. 3929-C unless it was declared that his detention under that Order was also illegal. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1) (b)—Scope.

Section 3 (1)(b) empowers the Central or Provincial Government to make an order detaining a person whom it is considered necessary to prevent from acting in prejudicial manner. Consequently, a person already in detention can be placed in detention and language of the preamble should not be construed narrowly so as to prevent the application of the Ordinance to such a person. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1)(b)—Clause (b) of sub-s. (1) of S. 3—Order of detention—Seal of Government not necessary.

It is not necessary that the order of a Governor under cl. (b) of sub-s. (1) of S. 3 directing the detention of a person should bear seal of the Government of the Province. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1) (b) — Arrest of B under Order No. 963-C purporting to be made under R. 26, Defence of India Rules—Cancelling of order by Governor and making of new order for detention under S. 3 (1) (b) — B contending abuse of power on Governor's part — Governor's action, held valid.

B was arrested on March 27, 1942 under Order No. 963-C dated March 19, 1942 purporting to be made in exercise of powers conferred by R. 26, Defence of India Rules. Order No. 963-C of March 19, 1942 was cancelled by the Governor by Order No. 3928-C dated July 3, 1944 and B was detained under Order No. 3929-C of the same date. Order No. 3929-C was made under S. 3 (1) (b), Restriction and Detention Ordinance, 1944. B contended that the Governor had no power to make a fresh order and the new order which he purported to make was a mere abuse of power :

Held, (1) that the mere fact that in July 1944 it was realised that it might not be possible to establish the validity of Order No. 963-C in a Court of law or to justify the detention of B under that order from the date of his arrest was not sufficient reason for holding that on July 3, 1944, the Governor's action in cancelling that order and making a fresh one was anything but an exercise of his powers to the best of his judgment, he being satisfied that the continued detention of B was necessary.

(2) That the inference to be drawn from Governor's action in cancelling Order No. 963-C and making a fresh Order No. 3929-C was not that the Government was trying to cover up past mistakes but that it was trying to provide that the future detention which it considered necessary, should be unquestionably legal. There was nothing at all suggestive of mala fides, rather the circumstances suggested the contrary. What was done was not to attempt to validate the old orders, but to replace them by fresh orders to which similar objections could not be taken. AIR (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 3 (1)(c)—Ordinance, if ultra vires — Government of India Act, 1935 (25 and 26 Gov. V Ch. 42), Sch. VII, List II, Item No. 2—"Public order," scope — Order under S. 144, Criminal P. C., restricting movement of person—Whether falls under Item No. 2 of List III.

None of the items in the lists is to be read in a narrow or restricted sense, and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

There is no warrant for putting such a narrow construction on the words "public order" in Item No. 1 of List II as to read it with reference to the latter part of the provision "preventive detention for reasons connected with the maintenance of public order." The words "preventive detention for reasons connected with the maintenance of public order" have been added, not to restrict the expression "public order" but merely because a specific reference was deemed desirable to that particular aspect of public order.

Section 144, Criminal P. C., enables a Magistrate to make an order preventing a person from entering a particular place, and the legality of such orders, when passed upon proper grounds, cannot be contested. Such orders will come within the provisions of Item No. 2 of the Concurrent List, and consequently, within the ordinance-making power of the Governor-General.

Consequently, the Restriction and Detention Ordinance III of 1944 is not ultra vires so far as S. 3 (1) (c) is concerned. A provision like this quite clearly falls within Item No. 1 of List II of the Provincial Legislative List, and also within Item No. 2 of List III, of the Concurrent Legislative Lists. AIR (Vol 32) 1945 Pat 444 : 24 Pat 418 : 12 BR 277: 47 Cr LJ 463: 27 PLT 14 : 222 Ind Cas 448 (DB).

——S. 6

——S. 6 (1), scope and effect of—Document which is not order at all—Validity.

The effect of S. 6 (1) is to validate orders made under R. 26 which would otherwise have been invalid "on the ground merely that the said rule purported to confer powers in excess of the powers that might, at the time the said order was made, be legally conferred by a rule made under the Defence of India Ordinance, 1939, or under S. 2, Defence of India Act, 1939." That is to say, it cured the defect in the divergence of language between the rule on the one hand and the Ordinance and the Act on the other. It is every such order which, under S. 6 (2), is to be deemed to have been, and which shall have effect as if it had been, made under the 1944 Ordinance; and as if such Ordinance had been in force at the relevant date.

Section 6 (2) of the 1944 Ordinance does not validate a document which is not an order at all, even though it bears the signature of a duly authorised officer, if it can be shown that the officer never applied his mind when he affixed his signature to it. It is only orders made valid by S. 6 (1) to which S. 6 (2) applies and is limited. If it can be shown that an order is invalid on a ground other than the invalidity of R. 26, S. 6 (1) of the 1944 Ordinance does not apply and cannot validate such an order. Only orders valid except for the effect mentioned in S. 6 (1) are covered by S. 6 (2). AIR (Vol 32) 1945 Bom 212 : 47 Bom L R 42 : 46 Cr L J 608 : I L R (1945) Bom 317 : (1945) 8 F L J 108 : 219 I C 392 (FB).

——S. 6—Ordinance, whether ultra vires—Ss. 6, 10, validity and effect of.

The Restriction and Detention Ordinance, 1944, is intra vires the Governor-General, nor are Ss. 6 (1) and 10 of the Ordinance retrospective in such a way as to be invalid.

The words "such orders" in the section mean by reference to S. 6 (1) "an order made before the commencement of this Ordinance under R. 26, Defence of India Rules."

Section 6 (2) of the Ordinance, in so far as it provides that certain order shall have effect on the commencement thereof, is not an attempt to alter the past and is valid. AIR (Vol 32) 1945 Pat 59 : 23 Pat 475 : 11 B R 295 : 46 Cr L J 460 : 218 Ind Cas 340 (DB).

——Ss. 6, 10—Scope and validity—Powers of Court.

The word 'such' in the expression 'every such order' in S. 6 (2) can only attract the qualification to be found in the opening words of cl. (1), namely, 'order made before the commencement of this Ordinance under R. 26 of the Defence of India Rules.' The further qualification to be extracted from the reference there contained on the ground of invalidity arising out of the ultra vires character of R. 26 cannot be imported into cl. (2), such a view as to the scope of the clause would determine the ambit of the expression 'order having effect by virtue of S. 6 in S. 10.' But it does not follow from this that the Court can no longer consider the validity of an order which, on the face of it, appears or purports to have been passed under R. 26. The Ordinance does not protect a document which is not really an 'order under R. 26' though it may appear on its face to be the order of an authorised officer.

No further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by the Ordinance. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under the Ordinance is a new order purporting to be made under the Ordinance, was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If, on consideration, the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and India on the subject, other than the ground that R. 26 was ultra vires, S. 10 of the Ordinance will not prevent it from so doing. Such an invalid order, though purporting to be an order, will not, in fact, be an order made under the Ordinance or having effect by virtue of S. 6 as it was made under the Ordinance at all for the purpose of S. 10. AIR (Vol 31) 1944 F C 86 : 23 Pat 678 : (1944) 2 M L J 167 : 48 C W N F C 121 : 1944 M W N 613 : 78 C L J 349 : 1944 F C R 295 : 26 P L T 1: 47 PLR 90 : 1944 Kar (F C) 172 Sup.

——S. 6—Interpretation.

The proviso to S. 6 (2) is not repugnant to the provisions of S. 6 (2) itself. Section 6 (2) relates to all orders under the Ordinance whereas the proviso relates to those made under R. 26 (1) (b), Defence of India Rules, namely, detention. It is clear from S. 6 (2) and the proviso that the detention of persons originally detained under R. 26 (1) (b), Defence of India Rules, is now to be treated as the detention of those persons under Ordinance 3 of 1944, as if an order had been made under that Ordinance on January 15, 1944. AIR (Vol 31) 1944 Cal 284 : 45 Cr L J 745 : 214 Ind Cas 219 (DB).

——S. 6 (1) and (2)—Applicability.

Section 6 (1) and (2) apply only to orders valid except for the defect that they were issued under R. 26, Defence of India Rules, which was declared ultra vires. If it can be shown that the orders were invalid on a ground other than the invalidity of R. 26, Defence of India Rules, S. 6 (1) and (2) of Ordinance 3 of 1944 cannot apply. Where the order can be questioned on one ground and one ground only, merely, that it was issued under R. 26, Defence of India Rules, which was declared ultra vires, that objection cannot affect the validity of the order by reason of S. 6 (1) of Ordinance 3 of 1944, and the order would, therefore, come within sub-s. (2) of S. 6 and must be deemed to have been made and shall have effect as if it had been made under the new Ordinance and if the Ordinance had been in force at the time when it was made. AIR (Vol 31) 1944 Lah 142 : 45 Cr L J 711 : 213 Ind Cas 327 (FB).

——S. 7.

——S. 7—Inordinate delay in sending notice under S. 7—In appropriate circumstances High Court may find that detention though not illegal in origin had become improper within meaning of S. 491, Criminal P. C.

The Ordinance prescribes no method by which the detenu can enforce the privilege which S. 7 confers on him with the avowed object of enabling him to obtain redress in the only way possible. Greater vigilance is, therefore, necessary in sending the requisite notice under S. 7 and in appropriate circumstances an omission to give effect to the intention of the statute may necessitate a finding that the detention though not illegal in its origin had become improper within the meaning of S. 491, Criminal P. C. AIR (Vol 33) 1946 Oudh 183: 1945 OWN 217: 20 Luck 535 (DB).

——S. 9.

——S. 9—Order of detention — Duty of authority making to devote care and attention in examining material placed before it before making order, pointed out—See 48 Bom. L. R. 159 : AIR (Vol 33) 1946 Bom 333.

——S. 10.

——S. 10—Object of detention is preventive not punitive—Court cannot enquire into sufficiency or reasonableness of grounds of detention.

The jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order "made under the Ordinance." It must be made by the detaining authority in the proper exercise of its powers. It would not be an order "made under the Ordinance" if it was made merely in the colourable exercise of its powers or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed all the safeguards. The order must not be made for an ulterior purpose—a purpose which has no connexion with the security of the State or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigation of a crime or to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. The powers conferred on the executive under the Ordinance are for the purpose of preventive detention and they are not punitive in their nature. The executive must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the safety of the State or the efficient prosecution of the war. It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can scrutinize them in order to see what was the condition of the mind of the detaining authority when it made the order. It is not open to the Court to go behind the statement as to sufficiency of materials. Whether the authority has sufficient materials or whether the grounds on which it has acted were reasonable is not for the Court to inquire into and, therefore. it is not open to the detenue to challenge the order. AIR (Vol 33) 1946 Bom 32: 47 Bom LR 675 (DB).

——S. 10—Detention not with view to prevent acting prejudicially to public safety but to consider

whether Criminal Tribes Act should be applied—Detention is bad.

When wide powers are given to the executive to deprive His Majesty's subjects of their liberty without the intervention of the Courts of law, the detaining authority must consider each case with that care and caution which the exercise of so tremendous a power should call for. The liberty of the subject is not to be lightly taken away. The satisfaction which the law requires on the part of the detaining authority before a subject can be detained is a reasonable satisfaction—a satisfaction not vitiated by any consideration which is foreign to the scope and object of Ordinance 3 of 1944. When mind is directed not on the question of security of the State but as to whether Criminal Tribes Act should be used or not, the detention can be questioned. AIR (Vol 33) 1946 Bom 32: 47 Bom LR 675 (DB).

——**S. 10—If the order for detention is regular in point of form and an affidavit has been made showing that the mind of the detaining authority has been applied to a consideration of the case, the document under which the person is detained is an order, so that the jurisdiction of the Court to question the grounds or motives for making that order for calling it in question are taken away by S. 10 (3) unless it could be affirmatively proved that the order was passed by some fraud or mistake.** AIR (Vol 32) 1945 Bom 533 : 47 Bom L R 669 : 47 Cr L J 297 : 222 Ind Cas 267 (DB).

——**S. 10—Scope.**

The first part of S. 10 (1) does not prevent Courts from enquiring into and deciding questions of validity of orders passed under R. 26 of the Defence of India Rules on the ground of the same being ultra vires. The second part of S. 10 (1) which suspends the operation of S. 491, Criminal P. C., to such orders, applies to two classes of orders: that is to say, orders made under S. 3 of the Ordinance itself and orders "having effect under this Ordinance or in respect of any person the subject of such an order." AIR (Vol 32) 1945 Bom 212: (1945) 8 FLJ 108: 47 Bom LR 42: 46 Cr L J 608: ILR (1945) Bom 317: 219 Ind Cas 392 (FB).

——**S. 10—Criminal P. C. (Act V of 1898), S. 491—Habeas corpus—Rights of detenu—Powers of High Court—Duty of Crown.**

The detenu is entitled to have the issue of his illegal and improper detention tried and determined and if the decision is in his favour, to be immediately released and set at liberty. The jurisdiction of the High Court to give a direction under S. 491, Criminal P. C., has not in any way been affected by S. 10 of the Ordinance and remains exactly the same as it was before the promulgation of the Ordinance.

It cannot be too clearly understood that the whole object of habeas corpus proceedings is expedition. They are summary proceedings and a person under detention is entitled to immediate release unless the Crown makes a return which is good on the face of it. The procedure which originally obtained in these proceedings was for the Crown to produce the man under detention along with the return so that he could be released forthwith if the return was not good on the face of it. This has been modified because, when the Crown is concerned, the detention is ordinarily legal. Therefore, all the Crown is now asked to do in the first instance is to produce the order of detention. But if this concession is abused, and the High Court is asked to go from one authority to another as if it was the business of the High Court to keep the man in jail at all costs and to find out why he was there, the High Court will return to the original practice and direct production of the detenue in every instance and release him forthwith if there is any attempt on the part of the Crown to prolong his detention by time-gaining devices. AIR (Vol 32) 1945 Nag 203: 47 Cr L J 429: 1945 NLJ 206: ILR (1945) Nag 731: 222 Ind Cas 343 (DB).

——**S. 10—High Court's jurisdiction to investigate or interfere with order of detention and pass orders under S. 491, Criminal P. C.**

Restriction and Detention Ordinance (III of 1944) does not take away the power of the Court to investigate into or interfere with the orders of detention or deprive the Court of its power to pass order under S. 491, Criminal P. C., the Court is at liberty to investigate whether an order purporting to have been made under R. 26, Defence of India Rules and deemed to be made under the Ordinance or a new order purporting to be made under the Ordinance was, in fact, validly made in exactly the same way as immediately before the promulgation of the Ordinance and if, on consideration, the Court comes to the conclusion that it was not validly made on any ground other than the ground that R. 26 was ultra vires S. 10 of the Ordinance will no more prevent it from so finding than S. 16, Defence of India Act did. AIR (Vol 32) 1945 Nag 159: 1945 NLJ 144: ILR (1945) Nag 382 (DB).

——**S. 10 — Section does not preclude High Court from considering petition under S. 491, Criminal P.C.**

Section 10 of the Ordinance does not preclude the High Court from considering a petition under S. 491, Criminal P. C., on the ground that the detention of the detenue was unlawful by reason of the fact that he has not been served with the actual order of detention under the Ordinance or with communication under S. 7 of the Ordinance or on the ground that the order of detention was not, in fact, made by the Governor or was mala fide. A I R (Vol 32) 1945 Oudh 222 : 1945 AWR (CC) 91 (2) : 1945 O W N (CC) 119 : 20 Luck 504 (DB).

——**S. 10—Validity of.**

Section 10 cannot be said to be beyond the ordinance making power of the Governor-General because the emergency described in the opening paragraph of the Ordinance does not postulate the necessity for such a provision. Nor is that section ultra vires on the ground that it purports to repeal S. 491, Criminal P. C. All that S. 10 does is to interdict the High Court from exercising in a certain class of cases the power conferred on it by S. 491, Criminal P. C. A I R (Vol 31) 1944 FC 86 : (1944) 2 MLJ 167 : 23 Pat 678 : 48 C W N F R 121 : 1944 M W N 613 : 78 CLJ 349 : 1944 FCR 295 : 26 PLT 1 : 47 PLR 90 : I L.R (1944) Kar (FC) 172 Sup.

——**S. 10—Scope and validity of S. 10 (2).**

Clause (2) of S. 10 is not valid and within the competence of the Ordinance making authority to the full extent its language signifies. The effect of the clause is to continue the deprivation of a subject's liberty and at the same time to deny him the opportunity of showing that his detention is not warranted by any statute or statutory rule. A I R (Vol 31) 1944 FC 86 : 23 Pat 678 : 78 CLJ 349 : (1944) 2 MLJ 167 : 48 C W N F R 121 : 26 P L T 1 : 1944 MWN 613 : 47 P L R 90 : 1944 F C R 295 : ILR (1944) Kar (FC) 172 Sup.

——**S. 10—Application by detenus from jail— Person withholding it renders himself liable for proceedings for interfering with due course of justice.**

The withholding by the Provincial Government of petitions to the High Court by detenus from jail under S. 491, Criminal P. C., no matter on what grounds cannot be justified even though the petition may appear to be frivolous or may appear to afford no ground whatsoever for the release of the detained person. Withholding petitions addressed to the High Court amounts to interference with the due course of justice and the person withholding them renders himself liable to proceedings for interfering with due

course of justice. Even after the decision by the High Court that Ordinance III of 1944 ousts the jurisdiction of the High Court to consider petitions under S. 491, Criminal P. C., petitions by detenus from jail under S. 491, Criminal P. C., must be forwarded as it will be for the High Court in every case to decide whether it has or has not jurisdiction in the matter. A I R (Vol 31) 1944 Lah 142 : 45 Cr L J 711 : 213 Ind Cas 327 (FB).

——Ss. 10, 6 — High Court's jurisdiction to consider application under S. 491, Criminal P. C.

Detention under R. 26, Defence of India Rules, effective under S. 6 of Ordinance— Application under S. 491, Criminal P. C., pending before High Court at date of Ordinance— High Court has no jurisdiction to consider application. AIR (Vol 31) 1944 Lah 142 : 45 Cr L J 711 : 17 Rang 55 : 213 Ind Cas 327 (FB).

——S. 10 (1)—Burden of proof—Order of detention—Validity—If can be challeged—Onus. See Restriction and Detention Ordinance 1944, S. 3. A I R (Vol 32) 1945 Bom 533 : 47 Cr L J 297 (DB).

——S. 10 (2)— Is valid and is not contrary to S. 110, Government of India Act.

Section 10 (2) of the Ordinance is valid and is not beyond the powers of the Governor-General. Section 10 (2) cannot be said to be contrary to the provisions of S. 110, Government of India Act. AIR (Vol 31) 1944 Cal 284: 45 Cr L J 745: 214 Ind Cas 219 (DB).

——S. 10 (2)—Whether ultra vires.

Section 10 (2) is not ultra vires on ground that Governor-General exercised judicial and not legislative powers in enacting it. AIR (Vol 31)1944 Lah 142: 45 Cr L J 711 : 213 Ind Cas 327 (FB).

——S. 11.

——S. 11—Effect of S. 11 on Evidence Act.

Section 11 of the Ordinance does not repeal any part of the Evidence Act and is not therefore ultra vires. At the most what it does is that for the period of its own currency, it suspends any provision of the Act which would enable a person detained under S. 3 to place before the Court the matters referred to in S. 11. The person detained is, of course, entitled to show lack of good faith by referring to materials other than those referred to in S. 11. A I R (Vol 32) 1945 Pat 44 : 23 Pat 968 (FB).

——S. 11 (1) and (2) (As amended by Ordinance XXII of 1944) — Amendment is retrospective — Power of Appellate Court to direct additional evidence on facts mentioned under sub-s. (1) to be taken in prosecution under sub-s. (2).

Amendment made by the Restriction and Detention (Amendment) Ordinance (XXII of 1944) in S. 11 (1) of the Ordinance III of 1944 is retrospective.

In a prosecution under S. 11 (2) of the Ordinance where evidence has been wrongly shut out, it is open to the Appellate Court under S. 428, Criminal P. C., to direct that additional evidence should be taken of the facts mentioned in S. 11 (1). A I R (Vol 33) 1946 Nag 99 : 1945 N L J 491 : I L R (1945) Nag 809 (DB).

——S. 11 (1)—Construction — True meaning of sub-s. (1), explained.

The true meaning of sub-s. (1) is that a public officer authorised to do so may produce before the Court, or disclose the substance of such grounds or particulars, though the Court cannot require him to do so. The first part of sub-s. (1) refers to statements made or evidence given by persons other than such public officer. That gives a consistent meaning to the section as a whole, and that is the only reasonable way in which sub-s. (1) can be construed. AIR (Vol 33) 1946 Nag 99 : I L R (1945) Nag 809 : 1945 Nag L Jour 491 (DB).

RESULTING TRUST

See Trusts Act, Ss. 80, 84, 88 to 91 and 94.

RESUMPTION

See (1) Grant.
(2) Landlord and Tenant.

RETAINER

See (1) Contract Act, Ss. 95, 168, 170, 171, 221.
(2) Legal Practitioner.

RETRACTED CONFESSION

See (1) Criminal P. C., S. 164.
(2) Evidence Act, Ss. 24, 30 and 133.

RETRACTED STATEMENT

See Criminal P. C., S. 288.

RE-TRIAL

See (1) Civil P. C., O. 41, Rr. 23 and 25.
(2) Criminal P. C., Ss. 403, 423 and 439.
(3) Criminal Trial.

RETROSPECTIVE EFFECT OR OPERATION

See Interpretation of Statutes.

RETROSPECTIVE EFFECT OF STATUTES

See Interpretation of Statutes.

RETURN OF PLAINT

See Civil P. C., O. 7, R. 10.

RE-UNION

See Hindu Law—Partition.

REVENUE

See Local Land Revenue Acts.

REVENUE ASSESSMENT

See (1) Bengal Land Revenue Assessment Regulation 1801 and 1828.
(2) Bengal Land Revenue Assessment (Resumed Lands) Regulation 1899.

REVENUE COURT

See (1) Civil P. C., S. 9.
(2) Jurisdiction.
(3) Local Tenancy Act.

REVENUE FREE LANDS (BADSHAHI GRANTS) REGULATION (BENG .REGN. 37 of 1793)

See also Bengal Revenue Free Lands (Badshahi Grants) Regulation, 37 of 1793.

——S. 15.

——S. 15—Interpretation.

Words "otherwise expressed in the grant" in S. 18 include a grant to the grantee and his heirs. A I R (Vol 9) 1922 Pat 411 : 1 Pat 201 : 69 Ind Cas 849 (DB).

REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (BENG. REG. 19 of 1793)

See also Bengal Revenue Free Lands (Non-Badshahi Grants) Regulation 19 of 1793.

——Debuttar lands—Grant described as debuttar — Grantor's rights in subsoil not lost.

Where the document or sanad granting a piece of land describes the grant as a debuttar pattah rent-free and not as danapatra or arpanam the grant becomes a rent-free lease and unless the grantor expressly gives away his rights in the subsoil the grantee has no right to it. AIR (Vol 16) 1929 Cal 791 (DB).

——Grants antecedent to 1765.

All grants made antecedent to 12th August 1765 and by whatever authority made and whether in writing or not, were admitted or allowed to be valid, if the grantees had got possession of the land and the land had not subsequently been made subject to the payment of revenue by competent officers of Government, and the zamindar can have no interest in such lands. AIR (Vol 16) 1929 Cal 791 (DB).

REVENUE JURISDICTION ACT (BOM. ACT 10 of 1876)

See also Bombay Revenue Jurisdiction Act (10 of 1876).

——Manager, not a Revenue Officer.

The Manager of encumbered estates in Sind is not a Revenue Officer and no finality attaches to his

orders. AIR (Vol 3) 1916 Sind 82 : 9 S LR 167: 32 Ind Cas 616 (DB).

——S. 4.

— S. 4 — Saranjam lands resumed—Suit for possession.

Section 4 does not bar a suit to recover possession of Saranjam lands resumed by Government. AIR (Vol 3) 1916 Bom 109 : 41 Bom 408 : 19 Bom L R 117 : 39 Ind Cas 65 (DB).

——S. 4 (a) — Suit relating to saranjam land.

A suit against Government relating to land held as 'Saranjam' is not cognizable by Civil Courts according to S. 4 (a) of the Act. (1909) 34 Bom 232:11 Bom L R 1333 : 4 Ind Cas 832 (DB).

——S. 6.

——S. 6 — Mistake of law—Effect.

A Revenue Officer, who makes an attachment etc., is not liable in damages if he makes a bona fide mistake of law as to the extent or nature of his powers. AIR (Vol 3) 1916 Bom 290:18 Bom L R 323 : 34 Ind Cas 198 (DB).

——S. 11.

——S. 11 — Right of suit where law gives appeal — Cause of auction — Ejectment — Order — Suit on title — Limitation Act, Art. 14 if applicable.

The order of a Collector directing the ejectment of a person being appealable under the Revenue Jurisdiction Act, no suit would lie where the cause of action is only such order. But where a person is actually ejected by the Collector, a suit would lie as there is no provision in the Act for an appeal from a physical act of ejectment. (1911) 5 S L R 46 : 10 Ind Cas 223 (DB).

REVENUE PAYING ESTATES

See Court-fees Act, S. 7 (v) (b).

REVENUE RECORDS

See (1) Evidence Act, S. 35.
(2) Custom (General)—Custom (Punjab).
(3) Landlord and Tenant—Record of Rights.
(4) Record of Rights.
(5) Riwaj-i-am.

REVENUE RECOVERY ACTS

See (1) Bengal Revenue Recovery Act (1 of 1890).
(2) Madras Revenue Recovery Act (2 of 1864).

REVENUE RECOVERY ACT (BENGAL ACT 1 of 1890)

——S. 4.

——S. 4 (2) — Applicability — A paying amount of certificate under protest to save his properties—Suit by A to recover amount paid filed in Civil Court — Jurisdiction.

The Collector of Mirzapore (U. P.) issued a certificate for a certain sum and sent it to the Collector of Saran (Bihar) with a request to recover it from A under the provisions of the Revenue Recovery Act, and remit it to his office at Mirzapore. The sum mentioned was said to be recoverable on account of the rent of a public ferry settled by the District Board of Mirzapore with the father of A. On receipt of the certificate, the Collector of Saran sold certain properties of A who then paid under protest the entire sum for which the certificate had been issued, to save his properties. He then instituted a suit in the Court of the Subordinate Judge of Saran for recovery of the amount paid by him, on the ground that he was not liable to pay that amount or any part thereof :

Held, that according to S. 5, Revenue Recovery Act, the sum for which the certificate had been issued was recoverable by the Collector as an arrear of Government Revenue as if the sum was payable to himself and the Collector had to follow the procedure laid down in S. 3 of the Act in spite of the fact that the ferry had been settled by the District Board. The case, therefore, fell directly within S. 4 and sub-s. (2) of that section was fully applicable to the case and the suit should have been instituted in the Civil Court at Mirzapore, and not at Saran. AIR (Vol 26) 1939 Pat 517 : 5 B R 734:182 Ind Cas 223 (DB).

REVENUE REGISTER

See Evidence Act, S. 35.

REVENUE SALE

See also (1) Bengal Revenue Recovery Act.
(2) Bengal Land Revenue Sales Acts (1859, 1868 and 1869).
(3) Bengal Revenue Sales Regulation (5 of 1812).
(4) Civil P. C., S. 65.
(5) Landlord and Tenant.
(6) Local Land Revenue and Tenancy Acts.
(7) Revenue Sales Act (Bengal Act 11 of 1859).

——Caveat emptor — Rule of.

The rule of caveat emptor does not apply to sales made for arrears of Government revenue. The purchaser has to be refunded the money and costs if the sale is set aside. AIR (Vol 5) 1918 Cal 292 : 42 Ind Cas 500 (DB).

——Residency Taluq—Suit for possession — Burden of proof.

Where separate accounts were opened with different sharers in respect of specified portions of a taluk, the remainder being left as the residency Taluk, the plaintiff who purchases the residency taluq in a revenue sale for default of payment of revenue, has to prove that the lands in suit appertain to that taluk and must succeed on the strength of his own title, the suit being one in ejectment. AIR (Vol 2) 1915 Cal 170 : 20 C L J 296 : 27 Ind Cas 12 (DB).

——Purchaser — If representative-in-interest of defaulting proprietor.

A purchaser of an entire estate sold for recovery of arrears of revenue due therefor is not a representative-in-interest of the defaulting proprietor. AIR (Vol 1) 1914 Cal 870 : 24 Ind Cas 281 (DB).

——Irregularity—Inadequacy of price.

The Court need not as a matter of law, draw the inference that inadequacy of price was due to irregularity in the sale proceedings. (1912) 16 C W N 227 : 13 Ind Cas 403 (DB).

——Sale of larger share than one in default—If prejudices plaintiff's rights.

Where a larger share of land than the one in default was put up for sale by the Revenue authorities, it is an act without jurisdiction and so the plaintiff's rights would not be prejudiced. (1911) 15 C L J 54 : 13 Ind Cas 959 (DB).

——Fraudulent sale — Purchaser party to fraud — Purchaser to be treated only as purchaser in private sale.

Although a Government sale for arrears of revenue gives a title against all the world with certain exceptions, a fraudulent purchase at such auction sale places the purchaser in a very different position; in other words, a court will strip of all disguises from a case of fraud and look at the transaction as it really is. Where a revenue sale was brought about by deliberate default on the part of the proprietors, and the defendant made the purchase at the auction sale in concert with the proprietors with a view to annul the encumbrances of the tenure-holders, amongst whom the plaintiff was one, there was before the commencement of the action such hostility on the part of the defendant to the title of the plaintiff as to justify the institution of a suit for declaration that the auction purchaser had not acquired the rights and privileges of a purchaser at a sale for arrears of revenue. (1910) 12 C L J 336 (345):7 Ind Cas 21 (DB.)

——Benami purchase.

There is nothing to preclude the contention that the purchase in a revenue sale is Benami. (1909) 19 M L J 270: 6 M L T 168 : 3 Ind Cas 124 (DB).

——Co-sharers making default — Whether tort feasors—Purchase by co-sharers.

Co-sharers who default in paying Government revenue commit no tort against other co-sharers. If they commit no wrong in defaulting and are permitted to buy at the subsequent revenue sale, they commit no tort in having benami. (1907) 5 C L J 64 (65) (DB).

——Auction purchaser's rights—Judgment obtained against defaulter not binding.

A purchaser in a sale for arrears of revenue who takes the property free of all incumbrances acquires it just as it was at the time of the Permanent Settlement. (1905) 9 C W N 383 (386) (DB).

REVENUE SALES ACT (BENGAL ACT 11 of 1859).

See also (1) Bengal Land Revenue Sales Acts (11 of 1859, 7 of 1868 and 8 of 1869).
(2) Revenue Sale.

——Sale of taluk for default of revenue — Caveat emptor.

Where the instalments of revenue dues are actually sent to and received by the Collector before the due date and the land was nevertheless actually sold under provisions of the Revenue sale, as the Collectorate were not aware as to which land the payment was made.

Held, that it was not a valid sale.

The rule of Caveat Emptor does not apply to rules made for Govt. Revenue. When the sale is set aside. the purchaser has to give back the land with mesne profits and costs of the suit by which it was set aside. AIR (Vol 5) 1918 Cal 292 : 42 Ind Cas 500 (DB).

—S. 2.

——S. 2—Kabuliyat fixing date of payment of annual rent.

The tenant of a holding on which revenue had been assessed at the time of the Permanent Settlement, gave a kabuliyat undertaking to pay the annual Juma to the Government by the 28th June every year. Held, that the undertaking is a promise by the tenant to pay the revenue ordinarily payable on the first day of the financial year, by the latest day of payment, that is, by the 28th June, S. 2 of Act, XI of 1859 clearly applies to monthly instalments in revenue paying estate, and does not apply to a yearly Jama of tenures. (1909) 13 C W N 633 : 9 C L J 341 : 3 Ind Cas 986 (DB).

—S. 6.

——S. 6 and Bengal Land Revenue Sales Act (7 of 1868)—Proclamation not posted in time—Irregularity or illegality.

The omission to post the proclamation of a Revenue sale in the Collectorate one month before the sale amount merely to an irregularity and not an illegality vitiating the whole proceedings and that aggrieved person must prove that he sustained injury. 11 C. 200, Not foll. (1912) 16 C W N 227: 13 Ind Cas 403 (DB).

—S. 10.

——Ss. 10 and 11—Sharers in some villages only in an estate—If can claim separate accounts.

Share-holders in only some villages in an estate cannot claim to have a separate account under S. 10 or 11 of the Act.

A proprietor not recorded as a sharer of a joint estate in a joint tenancy within the meaning of S. 10 or as a recorded sharer having a specific portion of the estate within the meaning of S. 11, but as a proprietor of an undivided interest over a portion of the estate within the meaning of S. 70 of Land Registration Act 1876, is not entitled to claim the benefit of the exception in S. 53 of the Revenue Sale Law Act in favour of sharers with whom the collector has opened separate accounts. (1912) 39 Cal 353: 14 CLJ 552 : 16 C W N 817 : 13 Ind Cas 353 (DB).

—S. 13.

——Ss. 13, 37 and 54—Sale of a share—Encumbrance—Adverse possession—Effect of.

A revenue sale conveys not only the rights of a recorded proprietor but the share itself to the purchaser even as against a person who has acquired a title by adverse possession for more than 12 years to the properties. (1909) 13 C W N 407 : 1 Ind Cas 81 (DB).

—S. 37.

——S. 37—Annulment—Protected taluq.

A taluq derived and descended from an ancient taluk which was recognised at the permanent settlement is protected from annulment under S. 37. (1911) 15 C W N 515 : 10 Ind Cas 287 (DB).

—S. 37, Proviso — Raiyat coming occupancy tenant and vice versa—Enhancement of rent.

The Proviso to S. 37 refers primarily to raiyats holding at fixed rates. A person entering on the tenancy as a raiyat at fixed rates may not thereby become an occupancy tenant, but an occupancy raiyat will not lose his rights as such by a grant of fixed rent. Quaere:—Whether S. 37 proviso permits a purchaser at a revenue sale to enhance the rent of an occupancy raiyat. AIR (Vol 2) 1915 Cal 348 : 42 Cal 745 : 22 C L J 223 : 20 C W N 185 : 31 Ind Cas 19 (DB).

REVERSION.

See (1) Custom (Punjab)—Gift.
(2) Grant.
(3) Hindu Law—Gift.
(4) Hindu Law—Reversioner.
(5) Hindu Law—Will.
(6) Will—Construction.

REVERSIONER.

See Hindu Law.

REVIEW.

See (1) Civil P. C., Ss. 114, 151 and O. 47.
(2) Criminal P. C., Ss. 367 and 369.
(3) Practice.

REVISION.

See (1) Civil P. C., S. 115.
(2) Criminal P. C., Ss. 435 to 439.
(3) Government of India Act, 1915, S. 107.
(4) N. W. F. P. Courts Regulation, 1931, S. 34.
(5) Provincial Small Cause Courts Act, S. 25.

REVOCATION OF CONTRACT.

See Contract Act, Ss. 5 and 6.

REVOCATION OF GIFT.

See (1) Hindu Law—Gift.
(2) Muhammadan Law—Gift.
(3) T. P. Act, S. 126.

REVOCATION OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

See (1) Probate and Administration Act, S. 50.
(2) Succession Act, Ss. 263, 264.

REVOCATION OF SUCCESSION CERTIFICATE.

See Succession Act, S. 383.

REVOCATION OF WILL.

See Succession Act, Ss. 62, 69, 70 and 72.

RIGHT OF APPEAL.

See (1) Civil P. C., Ss. 2 (2), 96, 100, 109, 110 and O. 43, R. 2.
(2) Criminal P. C., S. 404.

RIGHT OF ASSIGNEE.

See (1) Civil P. C., O. 21, R. 16.
(2) T. P. Act, Ss. 6 and 130.

RIGHT OF ELECTION.

See (1) Succession Act, Ss. 180 and 188.
(2) T. P. Act, S. 35.

RIGHT OF FORECLOSURE.

See (1) Civil P. C., O. 34.
(2) Mortgage.
(3) T. P. Act, S. 60.

RIGHT OF GUARDIANSHIP.
See (1) Guardians and Wards Act.
(2) Guardianship.
(3) Hindu Law.
(4) Muhammadan Law.

RIGHT OF OCCUPANCY.
See (1) Landlord and Tenant.
(2) Land Tenures.
(3) Local Tenancy Acts.

RIGHT OF PRIVACY.
See (1) Custom (General).
(2) Custom (Punjab).
(3) Easements Act, S. 7.

RIGHT OF PRIVATE DEFENCE.
See Penal Code, Ss. 96, 97, 99, 100, 102 to 105 and 299 to 304.

RIGHT OF REPLY.
See (1) Civil P. C., O. 18, R. 2.
(2) Criminal P. C. 292.

RIGHT OF RESIDENCE.
See (1) Criminal P. C., S. 488.
(2) Hindu Law—Maintenance.
(3) Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.
(4) Muhammadan Law—Dower—Maintenance.

RIGHT OF SPEECH.
See (1) Criminal P. C., S. 144.
(2) Penal Code, S. 124-A.
(3) Tort—Defamation.

RIGHT OF SUIT.
See (1) Civil P. C., Ss. 9, 47 and O. 2, R. 2.
(2) Contract.
(3) Decree.

RIGHT OF WAY.
See (1) Criminal P. C , Ss. 133, 139A, and 144.
(2) Easements.
(3) Easements Act, Ss. 1 4 and 28.
(4) Grant.
(5) Highway.
(6) Specific Relief Act, Ss. 54 and 55.

RIGHTS AND LIABILITIES OF PARTNERS.
See (1) Contract Act, Ss. 239 to 266.
(2) Partnership Act, Ss. 9 to 17.

RIGHTS AND LIABILITIES OF PURCHASERS.
See (1) Contract Act.
(2) Sale of Goods Act.
(3) T. P. Act.
(4) Vendor and Purchaser.

RIGHTS AND LIABILITIES OF SURETY.
See (1) Civil P. C., S. 145.
(2) Contract Act, Ss. 124 to 146.
(3) Criminal P. C., Ss. 112, 122, 169 and 514.

RIGHTS CONJUGAL, RESTITUTION OF.
See (1) Civil P. C., O. 21, R. 33.
(2) Criminal P. C., S. 488.
(3) Divorce Act, Ss. 32 and 33.
(4) Hindu Law—Marriage.
(5) Husband and wife.
(6) Muhammadan Law—Marriage.
(7) Restitution of conjugal rights.

RIGHTS OF LANDLORD AND TENANT
See (1) Evidence Act, S. 116.
(2) Landlord and tenant.
(3) Lessor and lessee.
(4) Local Rent Restriction Acts.
(5) Local Tenancy Acts.
(6) Mines and Minerals.
(7) T. P. Act, Ss. 105 to 118.

RIGHT, TITLE AND INTEREST
See Civil P. C., O. 21, Rr. 62, 66 and 92.

RIGHT TO ALIMONY
See Divorce Act, Ss. 36 and 37.

RIGHT TO BEGIN
See (1) Civil P. C , O. 18, R. 1.
(2) Criminal P. C., S. 286.

RIGHT TO COPIES
See (1) Civil P. C., O. 11, R. 5.
(2) Criminal P. C., Ss. 154, 172, 174, 176, 219, 362 and 548.

RIGHT TO ENFORCE CONTRACT
See (1) Contract Act, Ss. 46 and 48 to 50.
(2) Specific Relief Act, Ss. 23 and 25.

RIGHT TO GIVE IN MARRIAGE
See (1) Hindu Law—Marriage.
(2) Muhammadan Law—(i) Guardianship.
(ii) Marriage.

RIGHT TO GRAZE CATTLE
See (1) Custom (General)—Pasturage.
(2) Landlord and tenant.

RIGHT TO MAINTENANCE
See (1) Criminal P. C., S. 488.
(2) Hindu Law.
(3) Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.
(4) Husband and Wife.
(5) Muhammadan Law.

RIGHT TO PARTITION
See (1) Hindu Law—Partition.
(2) Hindu Women's Rights to Property Act.
(3) Partition Act, S. 4.

RIGHT TO POSSESSION
See Possession.

RIGHT TO RE-OPEN SETTLED ACCOUNT
See Accounts.

RIGHT TO REPLY
See (1) Civil P. C., O. 18, R. 2.
(2) Criminal P. C., S. 292.

RIOT
See Penal Code, Ss. 146 to 148.

RIPARIAN OWNERS
See (1) Alluvion and diluvion.
(2) Bengal Alluvion and Diluvion Act, 1847 and Regulation 1825.
(3) Custom (General)—Dhardhura.
(4) Custom (General)—Riparian rights.
(5) Custom (Punjab)—Alluvian and diluvion.
(6) Easements Act, Ss. 7 and 17.
(7) Grant.
(8) Landlord and tenant.
(9) Riparian rights.

RIPARIAN RIGHTS
See also (1) Alluvion and diluvion.
(2) Bengal Alluvion and Diluvion Act, 1847 and Regulation, 1825.
(3) Custom (General)—Dhardhura.
(4) Custom (General)—Riparian Rights.
(5) Custom (Punjab)—Alluvion and diluvion.
(6) Easements Act, Ss. 7 and 17.
(7) Fishery.
(8) Grant.
(9) Landlord and Tenant.

1. Artificial channel.
2. Cess.
3. Change in course.
4. Diverting and storing water.
5. Easement
6. Effect of grant.
7. Extent of right.
   See also N. 1
8. Ferry.
   See also Ferry.
9. Fishery.
   See also (1) Fishery.
   (2) Grant.
   (3) Oudh Rent Act 1886, S. 127.

10. Government's rights.
See also N. 9 and 14.
11. Obstruction.
See also N. 4.
12. Presumption.
13. Riparian owner.
14. Tidal and navigable rivers.
15. Upper proprietor's rights.

1. Artificial channel.

——New work in interests of irrigation facilities—Person suffering damage—Remedy.

It is the duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally to take such reasonable precautions as are obviously necessary to prevent damage to others. Although the person who suffers on account of the new work has no right to require the authorities to maintain the course of the channel for ever in one particular bed, yet he has the right to insist that any alterations which the controlling authority may find necessary, shall not work to his detriment. AIR (Vol 26) 1939 Mad 653: 49 L W 662: 1939 M W N 588 : (1939) 2 M L J 114 : 185 Ind Cas 42.

——In the case of an artificial water-course, any right of the owner to the flow of the water must rest on the prescription or grant from or contract with the owner of the land from which the water is artificially brought. AIR (Vol 25) 1938 Mad 619 : 47 L W 263 : (1938) 1 M L J 519 : 1938 M W N 673 : 182 Ind Cas 976 (DB).

——Agreement with land-holder—Obligation annexed to property.

Unlike the right to take water from a natural water course which is a natural right the right in relation to an artificial channel must be acquired. This extent of that right will be fixed in accordance with the arrangement or understanding under which the channel was constructed and an arrangement entered into by an owner will be binding on his transferee under S. 40 of the T. P. Act, as an obligation annexed to the ownership of property. AIR (Vol 22) 1935 Mad 975 : 1935 M W N 990 : 42 L W 642 : 158 Ind Cas 887 (DB).

——Right to flow of water from artificial channel.

A riparian owner cannot claim the right to use the water in an artificial channel just in the same way as he can claim to use it with respect to a natural stream. In the case of an artificial channel, any right of the owner to flow of the water must rest on prescription or grant from, or contract with the owner of the land from which water is artificially brought. AIR (Vol 22) 1935 Mad 700 : 41 L W 756 : 1935 M W N 665 : 157 Ind Cas 734.

——Right of persons to whom water is supplied.

In the case of artificial channels there are no riparian rights as such and whatever rights may be claimed by persons through whose lands the channel passes must rest on some arrangement either proved or presumed. AIR (Vol 21) 1934 Mad 683 : 40 L W 629 : 67 M L J 558 : 1934 M W N 1063 : 153 Ind Cas 14.

——Right of adjacent owners—Right to put up dams for irrigation purposes.

In the case of an artificial water-course any right to the flow of the water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs. This being so, it is plain that the circumstances might be such as properly to lead to the inference that the water-course was originally constructed on the terms that each of the riparian proprietors should have the same rights as the riparian preprietors upon a natural stream would have and no more. A riparian owner has a right to what may be called the ordinary use of the water flowing past his land, for instance to the reasonable use of the water for his domestic purposes and for his cattle and this without regard to the effect which such use may have, in case of deficiency upon proprietors lower down the stream, and further he has right to the use of it for any purposes, or what may be deemed the extraordinary use of it provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream or divert water for the purpose of irrigation. AIR (Vol 18) 1931 Pat 332 : 12 PLT 473 : 133 Ind Cas 46 (DB).

——Person in whose land such channel passes has a natural right to use the water.

In the absence of an agreement to the contrary, a person through whose land an artificial watercourse passes has a natural right to the use of the water in the channel, and the mere fact that the owner of the land through which the channel passes has not used the water for a long time is not necessarily fatal to his right to use the water : 101 Ind Cas 330 : 51 Bom 243 : 29 Bom L R 291 : AIR (Vol 14) 1927 Bom 251 (DB).

——Irrigation canal—Damage caused by overflow can be recovered.

Government by constructing an irrigation canal undertakes a duty to protect other parties against damage arising from the water of the canal. If it does not take adequate precautions for an outlet at the tail-end of the canal, to allow the overflow of water to pass away, it is liable to compensate those to whom damage would be caused by the overflow. 86 Ind Cas 928 : 6 P L T 708 : AIR (Vol 12) 1925 Pat 622 (DB).

——Water of natural stream flowing in artificial channel—Proprietors of lands on channel are entitled to unobstructed and undiminished flow of water.

The proper inference from the user of the water of a natural stream though flowing in an artificial channel is that the artificial channel had been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one. Such proprietors have a right to have the water come to them without obstruction in its ordinary and accustomed course, undiminished in flow, quantity and quality.

The identity of the water is not destroyed because on its way it spreads itself over certain fields, but must be held to be preserved on proof that on emerging from the fields it runs in a definite course up to the plaintiffs' pokur. 59 Ind Cas 929 : 6 P L J 6 : 2 P L T 122 : AIR (Vol 8) 1921 Pat 51 (DB).

——Water course—Right to enjoyment—Incidents of.

The incidents of a natural stream apply also to an artificial water-course supplied with water from a natural stream and the riparian proprietors of the water course have the same rights as if it were a natural stream. 3 Pat L W 5 : 3 Pat L J 51 : 43 Ind Cas 235 : AIR (Vol 4) 1917 Pat 65 (DB).

2. Cess.

——Inam village — Raising wet crops by creating cross bunds — Right of Government to levy water-cess.

Where the Government are in charge of the whole of the irrigation system and are under the duty of keeping it in good repair, the fact of their keeping it in an efficient condition does not entitle them to collect water cess if they are not otherwise entitled to it.

The principle of the Urlam case, [40 Mad 886] is applicable to inam villages if there are appropriate

facts but the said principle cannot be applied to a case where the physical conditions of the land and channel are such that the grant of an easement could not be implied, for instance, where there were no madais or sluices in the channel at the time of the inam settlement but wet crops were being raised by putting up temporary cross bunds. AIR (Vol 23) 1936 Mad 58: 69 MLJ 552 : 1935 MWN 1210 : 159 Ind Cas 354 (DB).

——Claim by Government to charge water cess against Inamdar for water taken from tank to lands not specified in Inam Register — Tank lying partly in inam village and partly within Government area—Inamdar having right to irrigate land specified in inam register through sluice and channel — Government is entitled to claim from Inamdar water cess for cultivating lands not specified in Register. 1936 MWN 1358.

——A suit for neeravaram by a person maintaining an artificial system of irrigation channels against persons to whom water is supplied from the channel on the basis of an agreement to pay such neeravaram is not a suit of small cause nature. AIR (Vol 21) 1934 Mad 683 : 40 L W 629 : 67 MLJ 558 : 1934 MWN 1063 : 153 Ind Cas 14.

——The riparian owner of land abutting a river belonging to Government has a natural right to use its water for irrigation in a reasonable quantity and no cess can be levied on such water. AIR (Vol 16) 1929 Mad 227 : 57 MLJ 648 : 1929 MWN 118 : 29 MLW 744 : 116 Ind Cas 573 (DB).

——Land on one side belonging to Government and that other said to the riparian owner — River non-navigable — He need not pay cess so long as he does not exceed his rights. AIR (Vol 14) 1927 Mad 988 : 53 MLJ 868 : 50 Mad 961 : 26 MLW 513 : 1927 M WN 854 : 105 Ind Cas 864 (DB).

——River belonging to Government—Cess if leviable from Zemindar after forfeiture.

Where a portion of bed and banks belong to the Zemindar, that portion does not belong to Government so as to entitle it to levy water cess. Where Zemindar was under an obligation to supply water free of charge, the Government is not precluded on succeeding to the Zemindari on forfeiture, from levying water cess. AIR (Vol 3) 1916 Mad 948 : 30 M LJ 163 : 19 MLT 6 : (1915) MWN 1025 : 3 L W 119 : 32 Ind Cas 279 (DB).

——Inamdar and Government—Inam Commissioner, functions of — Payment under threat of distress, not voluntary payment — Right of suit—Fasli jasti and Tirva jasti, meaning of.

An inam was granted in 1826 to the plaintiff, and it was enfranchised in 1871, quit rent being fixed at one-fourth of the average annual income, and second crop charge collected by the Inamdar on an average of 141 acres of nanjai lands and 36 acres of punjai lands was taken into accounts in arriving at the income :

Held:—That even assuming that water-cess is a tax and not the price of a commodity, the engagement between the Inam-Commissioner and Inamdar amounted to an undertaking by Government not to take more than ¼ of the income derived from various sources including the charge collected from the ryots for fasli jasti or tirva jasti and that to the extent of 141 acres of nanjai and 36 acres of punja, the Inamdar was entitled to use the tank water for irrigation for second crop on nanjai and for watering one crop on the punja free of any charge on bare payment of quit rent. (1909) 19 MLJ 470: 32 Mad 456 (460, 461): 6 MLT 242 : 3 Ind Cas 456 (DB).

3. Change in course.

——Bed of river belonging to Crown — Vertical formation therein — Ownership of.

If the bed of the river belongs to the Crown, then a vertical formation therein in the form of an island separated from the banks of the river by natural channel of the river would vest in the Crown.

The doctrine of re-formation in situ rests on the principle that the title of the original owner to the land washed away or submerged is not absolutely extinguished unless he has abandoned it but continues to remain in such owner, provided such land can be identified by boundaries, landmarks or otherwise, subject, of course, to such easements of navigation or other rights to which the flow of water thereon may give rise. When the water has receded and the land re-appears again, the original owner is held entitled to take the property if it can be clearly identified. This being the reason of the rule, it is difficult to see why it should be regarded as necessary that the bed land encroached upon by the river should be shown to have ceased to be part of the river bed before it could be claimed by the original owner as his property. There is no question of recovering in such cases what did not originally belong to the owner. AIR (Vol 32) 1945 Mad 396 : (1945) 2 MLJ 27: ILR (1944) Mad 420 : 221 Ind Cas 324 (DB).

——Accretion by alluvion — Principles relating to—Re-appearance of submerged lands — Claims to — Parties to confine to easement in pleading.

Where there is an acquisition of land from the sea or a river by gradual slow, and imperceptible means, there from the supposed necessity of the case, and the difficulty of having to determine, year by year to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land. In dealing with the great rivers in India, it is necessary to bear in mind the comparative rapidity with which formations and additions take place and that the words "slow and imperceptible" (used in the earlier decisions) are only qualifications of the word "gradual" and must be understood and applied with reference to the conditions of the country where the question arises.

Where the lands which have submerged under the water of a river once have re-appeared or where there are new formation of land in order to lay claims thereto, it is essential that parties should be strictly confined to the case which they make in their pleadings, for claims based on accretion, on re-formation in situ, or on riparian proprietorship up to the middle of the stream involve different considerations and require different media of proof. Where the party based their claim to the land as a re-formation of the site originally owned by them, it is not competent for them at a subsequent stage of the suit to raise a different case, namely, that the new formation is an alluvial accretion to their riparian land. AIR (Vol 32) 1945 Mad 396 : (1945) 2 MLJ 27 : I L R (1945) Mad 420 : 221 Ind Cas 324 (DB).

——Accretion — River receding from its course adjoining asli land — Principles governing division of accreted land.

The fundamental principle governing the apportionment of accreted lands among the riparian proprietors whose lands abut on the sea is that the division must be made fairly among them giving each of them a share in the new frontage in proportion to the extent of their old frontage.

The method that is to be adopted must lead to a fair and proportionate division of new river frontage, for unless that is done, there would be great prejudice to many of the riparian owners if more lands are gained later on by accretion of the river receding further and further from its original bed. Perpendicular lines dropped from the common boundary point of the asli land on the old river bank to the new river bank would secure this equitable distribution of the new river frontage amongst the riparian proprietors. AIR (Vol 24) 1937 Cal 18 : 167 Ind Cas 130.

——Land cut out and added to another's lands — Ownership is not lost, if land can be identified.

Where the identity of the defendant's lands is not lost by the change in the course of the river. in spite of the fact that those lands lie on the north side of the river instead of on the south where they had formed part of the defendants' villages, the title to the lands in suit would not vest in the plaintiff although the river had suddenly changed its course and the lands were cut off from the defendants' villages and were joined by the fluvial action to those of the plaintiff's. AIR (Vol 10) 1923 Oudh 102 : 9 OLJ 518 : 73 Ind Cas 727 (DB).

——River changing course — Old course — Fishing rights.

When a river has changed its course its old dry course must be deemed to be private property and the owner of the soil is entitled to all Bheels or ponds, gulfs or Damooshes in which water remains, but which do not communicate with the river except in the time of floods. AIR (Vol 5) 1918 Cal 595 : 22 CWN 63 : 41 Ind Cas 425 (DB).

——Alluvion—Ownership.

When land emerges from a river, it is given to the person who owns the adjacent land. 133 PWR 1909 : 4 Ind Cas 1146.

4. Diverting and storing water.

——Rule in Rylands v. Fletcher, Applicability — Right of owner to enlarge store of water by flooding another's land on higher level.

The rule in Rylands v. Fletcher [(1863) L. R. 3 H. L. 330], about the absolute liability for damage, negligence, or no negligence, where water which is stored on land escapes, does not apply in the case of irrigation tanks in India which have been used from time immemorial as storing places for water for the convenience and benefit of surrounding areas of land. That, however, does not entitle a person to enlarge his store of water by flooding land on a higher level belonging to somebody else or if he is permitted, for one reason or another, to do this during certain periods of the year; it does not entitle him to travel further and enlarge either the period or the area of inundation beyond that which was originally permitted. A I R (Vol 33) 1946 Nag 75 : I L R (1945) Nag 750 : 1945 N L J 452.

——Person leading water of river into another water course—Channels, if artificial.

If a person leads the water of a river into another channel, it is manifest that the most he could do is to adopt and adapt a pre-existing natural channel. The use of such a water course as a channel for the water of the river would not, however, make the channel an artificial one, or deprived the persons of their natural rights as riparian owners. Even where the water of a natural channel is diverted into an aritficial channel, riparian rights as in the case of a natural stream will remain. A I R (Vol 28) 1941 Pat 118 : 7 B R 153 : 21 P L T 873 : 191 Ind Cas 275 (DB).

——Natural stream diverted by man, whether retains its character.

A stream, which, in its inception, is a natural stream retains its character as such, even when it is diverted by the operation of man into an artificial channel; and if the water of a stream disperses itself over the fields but after emerging from the fields, again runs in a definite course, its identity is not destroyed. A I R (Vol 28) 1941 Pat 118 : 7 B R 153 : 21 P L T 873 : 191 Ind Cas 275 (DB).

——Upper proprietor's rights—Whether easement or riparian rights.

Where the riparian owner is not seeking to use the water of the river for a riparian tenement but to fill a tank situate at a long distance, the right to divert water to such a tank by putting up a permanent dam across the river is one in the nature of an easement and is not a riparian right. The lower riparian owner is, therefore, entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. AIR (Vol 25) 1938 Mad 180 : 46 L W 862 : 1936 M W N 948 (2) : 174 Ind Cas 229 (DB).

——Ryotwari land — Natural stream augmenting supply of tank — Cultivation of registered wet lands without this impossible — Government, if can interfere.

A ryot in respect of ryotwari land is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet field. The Government have got the right to regulate the method and supply. They can, therefore, indicate to him the source or method of supply and he is bound to accept those indicated. But there is no doubt that as incident to the tenure, there is a right in the ryot to receive the said water, call it contractual or proprietary. There is a corresponding duty on the party of the Government, though in one sense negative, to see that the supply shall be at his disposal by the usual and customary method.

The water of a natural stream or channel falling into a thangal and exclusively used by the plaintiff holding ryotwari lands was diverted into a tank. It was a customary method for over 30 years to take water of the stream to augment the supply of the tank. Without this, it would have been impossible to cultivate the land registered as wet under the ayacut of the tank :

Held, the Government must be taken have impliedly recognized this as the customary method of supplying for the time being for the irrigation of the wet fields. AIR (Vol 24) 1927 Mad 957 : 1937 M W N 817 : 46 L W 472 : 176 Ind Cas 867.

——Right to be so exercised as not to cause damage to neighbouring owner.

Every owner of land is entitled to use the land in any suitable way so long as such user does not cause damage to the lands of the adjoining owner and so long as such user does not interfere with a similar user of his own land by the adjoining owner. Everybody has a right on his own land to do anything with regard to the diversion of water or storage of water or with regards to the usage of water in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's in some other way than the way in which it has been affected before. AIR (Vol 13) 1926 Rang 83 : 95 Ind Cas 44 : 4 Bur L J 264 (DB).

——Damages — Action for infringement of right—Proof of damage necessary.

A riparian owner seeking to restrain another riparian owner from diverting the water of a stream beyond his riparian tenement, need not prove that he has suffered any damage nor is it a defence to such an action that the plaintiff's land is amply irrigated independently of the stream. A I R (Vol 3) 1916 L B 30 : 9 Bur L T 183 : 8 L B R 556 : 35 Ind Cas 356.

——Reservoir in another's land — Prescriptive right to take water by defined channel — Reservoir fed by surface water — Excavation by owner affecting supply of surface of water if actionable.

The defendants had by prescription acquired the right to take water for the irrigation of their lands by two defined channels issuing westward from an ahar or reservoir in plaintiff's mouzah and fed by water coming to it by defined channel and from the northwest and surface water from the North South and, East.

Held—That the plaintiffs had every right to cut in their own muozah a Pyne or channel which in no way interfered with the passage of water to the ahar

through the channel from the North-West although it might result in drawing off the supply of surface water to the ahar to such an extent as would diminish the quantity of water available to the defendants for irrigating their lands (1910) 12 C L J 579 : 14 CWN 825 : 6 Ind Cas 277 (278) (DB).

——Natural water course—Obstruction—Dam in the bed of a stream—Damage—Right to sue.

If a man erects in the bed of a stream a dam which has the effect of diverting the water from its natural water-course on to the land of the plaintiff and damage is thereby done, the plaintiff prima facie has a good right of action. (1907) 9 Bom L R 864 (865) (DB).

——Riparian rights — Rights to the unimpeded flow of water — Diverting the course of the river—Damages.

A riparian owner may put water that flows through his land to certain uses connected with his land and for that purpose he may be entitled to divert its course; but it must be done in such a manner as not to inflict any material injury on the lower riparian proprietor. (1906) 8 Bom L R 87 (88, 89) (DB).

——Cause of action.

A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption or without substantial diminution caused by the upper proprietor who may for legitimate purposes withdraw so much of the water as will not materially lessen the downward flow on his neighbour's land.

The owner of a tenement adjoining a natural stream has, however, no right to divert water to a place outside the tenement and there consume it even though he does not thereby diminish the flow of water to the lower riparian tenement. (1905) 28 M 236 (237, 238) (DB).

——Injunction — Rights to raise bund — Ordinary flood — Lands of neighbouring owners affected—Prescriptive right to throw back water.

Where the erection of a bund by the plaintiff will have the effect of the throwing upon the defendant's land more water than has customarily flowed on to it and of thus increasing the damage to which he has been hitherto subject, the plaintiff will not be entitled to an injunction to restrain the defendant from interfering with the erection of the bund. Every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose, and if he acts bona fide, he is not liable for any damage occasioned to his neighbours who must protect themselves.

But except in the case of extraordinary floods, such large powers for protection are not given to riparian owners who have a right to protect their lands with reference to ordinary floods only if they do so without injury to others. A propietor of land on the bank of a river ought to be restrained from erecting a bund, which, if completed, with in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them.

Per Russel, J.:—A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream and cannot apply to surface water not flowing in such a stream.

Semble : — Per Subrahmanya Aiyar, O. C. J. — A court will not grant an injunction in plaintiff's favour where there has been nothing more than mere assertions on the one hand and denials on the other as to the right of the plaintiff to raise a bund. (1904) 14 M L J 162 (170): 27 M 409 (DB).

5. Easement.

——Right to drain flood water to another's land.

A person has no absolute right to have his land kept free from flood water by draining it to another direction thus flooding another's lands His right, if any, is to drain the water off through certain defined channels and in order to succeed, he must show that he has a prescriptive right to drain flood water off in the manner suggested. A I R (Vol 24) 1937 Pat 302 : 3 B R 526 : 169 Ind Cas 66.

——Transfer of property.

Right to water from landlord's tank — Landlord transferring land — Transfer of easement rights — Land producing one crop transferred — Transferee can claim easement to take water for only one crop and no more. A I R (Vol 22) 1935 Mad 995 : 1935 M W N 1065 : 160 Ind Cas 471.

——Right to irrigate by dams — Extraordinary use of water.

A right to irrigate by putting up dams is a right relating to an extraordinary use of water, and persons entitled to it must not interfere with the rights of the lower proprietors. An easement to irrigate by putting up dams is a right for an extraordinary use of water and cannot be acquired apart from S. 26 of the Limitation Act. A case of custom should be proved by evidence that the custom was ancient, continuous, peaceable, reasonable certain, compulsory, and consistent with the customs regarding the right to irrigate from the river in question. It can be allowed only in pursuance of some arrangement arrived at between the parties interested or as entailed by the successful acquisition of a prescriptive right. (1908) 35 C 851 (857) (D B).

——Rights of proprietors on the banks — Extent of irrigation purposes—Easements Act, S. 7 ill. (j).

As between two riparian owners, each has right to the usufruct of the stream which passes through his land : this means not an absolute and exclusive right to the flow of water in its natural state, but to the flow of water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. Ill. (j) to S. 7 of the Easement Act shows that a riparian owner has the right to use and consume the water for irrigating the land abutting on natural stream, provided that he does not thereby cause material injury to other like owners. (1905) 29 B 357 (359) : 7 Bom L R 265 (D B).

6. Effect of grant.

——Channel passing through inam village — Right reserved in favour of Government — Land along channel dry — Right of inamdar — Inference.

Where a channel of thirty five miles length, during its course through Government villages, flows for a distance of a mile through an inam village, no reservation of the bed of the channel in favour of the Government can be implied. The presumption is that the channel was also granted along with the whole inam village. It is for the Government to allege and prove the same. Even if the lands granted are dry lands, it does not mean that the bed of the channel, in so far as it flows through the village, is not included in the grant. A I R (Vol 32) 1945 Mad 524 : 58 L W 497 : 1945 M W N 603 : (1945) 2 M L J 250.

——Grant of village—Extent of the right of taking water depends on terms of each grant. A I R (Vol 30) 1943 P C 136 : 10 B R 94 : 56 L W 669 : (1943) 2 M L J 382 : 1943 M W N 760 : 70 I A 112 : I L R (1943) Kar (P C) 167 Sup : I L R (1944) Mad 227 : 209 Ind Cas 1.

——Channel supplying water to inam lands and ayan villages—Right of inamdar over bed of channel —Suit by Government to restrain inamdar by injunction.

Even granting that where a main channel is the source of irrigation not merely for an inam village but for other villages also, there is a presumption that the channel was not intended to be comprised in the gift to the inamdar and that the inamdar is not the owner of the bed of the channel, the inamdar must be held to have an interest in the bed of the ceannel, to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. A I R (Vol 24) 1937 Mad 523 : 1937 M W N 145 : (1937) 2 M L J 178 : 46 L W 748 : 169 Ind Cas 597.

——Irrigation rights.

No distinction can be made between the effect of a grant on the measure of irrigation rights granted, whether enjoyment at the time of the grant was by an easement or as a riparian owner with natural or prescriptive rights. A I R (Vol 14) 1927 Mad 988 : 50 Mad 961 : 26 M L W 513 : 1927 M W N 854 : 53 M L J 868 : 105 Ind Cas 864 (D B).

7. Extent of right.
See also, N. 1.

——Village tank owned by proprietor — "Dry and wet" lands — Rights of proprietor and owner of dry lands to take water from tank explained.

The owners of dry lands are not ordinarily at any rate entitled to claim the water from the village tank or from the supply channel or from any other source in the village for their dry lands. These sources of supply are intended primarily, to supply the needs of the wet ayacutdars and wet ayucut under each tank or channel is fixed with reference to the capacity of the tank or the channel to supply enough water for a particular area. Hence, even the proprietor who owns these sources as the owner of the entire village, is not entitled to divert the water from these sources of supply to the detriment of the wet ayacutdars or to allow any other person the use of that water for his dry lands. Of course, if after supplying the needs of the wet ayacutdars with respect to the irrigable area there is surplus water, the proprietor may allow that excess water being used by the owner of a dry field. But beyond this, the proprietor himself has no right. The owners of dry fields cannot require a right by prescription against the proprietor himself or against the wet ayacutdars. A I R (Vol 30) 1943 Mad 268 : 1943-1 M L J 47 : 1943 M W N 141 : 56 L W 252 : 210 Ind Cas 15.

——Riparian rights, nature of.

Riparian rights do not depend upon a grant or upon the ownership of the soil of the stream but are jure naturae, incident to the ownership of the soil of the land abutting upon the stream, and the doctrine that these riparian rights still exist even when the stream is taken into an artificial channel is based upon the legal fiction that the artifical channel must have been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one.

It is quite a mistake to suppose, that a natural stream must have its origin in a mountain spring, or that it must flow continuously throughout the year, and it must at every single point of its course, flow through a clearly defined channel. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at items it is accustomed to become dry. Persons claiming irrigation from it have only the ordinary natural rights of riparian proprietors and cannot unduly diminish the water supply of riparian owners further down.

Riparian right is a natural right, not an easement, and is not lost by non-user to prove that it would be necessary to find that there has not merely been non-user for the statutory period, but that that non-user was due to the defendants having successfully prevented the use of the water. A I R (Vol 28) 1941 Pat 118 : 7 B R 153 : 21 PLT 873 : 191 Ind Cas 275 (DB).

——The proprietors of two pattis in a mauza filed a suit against proprietors of the third patti for a declaration that the defendants had no right to irrigate their fields from a certain kuhl and for issue of a perpetual injunction restraining them from obstructing the kuhl in any way and taking water thereform for irrigating their fields. Originally the defendants had the right to irrigate their lands from this kuhl, but this right was in abeyance for a number of years, partly owing to natural causes by which the bed of the kuhl had subsided and it was not possible to irrigate the defendants' fields, and partly because they had not contributed towards the expenses in 1869. Subsequently, the level of the water in the channel was raised and it was possible for the defendants to irrigate their fields :

Held, that the defendants were entitled to exercise their rights. The fact that the defendants did not contribute to the expenses was not an adequate ground for issuing the injunction asked for against them. A I R (Vol 27) 1940 Lah 398 : 42 P L R 467 : 191 Ind Cas 734 (D B).

——Right of riparian owner on waterway which is not public navigable waterway to navigate that portion of water which passes the property of another person.

A riparian owner on a waterway which is not a public navigable waterway, has no right to "navigate" that portion of the water which passes the property of other persons. He has a right to make use of the water as it passes his property, and other persons must not interfere with that right of enjoyment. There is only a right of way along a waterway, provided no easement has been created, unless the waterway is a public navigable waterway. If it is not a public navigable waterway, presumably riparian owners own the bed of the waterway as far as the middle thereof, but they have no rights over that part of the waterway which does not flow through their own land. A I R (Vol 27) 1940 Rang 292 : 1940 Rang L R 598 : 192 Ind Cas 401.

——Lower owner raising dam slightly — Dimunition in efficiency of mill of upper owner capable of being remedied by raising mill or dam :

Held, that the action of the defendant did not prevent the plaintiff from using his natural right and a suit for damages could not lie. AIR (Vol 22) 1935 All 836 : 158 Ind Cas 519, Reversed. AIR (Vol 23) 1936 All 520: 1936 A L J 534: 58 A 981: 1936 A W R 507 : 163 Ind Cas 877 (DB).

——Ryotwari land—Ryot's right as against Government — Customary right and prescriptive right — Exclusive right to water — Paramount right of Government to regulate water supply—Land registered as single crops — User of water for raising second crops—Acquisition of — Right to water for second crop.

Though there are some common factors between the claim of customary right to water and the claim of prescriptive right, there is also a fundamental differ-

ence. A customary right may give the plaintiffs all they really want but it may not give them an exclusive right to all the waters of the channel to the extent of preventing Government from using the water of the channel for other purposes even without prejudice to the plaintiffs' accustomed user. Prescriptive right may, in certain circumstances support a claim of exclusive right though even the extent of a prescriptive right must generally be measured with reference to the user made by the claimant and not with reference to the flow in the channel.

A right by prescription to the water of a channel can be acquired as against the proprietary right of another but not as against the sovereign right which, under the Indian law, the State possesses to regulate the supply of water in public streams so as to utilize it to the best advantage.

The rights and obligations as between the State and the ryot in India in the matter of irrigation rest largely on unrecorded custom and practice. Generally the ryotwari holder is only entitled to claim that the supply of water required for the cultivation of his registered wet lands should not be materially diminished by any act of the Government. Subject to this condition, the Government has absolute right to change the source of irrigation or the method of irrigatigon by which ryot has been supplied and to regulate the use of the waters of all public or natural streams in the best interest of the people.

The power of the State to interfere with the customary supply of water to ryotwari-holders ought not to be determined with reference to the registry but only with reference to the nature of the accustomed user.

The right of the ryots to receive water in respect of the wet lands registered as single crop is not limited to the water required for the first crop alone. If they have been raising second crop on such lands and have been taking water for such second crop they would be entitled to get water for such second crop also and the Government cannot deprive them of this right. A I R (Vol 23) 1936 Mad 923 : 1936 M W N 684 : 71 MLJ 268 : 44 L W 388: 166 Ind Cas 200 (DB).

——Right of irrigation.

When only a part of a stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished. To what depth of the lands on the bank of a stream the right of irrigation extends must depend upon the capacity of the stream and the extent of the land of other riparian owners standing in need of irrigation. 1936 M W N 1400.

——Owners of opposite banks.

In the case of riparian owners, the owners of the opposite banks of a river each own the soil of the up to the middle of the stream; usque an medium filum aquae. Thus ownership is recognised, not only in the water, but also in the land under the water. AIR (Vol 22) 1935 Nag 61 (2) : 31 N L J 165 : 156 Ind Cas 180.

——Water flowing into artificial channel from natural stream — Rights of adjoining proprietors.

Where water is made to flow from a natural stream into an artificial channel, such channel is not a natural stream but an artificial stream and the rights of adjoining proprietors therein are not prima facie the same as those of proprietors on the banks of natural streams. Ordinarily rights can be acquired in such channels only by grant or prescription. In order to acquire all the rights of riparian owners, it must be shown that the channels were originally constructed under such circumstances and so used as to give all the rights owned by riparian owners in respect of a natural stream. AIR (Vol 20) 1933 Mad 10 : 36 L W 688 : 140 Ind Cas 311.

——Limits of property.

If land on the bank of a river which is gradually silting up is surveyed at any particular time, though this will of course show the then limits of the riparian owner's property, it does not mean that it is the demarcated and fixed limit of the river. AIR (Vol 17) 1930 Mad 181 : 53 Mad 202 : 123 Ind Cas 31 (DB).

——Running stream—Rights of riparian proprietor —Nature and extent of.

By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle and this without regard to the effect which such use may have, in case of a deficiency upon proprietors lower down the stream. But, further he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. (1928) 110 Ind Cas 120 : 30 Bom L R 443 (DB).

——There is no custom prevailing in the locality of District Shahabad in Bihar, that the deep stream of the Ganges is the boundary of the riparian estates and consequently all accretions to an estate by that local custom become a part and parcel of the estate to which accretions have formed. AIR (Vol 14) 1927 P C 89 : 6 Pat 481 : 54 I A 156: 1927 M W N 393: 31 C W N 717 : 45 C L J 520 : 8 P L T 497 : 25 A L J 905 : 26 M L W 754 : 53 M L J 576 : 101 Ind Cas 1.

——Riparian owner has right to usufructuary use of a river's water—Government have no right to divert water above the owner's land more than is put into the river by artificial means. A I R (Vol 13) 1926 Bom 358 : 28 Bom L R 614 : 95 Ind Cas 817 (DB).

——Surface water — Natural right.

No claim can be made either as a natural right or as an easement by prescription except to water flowing in a defined channel, and no such claim can be made to the surface water. Whether a particular water is surface water or not, is a question of fact to be determined by circumstances. Well defined existence arising from an ascertained source is the test against any water being the surface water. The right to water in a stream is sustainable even though the water in the stream is not sufficient for the purpose claimed or it flows to the plaintiff's land only indirectly. AIR (Vol 1) 1914 Mad 507: 37 Mad 304 : 12 M L T 637 : 24 M L J 17 : 17 Ind Cas 648 (DB).

——Rights of — Water for irrigation.

A riparian proprietor can take as much water as he requires for ordinary purposes, but for purposes of irrigation he can take only a reasonable quantity. AIR (Vol 1) 1914 U B 19 : 7 Bur L T 282: 26 Ind Cas 974.

——Customary right — Irrigation — Melwaramdar and Kudiwaramdar — Irrigation rights.

Kudiwaramdar's right to the customary supply of water is a proprietary right appurtenant to their ownership of the lands; and the Melwaramdar cannot by virtue of any contract with third parties allow irrigation of new lands with water supplied from the tank to the prejudice of Kudiwaramdar. (1909) 32 Mad 423 : 5 M L T 140 : 4 Ind Cas 722 (DB).

——Riparian rights — Ordinary and extraordinary uses — Irrigation, extraordinary use — Injunction mandatory.

Riparian owners have equal rights to a usufruct of the waters of an adjacent natural stream and no proprietor has the right to use the water to the prejudice of other proprietors, about or below, unless he has a prior right to diversion. Every riparian proprietor has a right to the ordinary use of water, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But in the case of extraordinary use, he must not interfere with the right of other proprietors.

Irrigation even in India is an extraordinary use. One proprietor cannot under any circumstances divert and consume the entire flow of a stream for irrigation purposes to the exclusion of lower proprietors. The American and Indian authorities on the point reviewed. When a water course has been illegally obstructed and completely effaced the party injured is entitled to a mandatory injunction to compel the restoration of the water course to its natural form, and also to a permanent injunction to restrain the defendant from repeating the wrongful act. (1906) 4 C L J 370 : 11 C W N 85 (99, 100) (DB).

8. Ferry

See also Ferry.

——Navigability, tests of.

The generally accepted test as to whether a river is navigable or not is whether it allows of the passage of boats at all times of the year. AIR (Vol 28) 1941 Bom 11 : ILR (1941) Bom 97 : 42 Bom L R 1034 : 192 Ind Cas 635 (DB).

——Private and public ferries—Private ferry, whether immovable property—Right to collect tolls, whether immovable property — Suit to recover possession of public ferry—Maintainability.

As regards, ferries, a distinction must be drawn between a public ferry and a private ferry. A private ferry may be appurtenant to immovable property and may be immovable property, and in fact, it would be difficult to conceive a private ferry which was not immovable property. On the other hand, the lessee of a public ferry under S. 8, Northern Indian Ferries Act, is merely the lessee of the tolls of a public ferry. The public ferry remains in the possession of the public authorities and all that is let is a right to collect the tolls of that public ferry; such a right to collect tolls is in no way immovable property and such lessee cannot recover possession under S. 9, Specific Relief Act. AIR (Vol 23) 1936 All 858 : ILR (1937) All 193: 1936 ALJ 1122 : 166 Ind Cas 228 (DB).

——The franchise of a ferry is not indissolubly connected with land, and a franchise can be given to a person independently of it. But when a right to ferry is acquired as an easement, then, it would be a right appurtenant to land. AIR (Vol 22) 1935 All 481: 1935 ALJ 444 : 57 A 757 : 1935 A W R 396 : 157 Ind Cas 333 (DB).

——Private ferry—Monopoly.

A person owning a private ferry in India cannot claim an exclusive right of ferry by way of monopoly. A person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the river for the purpose of embarking and disembarking passengers. There is, however, no law in India which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river. In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant. A I R (Vol 22) 1935 All 481 : 1935 A L J 444 : (1935) R D 133 : 57 A 757 : 1935 AWR 396 : 157 Ind Cas 333 (DB).

——Right of ferry is a very valuable right to the riparian owners in India and the right is not lost because some one in the neighbourhood has been plying a ferry between the land of others with which they have no concern. A I R (Vol 22' 1935 All 481 : 1935 Al J 444 : (1935) AWR 396 : 57 A 757 : 157 Ind Cas 333 (DB).

——Plaintiffs and defendants working same ferry — New ferry opened by the defendants — Suit for injunction—Right to relief—Grant— Ferry falling into disuse — Power of Secretary of State to compel parties to restore it.

Plaintiff and defendants working same ferry — Defendant in 1926 opening new ferry— Suit by plaintiff for injunction — Finding that old ferry had become impossible to work when new ferry was established:

Held, that the plaintiffs had apparently not run their ferry since, 1926, and it could not, therefore, be said that the defendants had taken any part of the profit which the plaintiffs would otherwise have made; that as the new ferry was not established with boats in which the plaintiffs had any share, and that as the old ferry had become impossible to work when the new ferry was established, the defendants could not be treated as partners setting up a business in opposition to that of the partnership or as partners setting up a business with a portion of the partnership capital, and that no relief could be granted to the plaintiffs.

Obiter. — It is doubtful whether, when this ferry fell into disuse, it would have been open to the Secretary of State by suit to compel the parties to restore it and the plaintiffs are not entitled to require the removal of an opposition ferry which might have been established by any person who had proprietary right in the bed of the river and in the foreshore on each side. AIR (Vol 21) 1934 Pat 264: 149 Ind Cas 124 (DB).

——Right to ferry, nature of—Infringement—Change of terminus due to flood.

Special circumstances like the state or progession of the tides, the condition of the weather or season of the year may require that either terminus of a ferry should be variable from time to time, provided that the public continues to have access to it as of right. In the case of ferries in India, changes in the bed of the river itself necessitating alterations within reasonable limits of the terminus should also be placed in the same category. Where there is no evidence that the public used any other than the public highways leading to the ghats or that there was any deviation in that road other than that which was necessitated by the flooding of the road in the rainy season, the right of ferry is not infringed.

Franchise of ferry is, in a sense, a right of the public to be carried from one terminus of a public highway across the river to the terminus of another; in either words, the passage across the river is continuation of a public highway. Without the right of way to the river bank, the franchise cannot exist. To speak of a prescriptive right to land passengers on the property of another disproves the right of ferry unless the prescriptive right referred to is in the public to the path or road leading to the river on which the ferry plies. AIR (Vol 20) 1933 Pat 533 : 14 PLT 761: 148 Ind Cas 1101 (DB).

——Riparian owner's rights—Rival ferry—Respective rights—Non-user—Effect.

The general right of the owner of the land on either bank of a river establish a ferry for profit must give way if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant.

The franchise of a ferry is not necessarily an appurtenance to land, but when a right of ferry is claimed as appurtenant to certain villages, the grant of such right by the Crown would not be destroyed by mere non-user without waiver nor by the running of an opposition ferry. The franchise would continue so long as the grant continues and until the person who

sets up an opposition ferry could show a Crown grant or give evidence from which a Crown grant should be presumed, the cause of action would remain. A I R (Vol 18) 1931 All 587 : 1931 A L J 424 : 15 R D 441 : 53 All 764 : 135 Ind Cas 545 (DB).

9. Fishery.

See also (1) Fishery.
(2) Grant.
(3) Oudh Rent Act, 1886, S. 127.

——Adjuncts— Fishing rights in river follow river— Adjuncts vary with changes in river — To claim adjunct waters must be in continuous connection with river throughout year— Fishing in disconnected waters pass to owners of solum — New areas covered with waters connected with river — Owners of river fishery acquire right to fishing therein — Fishings in independent tributory of river is not adjunct of fishery in that river.

In general the fishery right in a river follow the river and subsidiary fishing rights in waters associated with a river fishery, or "adjuncts" as there have come to be called, may vary with the changes in the river itself. In order that the fishings in any waters may be claimed as an "adjunct" of a river fishery these waters must be in continuous connection with the river throughout the year, in the dry season as well as in wet season. Waters which cease to be continuously connected with the river cease to be "adjuncts" of it and the fishings in such disconnected waters cease to be part of the river fishery, and pass to the owners of solum. On the other hand, the owners of a river fishery acquire right to the fishings in new areas which come to be covered with waters connected with the river and the owners of the submerged solum must recognize the creation of such fishing rights within their estates. Connections between existing sheets of water and the river may also open or close with consequent effects upon the fishing rights. There may thus be loss and gain as between the owners of the solum and the owners of the river fishery as the physical circumstances alter.

Once it is ascertained that a river is an independent tributary of another river the fishings in the former river cannot in law be regarded as an "adjunct" or component part of the fishery in the latter river. AIR (Vol 33) 1946 PC 92 : 50 CWN 606.

——Whether sheet of water is part of river—Tests.

Per Nasim Ali J.— The question whether a sheet of water is still a part of the river or not is a question of fact. Each case must depend on its own peculiar circumstances. Connexion of the abandoned bed with the main stream throughout the year is necessary to keep alive the fishery right in the abandoned bed. The mere fact that the two are connected for some months during the rains is not enough.

Per Narsing Rao J. — (Test to see whether sheet of water is or is not part of river indicated.) AIR (Vol 28) 1941 Cal 223 : I L R (1940) 2 Cal 393 : 44 C W N 1079 : 197 Ind Cas 147 (DB).

——Crown's right to grant right to fish.

There is no principle on the basis of which the Crown can be prevented from dividing the rights in land and in making a grant of the right to fish as an incorporeal right, apart from the right to the subjacent soil in the waters covering the land to one, and either reserving to itself or granting to another the subjacent soil. AIR (Vol 27) 1940 Cal 506 : 44 CWN 1017: ILR (1940) 2 Cal 529 : 72 CLJ 302 : 191 Ind Cas 854 (DB).

——Fisheries, inclusion in zemindari.

Where the fisheries situated within the geographical limits of Pergunah Ekbarabad which had been granted by the Crown to others as incorporeal rights before the decennial settlement of that Pergunah, had not been included in the assets of zemindari of Pergunah Ekbarabad at the time of the permanent settlement, they cannot be taken to have been included in the zamindari as the assets thereof were not taken into account in settling Pergunah Ekbarabad. AIR (Vol 27) 1940 Cal 506 : 44 C W N 1017 : 72 C L J 303 : I L R (1940) 2 Cal 529 : 191 Ind Cas 854 (DB).

——To the extent of the right of the Crown to grant a several fishery to a private individual, there is no limitation in respect of time and the river need not be tidal. It is enough if it is navigable. AIR (Vol 27) 1940 Cal 506 : 44 C W N 1017 : 72 C L J 303 : I L R (1940) 2 Cal 529 : 191 Ind Cas 854 (DB).

——Boundary dispute—Test to ascertain boundary line.

The correct test in ascertaining the boundary line between jalkars is to follow the principle that it must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. AIR (Vol 24) 1937 P C 148: 31 SLR 350: 41 CWN 748: 3 BR 466: 18 PLT 423: 168 Ind Cas 6.

——Separate settlement—Beels.

Fisheries included in a lease can be assessed and offered for the settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up.

Government has power to settle the Beels separately or to assess them for their own profits. AIR (Vol 23) 1936 Cal 629: 64 CLJ 458: 168 Ind Cas 249 (DB).

——Right enjoyed from time immemorial — Legal origin.

Where it is found that the plaintiffs and their predecessors had been catching fish in the disputed khaos to the exclusion of all others from time immemorial, a legal origin for his right can be inferred from immemorial user. This legal origin may be either a grant or a regulation as evidenced by custom under which fishermen of the village have been exclusively catching fish in the disputed khaos. AIR (Vol 23) 1936 Cal 165: 62 Cal 800: 161 Ind Cas 986.

——Shifting bed.

A person who has been granted fishery rights in any river has a right to follow the shifting bed of the river. (1936) 63 Cal 351 (DB).

——Several fishery—Nature of—Grant from Government—Necessity of—Right of Government—Navigability of stream—Current from plaintiff's stream introduced into non-navigable done—Effect—Right of riparian proprietors—Whether affected.

A several fishery in India as elsewhere must be founded upon a grant from the Government; the river need not flow over the land of the Government. The right of the Government to the fishery does not depend upon its ownership of the soil but upon the navigability of the stream. There is no difference whether the change in the course is gradual or sudden. The grantee from the Government can follow the shifting channel of the navigable river and his right to fish therein is not affected by the said channel passing over the lands of a private person.

The plaintiff alleged that he had several fishery in all streams which fell within certain places. The current from the stream was introduced by an artificial excavation by the District Board into a done which was a blind stream and was not navigable:

Held, that the riparian proprietors from whom the defendants claimed to have derived the right to fish

in the 'done' in question, who undoubtedly held the 'done' when a "blind stream" as their territorial fishery, had still their rights unaffected when the 'done' was converted into a flowing channel by the act of the District Board, as the flowing channel is a non-navigable one.

Held, also that the plaintiff could have no right in the one as the current from the plaintiff's river was there introduced by an artificial excavation. AIR (Vol 22) 1935 Cal 399: 62 Cal 409: 39 CWN 380: 156 Ind Cas 515.

——Navigable and other rivers—Rights of Crown and private individuals.

In India the right of fishing in non-navigable rivers is not in the Crown, but is in riparian proprietors. When such a river passes entirely through the estate of one, he has the right of fishing and when it passes in between two estates, the proprietors thereof have the right to the soil according to the principle of usque ad medium filum aquae and the equal right of fishing in portions of the river adjacent to their lands. The Government has the right to the fisheries in large navigable rivers only and as the claim to a several fishery by a private person can only be founded upon a grant from the Crown, either proved or presumed, it would follow that where a several fishery is claimed by a private individual in the natural streams in a parganah or preganho, the right claimed can be over navigable rivers only or those portions of a river which are navigable, on the principle that a grantee cannot have a right in what the grantor had not. In any event, such a grant can confer on the person a right to fish only in natural watercourses and not in those made by the hand of man. AIR (Vol 22) 1935 Cal 399: 62 Cal 409: 39 CWN 380: 156 Ind Cas 515.

—— Whether underground rights.

Fisheries are not underground rights. AIR (Vol 22) 1935 Pat 149: 2 B R 585: 163 Ind Cas 169.

——Adverse possession—Limitation Act, S. 28, Art. 149—Effect of—Nature of possession—Knowledge of the competitor—Proof of adverse possession.

The effect of S. 28, Lim. Act, is that if the plaintiff, can establish that he and those from or through whom he derives right, have, for 60 years, been in possession adverse to the Crown of the property in question, any right of the Crown thereto is extinguished, and the plaintiff is entitled to succeed in his claim.

For adverse possession, the possession must be adequate in continuity, publicity and in extent to show that it is possession adverse to the competitor.

[Nature of proof of adverse possession against Crown indicated.]

The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. The Crown in the case of a fishery belonging to it, exercises its rights by granting leases or licenses to fish; it does not itself fish. Consequently, the granting by a person other than the Crown of leases or licenses to fish in the case of a fishery which prima facie belongs to the Crown is evidence of the usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of adverse possession. AIR (Vol 21) 1934 P C 23: 11 OWN 96: 66 MLJ 134: 39 L W 257: 1934 MWN 165: 36 Bom L R 249: 38 CWN 285: 1934 ALJ 153: 59 C L J 56: 61 Cal 262: 61 I A 78: 3 AWR 101: 147 Ind Cas 545.

—— Isolated and casual acts of fishery by public.

Where a fishery is claimed in a navigable river which is open to the public for the purposes of navigation, in estimating the character and extend of his possession, it must always be kept in view that possession of the foreshore in its natural state can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments, on his right.

Where there is some evidence of members of the general public having fished in the waters in question but such acts were in no proper sense acts of the Crown and were "isolated and casual," they are quite insufficient to deprive the plaintiff's possession of the requisite exclusive character.

Evidence of acts of possession in parts of a river adjoining the part actually in dispute is admissible provided there is "a common character of locality." AIR (Vol 21) 1934 P C 23: 11 OWN 96: 66 MLJ 134: 1934 M W N 165: 39 L W 257: 36 Bom L R 249: 38 CWN 285: 59 CLJ 56: 1934 ALJ 153: 61 Cal 262: 61 I A 78 : 3 AWR 101 : 147 Ind Cas 545.

——Exclusive right of fishery.

An exclusive right of fishery in public, tidal and navigable rivers may be granted by the Crown to private individuals. AIR (Vol 21) 1934 Cal 461: 61 Cal 45: 151 Ind Cas 813 (DB).

——Claim to profits a prendre—Custom.

A claim to profits a prendre over the soil of another such as a right to fish without stint and for commercial purposes, which might lead to the destruction of of the subject-matter is a claim of right unknown to law and a custom which may be alleged to support it is bad and unreasonable. And where the custom pleaded is indefinite and unreasonable, it cannot form the basis of a right. AIR (Vol 20) 1933 Cal 539: 37 CWN 18: 146 Ind Cas 427 (DB).

——Prescription.

The acquisition of a right of fishing through hired men is also not such a right as can be acquired by prescription. AIR (Vol 20) 1933 Cal 539: 37 CWN 18: 146 Ind Cas 427 (DB).

——Tidal and navigable river—Fishery suit to establish title to—Burden of proof—Possession. evidence of—Ex parte decree, value of.

Title to an exclusive fishery in a tidal, navigable river can be established by proving express or implied grant in a suit to establish the plainiffs' title to a fishery, the burden is upon and plaintiffs to show that the fishery has come to them under a valid and effectual grant from the Crown which has been sustained by the continuous use and enjoyment.

Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute a prima facie title.

Old leases have always been considered to be admissible as being evidence of acts of ownership. On the principle that when at a distant period as to which there is no more direct evidence available you find a person claiming to be the owner of property and willing to make himself as lessor for title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it,admitting his landlords' title to it, these circumstances are themselves admissible as evidence of title.

An ex parte decree for rent carries very little probative value especially when it is not shown that the decree was executed and rent realized. AIR (Vol 20) 1933 Cal 222: 56 CLJ 369: 143 Ind Cas 179 (DB).

——Where there is evidence to show that the owner of a village has been treating the jalkar as forming part of the village a settlement of the village would convey jalkar even though this right is not expressly conveyed. AIR (Vol 19) 1932 Cal 300: 59 Cal 344: 35 CWN 1256: 137 Ind Cas 279 (2).

——Permanent Settlement—Grant of bed of river to Zemindar is improbable—Grant of right of several fishery is possible—Such grant is prima facie evidence of ownership of soil.

If the stream was a public navigable river at the time of the Permanent Settlement, it is extremely improbable that its bed could have been settled with the zemindar, as part and parcel of his grant. On the other hand, although the bed may not have been so settled, it is conceivable that a several fishery of a public navigable river which passed through the ambit of his zemindari might have been granted to him. A grant of several fishery need not be established by a direct proof of the grant. The possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised. Evidence furnished by the thak map and the quinquennial papers will be of great value. Their weight must be determined along with such evidence as there may be on the record of exclusive user of a several fishery by the zemindar or his representatives. AIR (Vol 8) 1921 Cal 514: 33 CLJ 229: 60 Ind Cas 778 (DB).

——Fishery—Right of—In sheet of water adjacent to river.

The owner of a fishing right in a river has no title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood unless those sheets are part of land in:the bed of the river itself. A I R (Vol 5) 1918 Cal 595: 22 CWN 63: 41 Ind Cas 425 (DB).

——Fishery—Limitation Act, Art. 142.

Art. 142 of the Limitation Act applies to a suit for recovery of possession of a jalkar or declaration of of plaintiff's title thereto, where the question is whether the jalkar belongs to the plff. or defendant as persons claiming to receive rent in respect thereof and which of them is entitled to collect the rent, there having been no grant or completed easement, etc., in either party's favour. AIR (Vol 4) 1917 Cal 656: 34 Ind Cas 841 (DB).

——Fishery—Suit for rent—Bengal Tenancy Act, Sch. III, Art. 2, Cl. (b)—Limitation.

A suit for rent of a Jalkar right of fishery is governed by Sch. III, Art. 2, Cl. (b). AIR (Vol 3) 1916 Cal 80: 33 Ind Cas 110 (DB).

——Fishery — English law, how far applicable in India.

There are numerous differences in the physical, historical and social conditions of India which make the English law inapplicable to circumstances of this country. The grantee of an exclusive fishery in a tidal and navigable river is entitled to follow the river if it changes its course as by a sudden eruption. AIR (Vol 1) 1914 P C 48: 42 Cal 489: 41 I A 221: 18 CWN 1217: (1914) MWN 654: 1 LW 733: 16 MLT 319: 12 ALJ 1193: 20 CLJ 385: 16 Bom L R 901: 25 Ind Cas 467.

——Meaning of—Right to snare waterfowl.

The term jalkar does not rightly include a right to snare waterfowl. AIR (Vol 1) 1914 Cal 790 : 22 Ind Cas 844 (DB).

10. Government's right.

See also N 9 and 14.

——Raiyatwari land — Irrigation of registered wet land by raiyat by customary source — Altering source and causing diminution — Raiyat, if entitled to damages.

While the Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the raiyat who is entitled to get water for his registered wet fields gets his accustomed supply of water. Consequently a declaration made by the Court that the raiyat is entitled to irrigate his fields from a customary source until the Government makes an efficient alternative provision, is in accordance with law.

Where, in the above case, the Government alters the source of supply thereby causing diminution in the accustomed supply, the raiyat is entitled to damages. AIR (Vol 25) 1938 Mad 509 : 1938 M W N 194:48 L W 115: (1938) 2 MLJ 355: 178 Ind Cas 351.

——Paramount rights.

The paramount right of the Government to control water supply cannot supersede the rights of riparian proprietors. AIR (Vol 24) 1937 Mad 523 : 1937 MWN 145:(1937) 2 M L J 178:46 L W 748:169 Ind Cas 597.

——"Source of irrigation," meaning of — Government's right to alter source—Inquiry—Injunction.

When a tank or a river channel is mentioned in settlement registers as the irrigation source all that can be intended is that the tank or the channel are the direct sources from which water is to be derived for those lands and that the channel which is the direct source of supply is to be used in the usual manner in which the water in it is obtained and used.

It is open to the Government at any time to alter a source of irrigation so long as injury does not result to the party affected. But where this is the case, an injunction will issue against the Government. 1937 M W N 812 (DB).

——Altering source.

Evidence of authorisation in years gone by is not sufficient to rebut evidence of want of authorisation or prohibition at the time when water is actually taken as the Government have power to alter the source of supply and thus cancel an authorisation. AIR (Vol 23) 1936 Mad 692 : 1936 M W N 358 : 162 Ind Cas 97.

—— Government's rights.

Government has permanent title to regulate water in natural streams subject to limitations, that its act should not amount to trespass and no damage is caused to adjoining owners. AIR (Vol 13) 1926 Mad 1052 : 96 Ind Cas 915 (DB).

——Two tanks connected by channel—Outlet of one falling into disrepair — Plaintiff using water of one tank for over 60 years — Government proposing to repair the outlet can repair without diminishing plaintiff's water supply—The Court has no right to dictate to Government in what manner they can carry out repairs. AIR (Vol 13) 1926 Mad 832 : 92 Ind Cas 78.

——Law relating — Madras Presidency — Madras Irrigation Cess Act, 1865, S. 1.

The law of the Madras Presidency as to rivers and streams, differs in some respects from English law, and it is quite possible that the former law recognises some proprietary right of the Government in water flowing in them. AIR (Vol 4) 1917 P C 42 : 40 Mad 886 : 44 I A 166 : 33 M L J 144 : 22 M L T 76 : 15 A L J 697 : 21 C W N 1089 : (1917) M W N 536 : 19 Bom L R 751 : 6 L W 340 : 2 Pat L W 260 : 26 C L J 290 : 41 Ind Cas 98.

[On appeal from 34 Mad 295 : 8 Ind Cas 67.]

——Bed of a river — Water course—Right to—Proof of ownership.

In the case of a natural water course, the person claiming ownership in bed as against the government has to prove his ownership. The facts of ownership of lands on both sides of the channel evidenced by documents, to which Government is no party and of a slight diversion in the channel outside his lands are not sufficient to establish his ownership. AIR (Vol 1) 1914 Lah 61 : 100 P R 1913 : 7 P L R 1914 : 14 P W R 1914 : 21 Ind Cas 719 (DB).

——Water course — Ownership in bed of natural water course— Having lands on both sides of the channel — Whether sufficient proof.

In the case of a natural water course, the person claiming the bed of the stream against the Government has to prove that he is the owner. The fact that the plaintiff is shown to be the owner of lands on both sides of the stream in a document to which the Government is not, a party is not sufficient to establish his ownership. (1913) 25 M L J 161 : 21 Ind Cas 720 (DB).

——Water course — River-bed — Ownership of — Rights of Government — Burden of proving ownership by others.

In the Madras Presidency, the bed of river is vested in Government and the burden of proving private ownership lies upon him who asserts it. The digging of pits in the sand and taking water from the river to water trees belonging to a person is not an act of ownership entitling that person to claim the bed of the river. (1912) M W N 496 : 24 M L J 36 : 14 Ind Cas 261 (DB).

——Government and Ryotwary holder — Repair of irrigation works—Right of Suit for damages caused by Government's non-repair — Statute — Construction.

Government is not under an obligation with regard to each individual ryot to repair irrigation works whenever they require repair; and a ryotwari holder has no right of suit for damages against Government in respect of loss incurred by him owing to failure of water caused by non-repair. No liability arises in cases of non-feasance by the mere imposition of a duty by a statute in the absence of an imposition of the liability itself either expressly or by clear implication by the statute itself. (1910) 20 M L J 869 (875): 34 Mad 82 : 1910 M W N 207 : 6 Ind Cas 731 : 7 M L T 397 (DB).

——Government's right to regulation — Riparian rights—Upper and lower riparian proprietors' rights of diversion and appropriation — Damage — Proof—Onus.

Government has power by the customary law of India to regulate, in the public interests, the collection, retention and distribution of waters of rivers and streams flowing in natural channels and of waters introduced into such rivers, by means of works constructed at the public expense and in the public interests for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilized. This right of the Government is independent of the ownership of the bed of the stream; and no distinction can be drawn between cases where the interest said to be affected is that of ryotwari tenants or that of holders of proprietary interests. The onus of proving damage is on the person who alleges it. "Interruption" in Illustration (b) in S. 7 of the Easements Act means such interruption as results in material alteration in quantity.

Obiter:—In English Law, where the water is diverted by the upper riparian owner for riparian purposes, the lower riparian owner has no cause of action unless he could prove damage. But where the water is diverted by the upper riparian owner for non-riparian purposes, it is not necessary for the lower riparian owner to prove damage in order to establish a cause of action. An upper riparian owner is entitled to divert so much of the water from the stream as not to injure a lower riparian proprietor. (1909) 19 M L J 131 : 32 M 141 (162, 163) : 5 M L T 149 : 2 Ind Cas 325 (DB).

—— Government's right to distribute — Construction of new work and preservation of old works—Liability for damage caused — Flooding of adjacent land — Limitation.

Where the Government constructed a new calingula or byewash in a Government channel which fed a tank irrigating among others the lands of the plaintiffs (ryotwari holders under Government) in consequence of which the water diverted from the channel and flooded the plaintiff's land, the plaintiffs would be entitled to an injunction restraining the Government from thus flooding the lands. The plaintiffs would not be disentitled to such relief by the fact that the construction of his bye-wash was necessary for the protection of the tank which was fed by the channel and which irrigated the lands among others of the plaintiffs and there was no negligence in the construction of the calingula, or by the fact that owing to the floods of a certain year the level of the plaintiffs' lands was permanently lowered. The flow of water over another man's lands is a continuing injury and S. 24 of the Limitation Act will apply to such a case.

Per Arnold White, C. J.—(1) Government have the right to distribute the water of Government channels for the benefit of the public, subject to the right of a ryotwari landholder to whom water has been supplied by Government to continue to receive such supply as is sufficient for his accustomed requirements. (2) The rights of Government in connection with the distribution of water will not include a right to flood a man's land by the erection of a new work which in the opinion of the Government is desirable for the connection with the general distribution of water for the public benefit. (3) Although no Government may be authorized to construct a work (calingula), they must show that they cannot do so without injuring the lands of others. (4) The claim to injunction in respect of a continuing injury is not governed by Art. 120 of the Limitation Act.

Per Subrahmanya Aiyar, J. :—(1) It is among the most important functions of Government to construct new works of irrigation and to maintain old ones according to means and circumstances. (2) The position of Government in regard to liability for damage caused to individuals by such irrigation works would be analogous to that of persons acting under statutory authority. (3) So far as the construction of a new work is concerned, the authority is only permissive while as regards the maintenance of works once completed so as not, to interfere with the existing rights of others, the authority is imperative. (4) Where the authority is permissive the use sanctioned is only not in prejudice of the common law rights of others. (5) To throw water on another man's land against his will is a trespass, and the party affected has a right of action even if no substantial damage is shown. (6) The Government will be liable to a ryotwari holder where by the erection of new works his lands are flooded. (1905) 15 M L J 32 : 28 M 72 (81) (DB).

11. Obstruction.

See also N. 4.

——Proprietors of estate on partition stipulating to keep watercourse joint and agreeing not to interfere with supply channels—Either party can restrain other from erecting bund and causing interference without showing damage. AIR (Vol 27) 1940 Mad 656: (1940) 1 M L J 699:1940 M W N 311: 194 Ind Cas 774 (DB).

——Acquisition of right to maintain dam by prescription — Obstruction by accumulation of silt — Remedy.

Even if a person acquires the right by prescription to maintain the dam, he does not obtain a kind of immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existance of the dam. The obstruction caused to the free flow of water in the stream by such accumulation amounts to a nuisance and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and for damages. AIR (Vol 25) 1938 Mad 180 : 46 L W 862 : 1936 M W N 948 (2) : 174 Ind Cas 229 (DB).

——Tank in zemindari supplied by stream with natural tributaries — Interference with course of tributaries by riparian owner — Mandatory injunction, if can be granted against them.

A tank in the plaintiff's zemindari received water through a stream called Pedda Gedda. This stream took its rise in a Jeroyti village of the zamin and

passed through Mukhasa village of the defendants. During its course, the stream received supplies from four natural streams which took their rise entirely within defendants' village. The course of three of these was intercepted by the defendants by putting up a bund. It was found that both the tank and the stream Pedda Gedda belonged both to the plaintff and the defendants :

Held, that the interference with such flood of water constituted an actionable wrong, the rights of the defendants being subject to the right of the plaintiff to have the water of the stream Pedda Gedda and its tributaries flow in the customary manner down to him and that the plaintiff was entitled to mandatory injunction. A I R (Vol 24) 1937 Mad 310 : 1937 M W N 59 : 45 L W 188 : (1937) 1 M L J 216 : 1 L R (1937) Mad 510 : 168 Ind Cas 337 (FB).

——If the customary supply and manner of supply of water enjoyed by a ryotwari holder is interfered with not by the Government, but by private parties, such interference, prima facie, is an invasion of his rights and will give rise to a civil cause of action. To sustain an enforceable claim, however, the plaintiff must prove actual damage or likelihood of damage. (1936) 1936 MWN 553 (1) : 43 LW 330 : 161 Ind Cas 761.

——Obstruction—Plaintiff's right to irrigate respected for nearly 40 years by Government and then obstructed—Plaintiff can sue to remove obstruction.

The plaintiff originally enjoyed certain preferential rights in respect of the water of a river. The Government about the year 1872 constructed higher up the river an anicut and though this construction would in the natural course cause him damage, the Government adopted measures which adequately safeguarded his rights. Subsequent to the building of the anicut, the Government from time to time made changes in the machinary employed to carry the water, but the plaintiff's rights were not impaired and were on the contrary respected and recognized. The state of things continued till 1910 when Government issued an order whereby certain alterations in physical arrangements were brought into existence, and this had the effect of destroying the rights so long and continuously enjoyed by the plaintiff.

Held, that plaintiff's preferential right must be deemed to have had a legal origin and was not an act of grace by Government. AIR (Vol 14) 1927 Mad 1167 : 39 MLT 633 : 104 Ind Cas 781 (DB).

——Obstruction caused elsewhere than on the obstructor's land is also actionable.

An owner of land adjacent to water running in a defined natural channel has in law, a right to have a continuance of the accustomed flow or water both as regards quantity and quality, and the right is not limited to a case where the act complained of was done upon the land of the defendant, i.e., the person causing the obstruction.

The Court can grant a mandatory injunction ordering removal of such obstruction in proper cases. AIR (Vol 14) 1927 Rang 171 : 5 Bur LJ 244 : 103 Ind Cas 144.

——Obstruction of public river.

No riparian owner is entitled to obstruct a public river. AIR (Vol 6) 1919 Oudh 74 : 6 OLJ 616 : 21 Cr LJ 55 : 54 Ind Cas 407.

——Rights and duties of — It is open to a riparian owner to protect himself against extraordinary floods.

The rights of any other person is not in question in such a case as each one has a right to prevent a possible sudden danger. Every riparian owner should so conduct the operations in his property as not to injuriously affect those above or below him. To put up a dam to enable one to better cultivate field is not an ordinary agricultural operation. AIR (Vol 2) 1915 Mad 372 : 16 MLT 597 : 2 LW 45 : 28 MLJ 98 : 26 Ind Cas 800 (DB).

12. Presumption.

——Land abutting —Settlement of main land.

In the case of natural lake bounded on all sides by zamindari villages, the riparian rights in respect of the lands abutting on the lake must be deemed to have passed along with the lands when the villages were included in the zamindaris at the time of Permanent Settlement. AIR (Vol 23) 1936 Mad 550: 1936 MWN 417: 43 LW 761 : 163 Ind Cas 87.

——Presumption.

Grant—Inam—Water-course flowing through grantee's land — Presumption that it is included in the grant is stronger — Grantor must prove contrary. AIR (Vol 14) 1927 Mad 207 : 24 MLW 833 : 1926 M WN 980 : 99 Ind Cas 446.

——In Malbar there is a presumption, that the owner of the bank of a stream is entitled to the bed usque ad medium filum aquae; but this presumption is rebuttable. AIR (Vol 13) 1926 Mad 1052 : 96 Ind Cas 915 (DB).

——Ownership of bed and banks — Presumption — Accretion—Right to.

Accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the common law of India that the ownership of river beds usque ad medium filum aquae is presumed to vest in the riparian owners. But the presumption is capable of being rebutted. A person does not lose his title to land by its mere submersion under water so long as the land is identifiable. Non-resistance to vis major such as flood which causes the change of a river-course, cannot be treated as evidence of acquiescence or of abandonment of rights by a riparian owner. AIR (Vol 7) 1920 Mad 277 : 55 Ind Cas 770 (DB).

——Government—Ownership of water.

Waters in rivers are presumably vested in Government. 13 Cr LJ 131 : 11 MLT 162 : (1912) MWN 119: 13 Ind Cas 819 (FB).

——Immemorial user—Use for 60 or 65 years—Presumption of rightful origin.

Where a person has been irrigating his land from water taken from another person's tank for 60 or 65 years without interruption, a presumption arises that this enjoyment had an origin which conferred a right.

Quaere : whether the principle of (1839)5 M & W 748 did not apply to such a case. (1903) 30 Cal 281 (284) (DB).

13. Riparian owner.

——"Riparian owners" are those whose land abuts on, and is part of, the bank of a river or stream, whether tidal or non-tidal. AIR (Vol 28) 1941 Rang 208 : 1941 Rang LR 306 : 196 Ind Cas 382 (DB).

——Rain water collecting and flowing to person's land and used by him for irrigating crops — Question of riparian ownership, if arises.

Where rain water collecting in a depression in a Government land small part of which abuts upon a person's land flows to such person's land and is used by him for many years for irrigating his crops, no question of riparian ownership can arise. AIR (Vol 28) 1941 Rang 208 : 1941 Rang LR 306 : 196 Ind Cas 382 (DB).

——Riparian rights, nature of, explained—Rights of riparian owners, stated.

A riparian right arises from the right of access to the stream which land owners on its banks have, by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contract with the flow of the stream. Even if the portion on the bank be a narrow strip, the bank lands enjoy riparian rights if they be in the same ownership as the bank.

The zamindars and similar proprietors are to be considered the owners for deciding the question of

the contract with the stream. Although the ownership of the zamindar as distinguished from that of the ryot is the decisive factor, yet the whole of the land is not a riparian estate on the ground that it belongs to a single owner. A riparian tenement connotes, in addition to contract with the river, a reasonable proximity to the river bank. What is a riparian tenement does not depend upon any arbitrary rule but must, in each case, be a question depending upon circumstances.

Each riparian proprietor has a right to the water flowing past his land; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it. A riparian proprietor may use the water (a) for ordinary or primary purposes (b) for extraordinary or secondary purposes and (c) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not.

Irrigation is a secondary purpose and the English Law that the water should be restored after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before, has a modified application in India. When only a part of the stream is taken, and that for the purposes of irrigation the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user. When a riparian owner, taking advantage of his position, uses the water for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrong-doer, if not prevented, will, at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever. AIR (Vol 25) 1938 Mad 816: 47 LW 744 : 1938 MWN 736 : (1938) 2 MLJ 270 : ILR (1939) Mad 45 : 181 Ind Cas 950 (DB).

——Alluvion and diluvion—Rights to accretions by alluvion arises, ex jure naturae.

Rights to accretions by alluvion arise, ex jure naturae, wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers. 123 Ind Cas 31 : 53 Mad 202 : AIR (Vol 17) 1930 Mad 181 (DB).

——Owner of island.

The owner of the island possesses the same riparian rights as the owner of either main bank. 116 Ind Cas 573 : 1929 M W N 118 : 29 MLW 744 : AIR (Vol 16) 1929 Mad 227 : 57 M L J 648 (DB).

——Ownership of land washed away and reformed vests in the original owner of land can be recognised.

Lands washed away and afterwards re-formed upon the old site which can be clearly recognized, are not lands "gained" within the meaning of S. 4, Regulation 11 of 1825; they do not become the property of the adjoining owner, but they remain the property of the original owner.

The principle also applies when the question is between two riparian owners, who own property on either side of the river, and when the land is washed away from one side of the river and re-formed on the other side. 101 Ind Cas 1 : 1927 MWN 393 : 31 C W N 717 : 45 C L J 520 : 6 Pat 481 : 8 P L T 497 : 54 I A 156 : 25 A L J 905 : 26 M L W 754 : AIR (Vol 14) 1927 P C 89 : 53 M L J 576.

——Accretions to banks belong to riparian owners.

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation II of 1825.) If private private property be submerged and subsequently again left bare by the water, it belongs to the original owner. 77 Ind Cas 1048 : 32 M L T 162 : 1923 M W N 511 : 50 C 446 : 50 I A 121 : 28 C W N 453 : AIR (Vol 10) 1923 P C 1 : 48 M L J 444.

——Government property in bed of river washed away—No presumption of abandonment arises.

If the property is formed on the old site, it would belong to the owner of that old site 61 Ind Cas 852: 13 M L W 230 : AIR (Vol 8) 1921 Mad 363 (DB).

——Source and nature—Rights of riparian owners are natural rights.

The right of a riparian owner does not depend on the ownership of the soil of the stream. It belongs to him as a natural right incident to the right to the land adjoining the river. It is not based on prescription or presumed grant. So long as the river has a natural origin and flows in a known channel his right to use its water when it flows alongside his land is unaffected. In addition to this right he may, when the water recedes, have an easement to go across the land of another but such user can be claimed only by virtue of prescription or custom. 59 Ind Cas 364 : 7 O L J 268 : 2 U P L R (JC) 103 : AIR (Vol 7) 1920 Oudh 214.

——Alluvion and dilluvion—Ownership of bed.

Though the banks of a public navigable river belong to the respective owners, the bed belongs to Government. But any accretion to the bank goes to the owners of the banks. So also any land submerged and emerged again goes to the owners of the banks. 22 MLT 438: 26 CLJ 590 : (1918) MWN 28 : 20 Bom L R 49 : 43 Ind Cas 361 : AIR (Vol 4) 1917 P C 86.

—— Rights of — What may be treated as natural stream.

A riparian owner has a right to treat running water as a natural stream from its source to the lower end of his land, where water is flowing from a known source past his land in a defined channel which is not artificial, though the water does not empty itself in a lake or river and the right which he has to the use of such water is a natural right. A person owning land which is not in the bank of a river or stream cannot have the rights of riparian owner nor can a owner occupying land on the bank of a stream use the water from the stream for the purpose of land which is on the bank. 9 Bur L T 183 : 8 L B R 556 : 35 Ind Cas 356 : AIR (Vol 3) 1916 L B 30.

——Surface water—Twenty years user not proved.

The surplus water of defendant's tank was allowed to flow in a channel in a village where plaintiff was lessee. Plaintiff sued for unlawful interference with his right by cutting a bund and taking water from within the village. Defts were only taking water from the same tank through different watercourse.

Held, plaintiff could get no relief as they had a right to uninterrupted flow of surface drainage water as no user for 20 years was proved. 1 L W 363 : 24 Ind Cas 935 : AIR (Vol 2) 1915 Mad 585 (DB).

——Malabar rivers — Rights of Govt. to beds of rivers.

Per Sankaram Nair J.—Sadasiva Aiyar J. dissenting.—The ownership in the beds of non-tidal and non-navigable rivers in Malabar is in the private riparian owners usque filium aquae or add medium filium aquae, and not in the Government. 15 M L T 247 : 1 L W 307 26 M L J 385 : (1914) M W N 521 : 24 Ind Cas 547 : AIR (Vol 1) 1914 Mad 341 (DB).

—Water course—Incorporeal rights.

Incorporeal rights are in many cases capable of possession just as much as rights to corporeal hereditaments, and there is no distinction in principle between the rights of a person without title in possession of land for less than the statutory period to the possession thereof and those of a person in similar enjoyment of a water course; and consequently the latter is entitled to be protected as against all but the true owner in his enjoyment. (1910) 20 M L J 803 (804, 805): 6 Ind Cas 266: 7 M L T 352: 34 Mad 173: 1910 M W N 117 (DB).

—Joint property.

A natural stream can never be the joint property of the several riparian owners. (1910) 7 M L T 74: 20 M L J 722: 5 Ind Cas 742 (DB).

—Distribution—Melwaramdar and Kudivaramdar, relations between—Crown and ryots, relations between.

The Crown claims the right of periodical revisions of assessment and the right to distribute the water for the benefit of the public subject only to the ryot's claim for such supply as is sufficient for his requirements, and for that purpose, to make the necessary alterations in the sources of such supply. The Melwaramdar has neither the right of such revision of assessment nor is under any obligation to any other than the ryots of the plaint village for the distribution of this tank water. The right of the Kudivaramdars to the customary supply of water from tanks is a proprietary right appurtenant to their ownership of the lands. Consequently, if the Melwaramdar diminishes the water supply to the Kudivaramdar by supply of water to others, the Kudivaramdar has a right of action against the people who are so allowed the use. (1909) 32 M 423 (425): 5 M L T 143: 4 Ind Cas 722 (DB).

—Difference between English and Indian Law—Obiter.

The ordinary right of a riparian proprietor to the use of the water of a river or channel is not in India limited to personal uses, etc., as it is in England. (1902) 29 C 100 (110) (DB).

14. Tidal and navigable rivers.

—Public navigable river — Bed of non-tidal river —Ownership of — Right of Government — Law of Bengal and Madras—English common law — Applicability in India.

The bed of a navigable river in any part of India including Madras, whether tidal or not, is vested in the Government unless it has been granted to private individuals.

The English common law rule that the bed of non-tidal rivers belongs to the riparian proprietors is inapplicable in India. In Bengal a Regulation (No. XI of 1825) was made for the purpose of making known the rules established by the law and custom of the country for regulating disputes occasioned by the frequent changes which might take place in the channels of the principal rivers of Bengal. The regulations were promulgated after consulting the law officers on the Mahomedan and Hindu Law and they were without doubt intended to be declaratory of the pre-existing law. There is no reason for supposing that there was any difference between the riverain law of Madras and that of Bengal at the beginning of last century. In Bengal the common law of England did not oust the pre-existing law now embodied in the Regulation of 1825. AIR (Vol 36) 1949 P C 3: 75 I A 305: 1 L R (1949) Mad 675: 62 L W 25: 1949 M W N 83: 51 Bom L R 185: 1948 A L J 474: (1949) 1 M L J 128.

—Ownership of bed in Crown — Ownership of reformations — Navigability of river, relevancy of — Sudden erosions — Sites washed away — Title, if extinguished.

The question of navigability, in determining the ownership thereof, should not be considered with reference to conditions as they exist now but with reference to conditions as they existed at the time of the grant by the Government of estates on the banks of the river to the zamindars. If at the time of the grant the bed of the river cannot be deemed to have been conveyed to the zamindar, any doubt regarding the navigability of the river in present condition would not operate so as to convey half the bed of the river to the zamindar.

Where it appeared from the available records that extensive blocks of land were washed away in particular floods, that the extent so washed away was duly recorded and remissions of revenue were granted in respect thereof, it cannot be said that the process of erosion was gradual and imperceptible so as to provide a basis for the argument that the title of the former owner to these sites so washed away has been extinguished. A I R (Vol 32) 1945 Mad 396: (1945) 2 M L J 27: I L R (1945) Mad 420: 221 Ind Cas 324 (DB).

—Bed of river — Ownership of — Tests.

Bed of the river which is continuously tidal and navigable belongs to the Crown.

To determine the bed of the river, the criterion is whether the land in question is situated within the area over which the river will flow in a normal condition and which will sometimes be covered and sometimes left bare according to the quantity of water coming down the river. The question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot at any particular time, is one of fact often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, its growth and its user.

In considering whether a mere sand bank, visible when the water is low, submerged when the water is high is to be regarded as part of the bed of a river or as an island capable of ownership by a person who is not the owner of the bed of the river it is, of course, impossible to draw a hard and fast line between that which a sand bank still forming part of the river bed and that which is an accretion of reformation belonging to the owner of the land to which the accretion is attached or of the soil formerly existing at the point of re-formation.

Where the process of formation in the river (e. g., Godawari) consists ordinarily in the rise of a sand bank owing to the shifting of the river bed by floods, the planting of the sand bank with reeds, the interception of silt by the reeds grown on the sand and the gradual formation of cultivable land which will be considerably above the water level at all seasons except during high flood until this last stage is reached, that is to say, until the soil has been deposited so as to raise the bank above the ordinary level of the water, there can be no question of any completed title by lateral accretion to the land to which the sand bank is attached. If, however, the sand bank is a re-formation of land formerly owned and washed away, the owner may be presumed to have retained his title in the side of the land he formerly occupied, and when it re-appears, even though the re-formation is incomplete, he is entitled to a declaration of his right thereto, provided that the re-formation is identifiable with the original land and there has been no abandonment of his right therein.

Per Patanjali Sastri J.—Tidality or navigability of a river is not the sole test of the Government's ownership of the bed. The true position is that the Crown's ownership of the bed will be presumed if the river is either tidal or navigable. AIR (Vol 32) 1945 Mad

396 : (1945) 2 M L J 27 : I L R (1945) Mad 420 : 221 Ind Cas 324 (DB).

——Bed of river—Ownership of — English Common Law as to bed of rivers.

The title to the bed of the river at the locality in question where the tide ebbs and flows must be taken prima facie to belong to the Crown even though the river, in its present state, is not navigable there throughout the year. Assuming navigability to be the sole basis of the Crown's ownership of the bed, it cannot be said that the river is not navigable merely because the anicut intercepts almost the entire waters of the stream so as to render navigation difficult without artificial aids for some distance below during the summer months. The navigability of a river must be judged with reference to its natural state, and if it was navigable before the construction of the dam and the title to the bed was in the Crown, such title cannot be divested merely because the cross-bunding has reduced the volume of water flowing down the stream below the construction, any more than the title of a riparian owner can be divested by the river being made navigable by deepening the bed by artificial means. The Crown's title must be taken to continue unless it is shown that such title was lost by grant or adverse possession of the bed.

There is no presumption that a grant of lands on the banks of a tidal or public navigable river passed title to the bed ad medium filum.

Under the English Common Law, the ownership of the Crown in the bed of a river ends and that of the riparian owner begins at the point where the stream ceases to be tidal, alike in navigable and non-navigable river. This limitation on the Crown's ownership of the bed has not always been accepted by the Courts in America where it is held, in some cases, that the bed of a navigable stream vests prima facie in the Crown even where it is non-tidal, such extension of the Crown's ownership being founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment. A I R (Vol 32) 1945 Mad 396 : (1945) 2 M L J 27 : I L R (1945) Mad 420 : 221 Ind Cas 324 (DB).

——English Common Law rule, if applicable to rivers in India — Bed of public navigable river — ownership of.

Conditions in India are so dissimilar from those in Great Britain that it might well be that the English Common Law rule should not be applied without modification, and public rights should be recognised in the bed of rivers which are navigable but not tidal. The tide is not a factor in deciding the ownership of the bed of a public navigable river in India. The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. AIR (Vol 29) 1942 Mad 406(2) : 1942 M W N 225 : 55 L W 217: (1942) 1 M L J 344 : I L R (1942) Mad 532 : 205 Ind Cas 415 (DB).

——Petty stream navigable only for short time at certain periods of tide, by small boats — Whether public navigable waterway.

The flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong prima facie evidence of its being a public navigable river. The strength of his prima facie evidence, arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. A I R (Vol 27) 1940 Rang 292: 1940 Rang L R 598: 192 Ind Cas 401.

——Tidal creek — 'Bed' — Right of navigation — Riparian owner's rights— Obstruction to free access from channel to land of adjacent owner—Right to sue.

Under the English Law, the bed of a tidal creek, which is vested in the Crown, and over which all subjects of the Crown have a right of navigation, is confined to the space covered by 'ordinary' high tides, that is, the mean between spring and neap tides—or in other words, to that part of the shore which, for four days in every week, or for the most part of the year, is reached and covered by the tides. It is only within these limits that the bed can be regarded as in the nature of unappropriated soil, not capable of ordinary cultivation and occupation. This principle is equally applicable to Indian waters.

Where a creek is only navigable for a few hours at most on from five to ten days in the month, the whole of it cannot possibly be a public waterway.

Where the complaint is not of an obstruction to the channel itself but of something which obstructs free access from the channel to the land of the complainant, the latter must, in order to make good his complaint, prove not merely that there is a public waterway over some part of the channel but that the waterway comes right up to his land.

The public right to use a water way would not imply the right to land upon or to take merchandise on, to or over immediately adjacent land in private ownership. Such a right may be established by custom or prescription, but the banks above the "ordinary" high-water mark remain private property unaffected by the waterway.

The rights of riparian owners on the banks of tidal navigable water exist jure naturae, because the land has, by nature, the advantage of being washed by the stream, but it is essential to the existence of this right that the land should be in contract with the flow of the stream at least at the time of "ordinary" high tides. AIR (Vol 18) 1931 P C 72 : 58 I A 80 : 60 M L J 593 : 33 L W 543 : 35 C W N 472 : 1931 M W N 521: 33 Bom LR 897: 9 R 122: 53 C L J 472: 131 Ind Cas 777.

——Ownership of bed — Presumption.

In the absence of proof to the contrary the presumption is that the soil of non-navigable river vests in the owners on either side. Rule applied to Palar river in Madras Presidency. AIR (Vol 17) 1930 Mad 861 : 1930 M W N 684.

——The whole river from bank to bank is to be regarded as navigable.

A river, which is tidal and navigable, cannot be divided up arbitrarily to say that the portions which are too shallow to permit of navigation or too high to be covered by tides are not included in the navigable and tidal river, for the bed of a aiver means everything that lies between the two embankments. AIR (Vol 16) 1929 Mad 227 : 57 M L J 648 : 1929 M W N 118 : 29 M L W 744 : 116 Ind Cas 573 (DB).

——For a river to be navigable the fact that small fishing craft may float over the water is not enough; small fishing crafts are very often mere logs of wood on which fishermen sit while fishing and cannot be said to be useful for commercial purposes. A I R (Vol 14) 1927 Mad 988: 50 Mad 961: 26 M L W 513 : 1927 M W N 854 : 53 M L J 868 : 105 Ind Cas 864 (DB).

——A river must be navigable throughout the year if it is to be regarded as a navigable river. (1920) M W N 209, Diss. from. AIR (Vol 14) 1927 Mad 988 : 50 Mad 961 : 26 M L W 513 : 1927 M W N 854 : 53 M L J 868 : 105 Ind 864 (DB).

——Navigable river is one which is navigable throughout the year. Ordinary boats which generally ply in the river must be able to ply all the year round. AIR (Vol 14) 1927 Mad 272: 1927 M W N 57: 52 M L J 15 : 99 Ind Cas 637.

——Public navigable river — Test of.

The test for determining whether a river is a public navigable river or not is whether or not the river is navigable for boats at all seasons of the year. The question of size may not be without importance but speaking generally the presumption in the one case is that the bed belongs to the public or is public domain and in the other that the bed belongs to private proprietor. In the absence of any other evidence than that afforded by a thak or survey map these natural presumptions may be sufficient to displace the contrary evidence of the map. A I R (Vol 7) 1920 Cal 639: 24 C W N 809 (DB).

——Zemindars—Public navigable river — Dry land appearing on bed through rescission — Whether part of Zemindar's property.

Plaintiff who sued for a declaration that land recently the beds of these rivers but now dry by reason of the rivers receding .from their beds were included in their permanently settled estates must prove their allegation that at the date of the permanent settlement of their adjoining zemindari in 1793 they were narrow channels. AIR (Vol 7) 1920 Cal 454 : 24 Cal W N 639 : 31 C L J 320 : 57 Ind Cas 29 (DB).

——Ownership of river-bed — Tidal and navigable rivers—Presumption—Lankas in Krishna river.

As regards the portion of a river bed where a river is both tidal and navigable, there is a very strong presumption that it belongs to the Crown, where however the river is not tidal, the question whether the bed must be presumed to belong to the Government or the riparian owners on either bank, will depend on the fact whether the river is navigable in the legal sense. A river in India is not navigable in the legal sense unless it is navigable throughout the year.

Per Burn J.—Conditions in Madras are so dissimilar from those in Great Britain that the English Common Law rules as to the ownership of river beds should not be applied here without modification and public rights should be recognised in the beds of rivers which are navigable but not tidal. The lankas and keelanas formed in the bed of the Krishna river at a place where it was navigable only for about 4 months in the year belonged to the riparian owners on either bank and not to the Government. AIR (Vol 7) 1920 Mad 295 : 11 L W 256: 27 M L T 147 : (1920) M W N 209 : 58 Ind Cas 689 (DB).

——Title to bed of river — Riparian owners — Can claim up to half the bed—Navigable rivers—Test of.

By the common law of this country the right to the soil of a non-navigable river flowing through the estate of different proprietors belongs to the riparian owners ad medium filum aquae. A boundary given as the road of the river is the middle of the road or river. Therefore permanently settled estates bounded by a non-navigable river include half of the bed of the river. The test as to whether a river is navigable or not, is to see if boats can pass on it at times of the year. AIR (Vol 6) 1919 Cal 768 : 46 Cal 390 : 22 C W N 872 : 46 Ind Cas 305 (DB).

15. Upper proprietor's rights.

——Use by owner of upper holding of water for irrigation — Rights of owner of lower holding.

The proprietor of an upper tenement who claims the right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, can take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what should be allowed to descend. If the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose, it cannot be said that the amount that goes down is materially diminished. The owner of the lower holding is not entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for the future. AIR (Vol 26) 1939 Rang 446: 1939 Rang L R 581 : 185 Ind Cas 802.

——Right to maintain dam — If can enlarge dimension of channel.

The acquisition by the upper riparian owner of a prescriptive right to maintain the dam will not of itself entitle him to all the waters intercepted by the dam but only to such water as he has been accustomed to take by the channel. If he is entitled to draw water through a channel with certain dimensions, he cannot enlarge the dimension of that channel. AIR (Vol 25) 1938 Mad 180 : 46 L W 862 : 1936 M W N 948 (2) : 174 Ind Cas 229 (DB).

——Dam—Injunction against upper owner—Proper form.

It cannot be laid down as a general or absolute proposition that under no circumstances can an upper riparian owner resort to particular methods of diversion e. g., by putting up a dam irrespective of the question whether such methods of diversion materially diminishes the flow of water or not. Therefore, in granting injunction against an upper riparian owner, it is not proper to make any reference in the decree either by way of authorisation or by way of prohibition to the erection of a dam or other method that may be employed by the upper riparian owner. AIR (Vol 21) 1934 Mad 583 : 40 L W 373 : 67 M L J 373: 1934 M W N 1099 : 152 Ind Cas 413.

——Appropriation of whole water when permitted.

For ordinary purposes such as drinking and watering cattle the upper proprietors are entitled to appropriate if necessary the whole of the water of a natural stream; but for extraordinary purposes such as the irrigation of their fields, they are entitled only to take so much as will not reasonably diminish the volume of water in the river. But if a higher proprietor establishes that he has been in possession from time immemorial of the right to appropriate the whole of the water, the law will not prevent him from acquiring the right. AIR (Vol 13) 1926 Pat 187: 7 P L T 547 : 94 Ind Cas 929 (DB).

——Lower owner blocking a canal running through his land, and inundating land of upper owner — Lower owner is liable—This applies in Lower Burma also. AIR (Vol 12) 1925 P C 236 : 49 M L J 282 : 52 I A 385 : 1925 M W N 894 : 30 C W N 218: 42 C L J 156: 3 Rang 494: 27 Bom L R 1427 : 90 Ind Cas 198.

——Upper proprietor cannot obstruct natural stream —Lower proprietor need not be using the water at the time of obstruction.

Every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have water come to him in its ordinary and accustomed course, undiminished in flow, quantity and quality, unaffected in temperature, and to go from him without obstruction and therefore under no circumstances can an upper riparian proprietor claim to erect a dam across a natural stream, thus depriving the lower riparian proprietor of the use of water. It is not necessary under the law that the lower riparian proprietor should make any actual use of the water at the time of the suit. It is sufficient if he is prevented by the action of the upper proprietor from any possible use of the water due to the obstruction caused by erecting a dam. AIR (Vol 12) 1925 Nag 273 : 8 N L J 41 : 87 Ind Cas 184.

——Basis.

Where the ownership of the channel is not claimed, a right to irrigate lands by the water coming from the said channel, as against an upper proprietor, can be claimed only by way of easement o by contract. AIR (Vol 10) 1923 Mad 141 : 44 M L J 234 :

16 M L W 793 : 31 M L T 421 : 1922 M W N 839 : 23 Cr L J 655 : 69 Ind Cas 95.

——Discontinuous percolation — Natural stream — What is — Right to uninterrupted flow of water is only in natural stream.

The principle that a riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land applies only to a natural stream having a defined channel.

A natural stream is defined as one which arises at its source from natural causes and flows in a natural channel, and water percolating discontinuously through or along strata cannot be described as a stream. AIR (Vol 8) 1921 Lah 286 : 3 L L J 555 : 64 Ind Cas 158.

——Water course — Natural stream — Riparian proprietors—Rights inter se.

A water course which has its origin in a spring the water from which first falls into a pit, percolates underground and then flows under ground for some short distance in a natural and known course until it reappears and flows on the surface is a natural stream. An upper riparian proprietor cannot by putting a dam at a point in the stream where his lands abut on it, use the water so as to interfere with the rights of the lower riparian proprietors. In the absence of any right acquired by prescription or grant, he can as an ordinary riparian proprietor drive the water for the purposes of irrigation without violating the rights of and inflicting material injury upon other riparian proprietors. (1904) 6 Bom L R 291 (293, 294) : 28 Bom 344 (DB).

RISK NOTE

See Railways Act, 1890, S. 72.

RIVAL DECREE-HOLDERS

See Civil P. C., Ss. 47 and 73.

RIVER AND RIVER BEDS

See (1) Alluvion and Diluvion.
(2) Bengal Alluvion and Diluvion Act, 1847 and Regulation. 1825.
(3) Custom (General)—Riparian Rights.
(4) Custom (Punjab)—Alluvion and Diluvion.
(5) Grant.
(6) Landlord and Tenant—Re-formation.
(7) Riparian Rights.

RIWAJ-I-AM

See also (1) Custom (General) and (Punjab).
(2) Landlord and Tenant.

1. Ancestral and acquired property.
2. Construction.
3. Evidentiary value of.
4. Entry opposed to custom.
5. Presumptions, onus and rebuttal.

1. Ancestral and acquired property.

——Ancestral and acquired property.

Although in the riwaj-i-am no distinction is drawn between ancestral and acquired property, it is a well recognized rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property. AIR (Vol 13) 1926 Lah 210 : 7 Lah 124 : 27 P L R 154 : 95 Ind Cas 337 (DB).

——It is a safe rule to accept, unless there is a provision to the contrary, that the rules laid down in the riwaj-i-am refer to ancestral and not acquired property. AIR (Vol 8) 1921 Lah 180 : 2 Lah 98 : 3 L L J 152 : 97 P L R 1921 : 60 Ind Cas 509 (DB).

——Entry regarding succession — No discrimination between ancestral and self-acquired property.

The entry in riwaj-i-am about landed property and succession to it without discrimination between ancestral and self-acquired property, is to be taken to apply to ancestral property. AIR (Vol 3) 1916 Lah 343 : 38 P R 1916:99 P W R 1916:33 Ind Cas 992.

2. Construction.

——Construction.

"Bap ke jaidan" means property both personal and ancestral of the father. Ancestral property is qua the son "bap ki jaidad" because he inherits through the father though not necessarily from him. AIR (Vol 16) 1929 Lah 150 : 29 P L R 472 : 112 Ind Cas 668.

——Of Amritsar district.

Riwaj-i-am of Amritsar District applies also to urban house property. AIR (Vol 15) 1928 Lah 762 : 112 Ind Cas 8.

——Entry—Nature.

An entry in riwaj-i-am must be construed as being strictly limited to the case set out in the question. AIR (Vol 4) 1917 Lah 119 : 104 P L R 1917 : 82 P W R 1917 : 101 P R 1917 : 40 Ind Cas 246 (DB).

——Succession—Interpretation of entry.

The answer to the question of Riwaj-i-am of settlement that no share is ever taken by the sister or her son, refers only to cases of succession in the presence of collaterals. AIR (Vol 3) 1916 Lah 186 : 79 P W R 1916 : 85 P R 1916 : 33 Ind Cas 783 (FB).

——Gurdaspur Dt.—Chundawand rule.

The Riwaj-i-am of the Gurdaspur Dt. for the Chundawand rule, deserves no weight because no specific instances are cited therein to support the said rule. 58 P R 1911 : 45 P L R 1912 : 202 P W R 1911 : 12 Ind Cas 857.

——Karabati—Meaning—Hoshiarpur.

The word 'Karabati' does not necessarily include the 'yak jaddies,' but it does include a wider circle than agnates up to the fourth degree as regards succession of sister. 74 P W R 1909 : 65 P L R 1909 : 55 P R 1909 : 2 Ind Cas 117 (DB).

3. Evidentiary value.

——Settlement record—Entries—Value.

Where the entries in the prior settlement records are ambiguous and the entry in a later settlement record is conclusive the Court should act upon the latter. AIR (Vol 18) 1931 Oudh 136 : 7 O W N 1079.

——Evidentiary value of—It is record of custom — In absence of evidence to contrary it is strong evidence of custom.

The Riwaj-i-am, which is a public record prepared by a public officer, in the discharge of his duties and under Government rules, is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. Statements made in the Riwaj-i-am are not merely a record of an agreement between the persons concerned as to the rule by which they wished to regulate succession amongst them, but a record of custom. The custom recorded therein governing the other branches of a family would, in the absence of any evidence to the contrary, afford strong evidence relevant for the determination of the custom (daughter's right to inherit) applicable to the particular branch of that family. A I R (Vol 18) 1931 Oudh 40: 7 O W N 1120 (DB).

—Evidentiary value.

A riwaj-i-am whether supported or unsupported by instances, is a piece of evidence which if unrebutted is sufficient to decide the case. A I R (Vol 15) 1928 Lah 212 : 9 Lah 110 : 103 Ind Cas 170 (DB).

——The riwaj-i-am of 1865 of the Amritsar District is an accurate and reliable record of custom stated therein. AIR (Vol 14) 1927 Lah 241 : 8 Lah 281: 100 Ind Cas 924 (DB).

——The evidence afforded by entries in records of custom prepared by responsible officials whose duty it was to ascertain and record the customs entered, is valuable evidence of the existence of the customs. AIR (Vol 14) 1927 Oudh 598: 103 Ind Cas 23 (DB).

——Entries are admissible in evidence and are a strong proof of custom.

The Riwaj-i-am is a public record prepared by a public officer in the discharge of his duties and is clearly admissible in evidence to prove the fact therein entered and the statements contained in the riwaj-i-am from a strong piece of evidence in support of the custom. AIR (Vol 13) 1926 Lah 142 : 89 Ind Cas 724 (DB).

—Wajib-ul-arz.

A wajib-ul-arz does not stand on a less firm ground than a riwaj-i-am. AIR (Vol 13) 1926 Oudh 101 : 12 O L J 571 : 2 O W N 872 : 91 Ind Cas 583 (DB).

——Is important piece of evidence.

Among parties generally following Customary Law, it is permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable can be found. The riwaj-i-am even when unsupported by instances is an important piece of evidence to which serious regard is to be paid. AIR (Vol 11) 1924 Lah 698: 78 Ind Cas 932 (DB).

——Riwaj-i-am is a strong piece of evidence in support of custom therein declared. A I R (Vol 10) 1923 Lah 517 : 4 Lah 189 : 73 Ind Cas 452 (DB).

——The riwaj-i-am entries would have to be regarded seriously as an important piece of evidence in the reversioner's favour in the event of his preferring afterwards a claim to inherit before the daughter. AIR (Vol 10) 1923 Lah 28 : 72 Ind Cas 873.

——Entries in—Value of.

The riwaj-i-am contains merely an expression of opinion which cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the members of the community. AIR (Vol 8) 1921 Lah 353 : 2 Lah L J 178 (DB).

——Entries in — Evidentiary value of — Proof of custom.

A riwaj-i-am is a public record and statements contained therein form strong evidence of the custom affirmed therein, even when they are unsupported by instances, provided they are not opposed to the general custom of the country. AIR (Vol 6) 1919 Lah 36 : 133 P R 1919 : 53 Ind Cas 435.

——Entry in—Family custom.

Indefinite entry in riwaj-i-am as to the question of custom of adoption among Hindu jats in Sheshna, Dt. Ludhiana, has no effect. AIR (Vol 4) 1917 Lah 231 : 29 P R 1917 : 38 Ind Cas 636.

——Entries in—Strong evidence of custom recorded.

Entries in a riwaj-i-am are strong evidence of the custom recorded therein. AIR (Vol 3) 1916 P C 129 : 44 Cal 749 : 44 I A 89 : 19 Bom L R 388 : 12 P W R 1917 : 21 M L T 310 : 32 M L J 615 : 45 P R 1917 : 15 A L J 525 : 21 C W N 842 : 26 C L J 175 : 38 Ind Cas 354.

——The value of an entry in the riwaj-i-am depends upon the instances quoted in support of it. 57 PWR 1912 : 102 P L R 1912 : 13 Ind Cas 448 (DB).

——Entries in—Evidence of custom.

A Riwaj-i-am of 1907 represents the custom of 1906 more accurately than one 20 or 30 years old. 72 PLR 1911 : 257 P W R 1911 : 12 Ind Cas 955 (DB).

——Evidentiary value.

Riwaj-i-am sppported by large number of expression of opinions is very important. 29 P R 1911 : 94 P L R 1911 : 124 P W R 1911 : 9 Ind Cas 608 (DB).

——Entries—Value.

Entries in Riwaj-i-am have a value of their own as expressing public opinion ante litem motam; such entries should be followed in the absence of any evidence throwing doubt on its correction. 49 P R 1910: 87 P W R 1910 : 37 P L R 1910 : 6 Ind Cas 929.

4. Entry opposed to custom.

——Special and general customs.

Entry of special custom opposed to general custom — Burden though comparatively light, is shifted on to person challening entry. AIR (Vol 16) 1929 Lah 318 : 10 Lah 694 : 30 P L R 750 : 116 Ind Cas 903 (DB).

——Entry—Opposed to Custom.

Statement of special custom though unsupported by instances, is prima facie proof of that custom — Onus of rebuttal is on the party disputing the correctness of the entry. A I R (Vol 15) 1928 Lah 893 : 10 Lah 531 : 30 PLR 640 : 113 Ind Cas 44 (DB).

——A statement in riwaj-i-am opposed to general custom and unsupported by instances possesses very little evidential value. A I R (Vol 10) 1923 Lah 401 : 4 Lah 99 : 76 Ind Cas 921 (DB).

——Entries in—Value to be given to.

Statements in a riwaj-i-am, when opposed to the general custom are of very little weight unless supported by instances, AIR (Vol 5) 1918 Lah 228: 84 PR 1917 : 151 PWR 1917 : 3 P L R 1918: 42 Ind Cas 358 (DB).

——Evidentiary value of, to prove special custom.

A Riwaj-i-am is insufficient to prove a special custom at variance with the general custom of the province, in the absence of instances to support it. 152 P W R 1912 : 164 P L R 1912 : 85 P R 1912 : 14 Ind Cas 532 (DB).

——Entries—Value.

Entries in Riwaj-i-am as to custom unsupported by instances have no value. 84 P W R 1910 : 7 Ind Cas 352 (DB).

——Change in custom.

Entry in Riwaj-i-am unsupported by instances, does not justify a change in ordinary custom. 48 PR 1909 : 72 PWR 1909 : 122 P L R 1909 : 2 Ind Cas 79 (DB).

5. Presumptions, onus and rebuttal.

——Presumption.

Initial presumption is in favour of correctness — Entry that daughters are excluded by agnates—Onus is on daughter to show custom entitling her to succeed. AIR (Vol 17) 1930 Lah 761 (DB).

——The initial presumption must in every case be made in favour of the correctness of the entry in the Riwaj-i-am, even though it is unsupported by instances. (1928) 111 Ind Cas 842 (Lah).

——Entry in, though unsupported by instances, casts burden of rebutting it on party challenging it.

A general proposition, that an entry in a riwaj-i-am, unsupported by instances is of little evidentiary value and insufficient to cast the onus of rebuttal upon the other side, is unwarrantable. An entry in the riwaj-i-am, though unsupported by instances, imposes the burden of proving that it was an incorrect statement of custom on the party who challenges it. AIR (Vol 14) 1927 Lah 677 : 8 Lah 527 : 28 PLR 681 : 105 Ind Cas 204 (DB).

——An entry in a Riwaj-i-am, though unsupported by instances, is a strong piece of evidence, which it lies upon the opposite party to rebut, in favour of the truth of the statements of custom which it contains. AIR (Vol 14) 1927 Lah 340 : 101 Ind Cas 852 (DB).

——Entry as to custom is prima facie evidence unless rebutted.

An entry in a Riwaj-i-am recording a special custom is prima facie proof of that custom and the onus

is shifted to the other side to rebut it. 84 PR 1917 ; 13 PR 1919 ; AIR 1922 Lah 320 ; AIR 1923 Lah 401 and AIR 1925 Lah 35, Diss. from. AIR (Vol 14) 1927 Lah 241 : 8 Lah 281 : 100 Ind Cas 924 (DB).

——A presumption of correctness arises in regard to entries in the Riwaj-i-am, and in the absence of evidence to rebut, they should be given effect to. A I R (Vol 14) 1927 Lah 143 : 8 Lah 144 : 29 PLR 101 : 99 Ind Cas 692 (DB).

——Evidentiary value is great as regards custom recorded therein.

Where a statement in a Riwaj-i-am as to the existence of a custom is supported by instances it affords sufficient proof of that custom unless rebutted by the party who denies it. An entry in a Riwaj-i-am as to a custom is a strong piece of evidence in support of that custom, and it lies on the person denying that custom to rebut that evidence. Where the Riwaj-i-am declared that the adoption of sister's son is allowed by custom :

Held, that the onus of proving that the adoption of a sister's son was not valid lay on the plaintiffs who impeached its validity. A I R (Vol 11) 1924 Lah 37 : 4 Lah 102 : 5 LLJ 253 : 74 Ind Cas 589 (DB).

——Entries in—Value of.

The riwaj-i-am carries with it a certain presumption of correctness but the presumption is rebuttable; when positive instances are given, the riwaj-i-am cannot be regarded as overriding them. A I R (Vol 7) 1920 Lah 9 : 10 P L R 1920 : 18 P W R 1920 : 54 Ind Cas 419 (DB).

——Entries—Value of—Custom.

An entry in a riwaj-i-am even though unsupported by instances constitutes a strong piece of evidence in support of an alleged custom and it lies upon the party impugning it to rebut the value of this evidence. AIR (Vol 5) 1918 Lah 299 : 109 P W R 1918 : 94 P R 1918 : 45 Ind Cas 966 (DB).

ROAD
See (1) Easements Act, Ss. 14 and 28.
(2) Grant.
(3) Highway.
(4) Motor Vehicles Act, S. 4.
(5) Penal Code, S. 304-A.
(6) Specific Relief Act, Ss. 54 and 55.

ROAD CESS
See (1) Bengal Cess Act (9 of 1880).
(2) Road Cess Act (9 of 1880).

ROAD CESS ACT (BENGAL ACT 9 of 1880)
See also Bengal Cess Act (9 of 1880)

——S. 14.

——Ss. 14, 94 and 95—Scope of S. 94— Undervaluation—Effect.

Section 94 of the Act aims at securing that the person submitting a return should not undervalue his property for Road Cess and Public Works Cess. Therefore, a person who does not undervalue his property commits no offence. (1909) 13 C W N 191 : 5 MLT 93 : 11 Cr L J 11 : 4 Ind Cas 578 (DB).

ROAD CESS RETURNS
See (1) Bengal Cess Act (1880) and Road Cess Act (1880).
(2) Evidence Act, S. 35.

ROBAKARIES
See Evidence Act, S. 35.

ROBBERY
See Penal Code, Ss. 390 and 398.

ROHILKHAND AND KUMAON RAILWAY BYE-LAWS

——Cl. 26.

——Cl. 26—Validity.

If the bye-laws of Railway Company render it unnecessary to make the demand by the Company from the owner of goods, they are ultra vires. The bye-laws do not constitute a demand. (1910) 7 A L J 606 : 6 Ind Cas 333 (DB).

RULE AGAINST PERPETUITY
See (1) Succession Act, Ss. 114 and 383.
(2) T. P. Act, S. 14.

RULES OF PRACTICE
See (1) Crown Side Rules.
(2) Judicial Committee Rules.
(3) Respective High Court Rules.

RULING CHIEF
See (1) Civil P. C., 1908, O. 30, R. 10.
(2) Indian States (Protection against Disaffection) Act, 1922.
(3) Specific Relief Act, S. 27.

RUNNING ACCOUNT
See (1) Accounts.
(2) Limitation Act, Art. 62.

RYOT
See (1) Landlord and Tenant.
(2) Local Tenancy Acts.
(3) Madras Estates Land Act.

RYOTI LAND OR VILLAGE
See (1) Bengal Tenancy Act.
(2) Land Tenures.
(3) Madras Estates Land Act.

RYOTWARI TENURE
See (1) Land Tenures.
(2) Madras Estates Land Act.

SAIRAT
See Words and Phrases.

SAJJADANASHIN
See Muhammadan Law—Wakf.

SALARY

——Attachment.
See Civil P. C., S. 60 and O. 21, R. 48.

SALE
See (1) Contract Act, S. 55 and Ss. 75 to 123.
(2) Sale of Goods Act.
(3) T. P. Act, Ss. 54, 55.

SALE BY GUARDIAN
See (1) Civil P. C., O. 32.
(2) Guardians and Wards Act.

SALE CERTIFICATE
See C. P. Code, O. 21, R. 94.

SALE—CONSTRUCTION
See Deed—Construction.

SALE IN EXECUTION
See C. P. Code, S. 47, O. 21, Rr. 66—90.

SALE IN INVITUM
See (1) Civil P. C., O. 21, Rr. 64 to 96.
(2) T. P. Act, S. 5.

SALE OF GOODS
See (1) Contract Act, Ss. 55 and 75 to 123.
(2) Sale of Goods Act.

SALE OF IMMOVABLE PROPERTY
See T. P. Act, Ss. 54 and 55.

SALE—PRE-EMPTION
See (1) Agra Pre-emption Act.
(2) Custom (General).
(3) Custom (Punjab).
(4) Pre-emption.

SALE—REVENUE
See (1) Local Land Revenue Acts.
(2) Local Tenancy Acts.

SALE—VENDOR AND PURCHASER
See (1) T. P. Act, Ss. 54 and 55.
(2) Sale of Goods Act.
(3) Vendor and Purchaser.

SALE OF GOODS ACT (III of 1930)

See also, (1) Contract Act, Ss. 76 to 123.

(2) Vendor and Purchaser.

——S. 1.

——S. 1—Act, whether applies to electricity.

It is doubtful whether the Sale of Goods Act is applicable to such things as gas, water and electricity. A I R (Vol 23) 1936 Cal 753 : 41 C W N 225 : 38 Cr L J 545 : 168 Ind Cas 657 (DB).

——S. 1 — Applicability to movables — Effect on General Clauses Act.

Sale of Goods Act does not apply to the case under Cl. 10, Letters Patent (Rang.) because the suit relates to immovable property.

The provisions of a Special Act such as the Sale of Goods Act cannot, except in the branch of the law to which it specially applies, overrule a statute of the nature of the General Clauses Act. AIR (Vol 18) 1931 Rang 109 : 9 R 13 : 134 Ind Cas 511.

——S. 2.

——S. 2 (4)—Railway receipt—Endorsement—Locus standi of endorsee to maintain suit.

A railway receipt being a mercantile document of title an endorsee of the receipt has interest in the goods covered by the receipt and has a right to maintain an action for damages in respect of the goods. A I R (Vol 36) 1949 E P 190 : 50 P L R 290 (DB).

——S. 2 (4) — Document of title—Test—T. P. Act, Ss. 130 and 137.

Defendant No. 1 entered into a contract for the delivery of certain goods with defendant No. 2, which was evidenced by a souda chithi. Defendant No. 2 sold the rights under the above contract to the plaintiff and authorised him to take delivery of the goods from defendant No. 1. An endorsement to that effect was made by defendant No. 2 on the chithi. Plaintiff brought a suit as defendant No. 1 failed to deliver the goods. It was contended for the defendant that the endorsement on the chithi amounted to an assignment under S. 130 of the T. P. Act and the document not being in proper form was inadmissible in evidence. It was contended in reply by the plaintiff that the document was a document of title to goods within S. 2 (4) of the Sale of Goods Act and hence the provisions of the T. P. Act and the Stamp Act did not apply. Overruling the plaintiff's contention,

Held, that a document is a document of title to goods if it is such as is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. A document of title to goods ordinarily represents the goods and is capable of being transferred. As it was not proved that the souda chithi was used in the manner indicated as the indicia of document of title to goods and that a mere endorsement of that document was sufficient to transfer the rights in the goods, and as the document was not a delivery order, the suit of the plaintiff must fail. AIR (Vol 36) 1949 Nag 186: ILR (1948) Nag 843: 1948 N L J 432.

——Ss. 2 (4) and 25 (2)—Railway receipt—Endorsement—Effect of—Seller consigning goods and taking receipt in own name as consignee — Successive endorsements — Last endorsement in favour of consignee—Effect of — Right to sue for loss of goods in transit—Consignor's right.

Though a railway receipt is a document of title to goods, mere endorsement of the receipt by itself is not enough to constitute the endorsee either a bona fide pledger for value or a bona fide transferee for value of the goods represented by the railway receipt. Without anything more, it only constitutes the endorsee the agent of the consignee for the purposes of taking delivery of the goods represented by the railway receipt from the railway company. Successive endorsements on the face of the receipt would, therefore, have no other effect than that of constituting the successive endorsees the agents of the consignee for the purpose of taking delivery of the goods represented thereby from the railway company. A re-endorsement in favour of the consignee by the last endorsee would only have the effect of re-investing in the consignee who endorsed the railway receipt in the first instance the right to take delivery of the goods. The consignee would in such a case have re-invested in him the original right which he had to take delivery of the goods from the railway company. This result could also be achieved by a cancellation of the previous endorsements including the one made by the consignee himself in the first instance. The endorsement has not, without anything more, the effect of passing the property or title in goods to the endorsee, nor does he thereby become the person entitled to receive delivery of the goods from the railway company in his own right. When the consignor (seller) takes the right in his own name as consignee (self) the goods are deliverable to his order and the seller must prima facie be deemed to have reserved the right of disposal of the goods, under S. 25 (2) of the Sale of Goods Act. In cases the goods are lost or destroyed in transit, the seller alone and not the buyer is the person entitled to sue the railway company for compensation for the loss of goods. AIR (Vol 34) 1947 Bom 169: 231 Ind Cas 367: 48 Bom L R 698.

——S. 2 (4) — Delivery chit, whether document of title.

A part from any established trade custom, a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of the price of goods is not a document of title within the meaning of S. 2 (4). A I R (Vol 28) 1941 Sind 78 : I L R (1941) Kar 89 : 195 Ind Cas 137 (DB).

——S. 2 (4)—Railway receipt—Document of title.

A Railway receipt is now included in the definition of documents of title to goods in S. 2 (4). A I R (Vol 21) 1934 P C 246 : 11 O W N 1511 : 41 L W 1 : 68 M L J 26 : 39 C W N 209 : 1935 M W N 27 : 37 Bom L R 130 : 60 C L J 528 : 37 P L R 185 : 58 M 181 : 4 A W R 1306 : 61 I A 416 : 1 B R 145 : 152 Ind Cas 730.

——S. 2 (9) — Broker in jewellery, whether mercantile agent.

A broker in jewellery who is given jewelleries by their owners for sale is a mercantile agent. The fact that the jewelleries were given to the broker because of her false representation is immaterial. The broker can make a valid pledge if the pawnee acts in good faith and had not, at the time of the pledge, notice that the pawnor had no authority to pledge. AIR (Vol 21) 1934 Rang 198 : 35 Cr L J 1375 : 151 Ind Cas 413.

——S. 2 (14)—Specified goods and ascertained goods —Distinction between.

Specified goods are not the same as ascertained goods. Specified goods as the definition says mean goods identified and agreed upon at the time a contract of sale is made. They may be goods in existence and may even be future goods if they get specified by some other circumstances. The phrase "ascertained goods" has not been defined and to understand it, it is helpful to think in terms of "unascertained goods". If the identity of the contract goods is not

established by appropriating them towards the contract, the contract remains in respect of unascertained goods. In a majority of cases unascertained goods are defined only by description. If a contract of sale clearly shows that the subject-matter of the contract is the existing stocks in certain warehouses in a certain place, the sale is in respect of specific goods to be found there. A I R (Vol 36) 1949 Nag 178 : 1947 N L J 429 : ILR (1948) Nag 543 (DB).

——S. 2 (14)—'Specific goods,' meaning of.

'Specific goods' in S. 2 (14) is not identical with 'ascertained goods' ; it does not mean goods which have been examined by the buyer. AIR (Vol 24) 1937 Cal 140 : 63 C 736 : 169 Ind Cas 128.

——S. 4.

——S. 4 — Shares — Concluded contract of sale — Effect — Passing of title — Absence of or effect of previous negotiations or agreement — Relevancy of.

Where a concluded contract of sale of shares is evidenced by the documents, and it is not a sham transaction, it must pass title in the shares to the vendee, no matter what negotiations precede the sale, and no matter whether the sale was made to give effect to a part of the agreement between the parties or was agreed upon independently of it. The fact that the whole of the arrangement between the parties has not been carried through or that it cannot be satisfactorily proved does not lead to the result that what actually took place cannot be given effect to. A I R (Vol 37) 1950 F C 21 : 1949 F C R 441 : 51 Bom L R 906 : 1949 F L J 374.

——S. 4 — Contract — Hire purchase — Essentials.

An essential feature of a contract for hire-purchase is the option given to the prospective purchaser to terminate the contract and return the chattel. A I R (Vol 31) 1944 Mad 526 : 1944-2 M L J 74 : 57 L W 448 : 1944 M W N 595 : I L R (1945) Mad 269 (D B).

——S. 4—Distinction between agreement and decree declaring agreements.

Consent decree declaring agreement of parties to sale and agreement of parties themselves to sale — Distinction pointed out. A I R (Vol 29) 1942 Sind 37 : I L R (1941) Kar 495 : 199 Ind Cas 438 (D B).

——S. 4 — Contract of sale — Promise to pay purchase price in instalments — Whether amounts to payment of money.

In a contract of sale, the promise to pay purchase price in instalments is an undertaking which amounts to the payment of money. A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments. A I R (Vol 28) 1941 PC 101 : 8 B R 118 : 1941 A W R 63 : 196 Ind Cas 823.

—— S. 4 — Hire purchase — Rights and obligations of parties — Right to recover rent.

In hire-purchase cases, the rights and obligations of the parties depend primarily on the conditions of the particular contract between them. The general rule is that in a hire-purchase agreement, the right of the owner to recover rent is not lost by the exercise of the right to retake possession, even in the absence of an express stipulation to that effect. A I R (Vol 26) 1939 Lah 324 : 41 P L R 365 : 184 Ind Cas 100.

——S. 4 — Conveyance and contract of sale — Distinction.

There is a distinction between a conveyance and a contract of sale of minor's property. When the minor's property is already alienated, the Court is required only to find whether the alienation is binding on the minor or not. In such a case, no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. A I R (Vol 26) 1939 Nag 265 : 1939 N L J 324 : I L R (1940) Nag 55 : 185 Ind Cas 156.

——S. 4 — Contract to make and deliver set of false teeth is contract for sale of goods.

Where a contract is for a chattel to be made and delivered, it is clearly a contract for the sale of goods. A contract to make and deliver a set of false teeth is, therefore, contract for the sale of goods and the principles of the Sale of Goods Act apply to such a contract. A I R (Vol 26) 1939 Nag 19 : 1939 N L J 118.

——S. 4 — Hire-purchase agreement — Nature of — Important point is to ascertain precise time when property in subject-matter passes to hirer — Construction.

Hire-purchase agreement is ordinarily so complex that it may be described as a compound of agreement of hiring and agreement to sell tinged with an agreement of hypothecation. The main point in regard to the hire-purchase agreement is to ascertain the precise time when the property in the subject-matter of the agreement passes to the hirer, for on that point turns the nature of the rights and obligations of the parties which have to be ascertained for the purpose of giving appropriate relief. The question whether or not the agreement transfers by its own force the ownership from one party to the other is one of great moment for the purpose of determining the nature and extent of the remedy that is available to the aggrieved party. If it is found that the agreement is a contract of sale with the condition of retarded payment of the price by instalments, the property in the chattel would pass to the ostensible hirer. If, on the other hand, the agreement is one of hiring albeit coupled with an option to purchase, the property will not pass to the hirer as he will be treated only as a bailee until he exercises his option after having fulfilled the required conditions. In the former case, the owner who has parted with his ownership is entitled to sue the purchaser for the balance of the price as a debt owed to him. In the latter case, he may seize the chattel or sue for recovering the arrears of hire money or for damages as a consequence of the breach of the contract.

To construe a hire-purchase agreement one must look into the language used by the parties to it for indications of the various stages in the development of the contract in relation to the rights and obligations that the parties contemplated to create, alter or extinguish. Every part of the agreement must, therefore, be explored to seek out the clue to the real intention of the parties as to the time of the transition of the property in the subject-matter of the agreement. If the agreement embodies a stipulation which entitles the hirer to terminate the contract at any time he pleases, that stipulation will qualify the contract as a whole and would also serve to shed light on the intention of the parties as to the time of the transfer of ownership from one party to the other. A I R (Vol 25) 1938 Nag 18 : I L R (1940) Nag 208 : 175 Ind Cas 337.

——S. 4—In C. I. F. contracts, the property in goods does not pass to the buyer on the mere acceptance of the draft but passes only on the payment of the draft.

A I R (Vol 24) 1937 Lah 566 : 174 Ind Cas 945.

——S. 4 — Transaction in substance one of sale — Existence of various other covenants — Whether changes the character.

The mere fact that in the contract between the parties there might be various covenants or the existence of another provision giving the seller certain rights as consideration for his having brought about the transaction of sale does not change the character of the transaction if in substance it was one of sale. A I R (Vol 24) 1937 Mad 714 : 1937-2 M L J 922 : 176 Ind Cas 444.

——S. 4 — Hire-purchase agreement, what is.

Hire-purchase — Lender paying dealer on behalf of buyer to complete purchase of motor car—Property in car passes to buyer — Lender obtaining promissory note and hire-purchase agreement from buyer :

Held, transaction was collateral security and not hire-purchase. A I R (Vol 22) 1935 Lah 861 : 37 PLR 293 : 160 Ind Cas 503 (D B).

——S. 4 — Contract for sale — Price not mentioned — Whether concluded contract.

In the absence of evidence of price of the article, there cannot be a concluded contract as the most essential condition in contract for sale of goods is the price. A I R (Vol 21) 1934 All 203 : 1934 A L J 43 : 3 A W R 161 : 147 Ind Cas 982.

——S. 4 — Hire-purchase agreement — Condition to return article with hire due — Agreement, whether sale.

Where under an agreement of hire-purchase, the purchaser is given the option to terminate the contract of hire at any time by returning the article hired and paying the hire due up to date of such return, the transaction cannot be regarded as an out and out sale. A I R (Vol 21) 1934 Oudh 133 : 11 O W N 454 : 148 Ind Cas 793 (D B).

——S. 4 — Hire or purchase — Test.

The defendant took certain articles on hire from the plaintiff under an agreement which provided that if he paid ten months' hire, he shall become the purchaser of the articles and that if he failed to pay hire in any one month, the plaintiff may cancel the transaction and terminate the hiring treating the whole transaction purely on 'the hire system'. The agreement did not give the defendant the option of terminating the contract and returning the articles and ten months' hire represented the value of the articles :

Held, that the agreement was one of purchase and not hire-purchase and on default, the plaintiff was entitled only to that part of the purchase price which had not been paid.

The distinguishing mark of an agreement which is a sale and not a hire-purchase agreement is that the "hirer" should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement if he so wished, before the full value of the goods is paid. A I R (Vol 19) 1932 All 607 : 1932 A L J 761 : 54 All 781 : 141 Ind Cas 615 (D B).

——S. 4 — Hire or purchase — Tests.

The question whether a so-called hire-purchase agreement is really a transaction of hire or purchase has, in every case, to be decided on the language of the agreement and not on abstract principles, and it is dangerous to make an attempt to interpret one document with the aid of another.

The defendants received an article on hire valued at Rs. 150. The agreement provided (i) that the defendants were to take care of the article, (ii) that if the defendants failed to pay hire in any month, the plaintiffs were entitled to terminate the hiring and take possession, (iii) that the defendants could, if they wanted, terminate the agreement at any time but they would not be entitled to refund of hire paid, (iv) that if the defendants paid the monthly hire of Rs. 15 for ten months, they would become owners of the article :

Held, that the agreement was one of hire and not of sale. A I R (Vol 18) 1931 All 759 : 133 Ind Cas 159.

——S. 5.

——S. 5—Conditional sale—Hire, agreement for.

An agreement by which the hirer of a sewing machine agrees to pay regularly a fixed monthly rent for the machine and which provides that the hirer might at any time during the hire become the purchaser of the machine by payment in cash of the price mentioned in the agreement provided the payments of hire are regularly and duly made is an agreement for hire; and it does not become one for purchase until the specified conditions are fulfilled. (1904) 6 Bom L R 871 (873, 874) (DB).

——Ss. 5 (2) and 2 (7)—Interest of partner in partnership—Oral sale—Validity.

The interest of a partner in partnership being movable property and not being an actionable claim, comes within the definition of "goods" given in S. 2 (7) of the Sale of Goods Act. Accordingly under S. 5 (2) of the Act, a sale of such interest may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. A I R (Vol 37) 1950 Nag Nag 89 : I L R (1950) Nag 355 : 1950 N L J 157.

——S. 9.

——S. 9—Reasonable price, what is.

Held, that if there be no daily buying rate for that day the purchaser must purchase his paddy at a reasonable rate which must be fixed in accordance with the market price of that day. AIR (Vol 23) 1936 Rang 419 : 165 Ind Cas 308 (DB).

——S. 11.

See also, Contract Act, S. 55.

——S. 11—Mercantile transaction, what is.

Where both parties are engaged in business and articles are purchased by one party from the other party for business purposes, the transaction falls with in the term "mercantile transaction." It is not necessary that the purchase should be for the purpose of selling the goods to another. A I R (Vol 27) 1940 Oudh 443 : 1940 O W N 901 : 1940 A W R 395 : 16 Luck 357 : 190 Ind Cas 534.

——S. 12.

——S. 12 — Relief of specific performance is discretionary — Contract of sale of shares limited in number—Specific performance will be granted.

Specific performance is undoubtedly a discretionary remedy. When shares of a company are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares. A I R (Vol 36) 1949 F C 211.

——S. 13.

——Ss. 13, 15 and 16—Sale of motor car by description—Latent defects — Breach of implied condition of merchantability—Remedy of buyer.

In the case of a sale of a motor car by description by a seller who deals in cars of that description, there is under the Second Exception of S. 16 of the Sale of Goods Act an implied condition in the contract of sale that the car sold is of merchantable quality. When in such a case a latent defect which is not expected in a car of that description of average quality is discovered subsequently, there is not only a breach of the implied condition of merchantability under the Second Exception of S. 16, but also of the implied condition of conformity with description under S. 15, and in either case the buyer can under S. 13 of the Act treat such a breach as a breach of warranty and claim damages, without repudiating the contract of sale. S. 13 of the Act is not limited to a breach of an express condition but extends also to a breach of an implied condition. I L R (1946) Cal 225 : 50 C W N 213 (2).

——S. 13 (2)—'Bargain and sale', what is.

The plaintiff and defendant had business in shellac. Plaintiff contracted with defendant to sell four lots of shellac of 124 bags, 157 bags, 22 bags and 254 bags. Through a broker authorized by plaintiff, the sale was concluded in respect of 124 bags on April 30, 1934 and the bags were delivered and paid for. On May 7, 1934, the contract was concluded in respect of the 157 bags. On analysing samples from the four lots, defendant found that the impurities in them

showed a wide range. In respect of the 157 bags, delivery was made on May 13 and weighment on 16th. On the 20th, defendant found on analysis that there were different percentages of impurities. He refused to take further delivery :

Held, that the transaction was clearly not one of "bargain and sale," but one giving rise to a claim on account of "goods sold and delivered." AIR (Vol 24) 1937 Cal 140 : 63 Cal 736 : 169 Ind Cas 128.

——Ss. 13 (2), 17—Sale by sample—Incidents.

Provided a specimen has been in existence on the basis of which an offer was made and the offer was accepted notwithstanding the disappearance of that specimen, the sale would remain a sale by sample. In great many modern transactions, the seller will offer a sample of certain goods which cannot be judged or compared with the bulk by mere physical examination. What, therefore, is done is that the sample or portion of it is examined and the analysis obtained. The quality is in the analysis. That must happen, and if that sale is, in fact, made in relation to the specimen supplied, notwithstanding that the sample is transformed into a certain formula, the sale would retain its original nature. In each case what is to be determined is what in this particular transaction or in that particular trade is the way in which business is done. When the offer is made on the basis of a specimen and accepted, the sale is made upon that specimen notwithstanding that the specimen is turned into a formula. A I R (Vol 24) 1937 Cal 140 : 63 Cal 736 : 169 Ind Cas 128.

——S. 15.

——S. 15—Contract Act (1872), S. 43—Joint liability —May be enforced against only some of promisors—Promisees asking for specific performance in terms of S. 15, Specific Relief Act — There is no prejudice to promisors.

Unlike English law the Indian law, makes all joint liability, joint and several, in the absence of any agreement to the contrary. It is, therefore, open to the promisees to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors must have been made parties. Moreover, when the plaintiffs pray ultimately for specific performance of a part of the contract in the manner contemplated by S. 15, Specific Relief Act and express their readiness to pay the entire consideration for the part, the defendants cannot be said to be prejudiced in any way. A I R (Vol 36) 1949 F C 211.

——S. 15 — Railway — Tenders for sale of "mild steel" invited—Plaintiff's tender accepted — Doubt as to quality — Railway Company referring to conditions of tender and sale which stated that description of goods was believed to be correct—Stipulation that no misdescription would invalidate sale—Plaintiff taking delivery of goods which were found to be "wrought iron"—Effect.

The defendant Railway Company invited tenders for certain goods which they wanted to dispose of. These goods included "mild steel special-wheels. etc." The plaintiffs sent a tender for these goods. When it was accepted, they felt some doubt as to whether the goods were really of 'mild steel' and, therefore, wrote to the Railway Company saying that they were willing to purchase the goods only if they were of mild steel. The company, in its reply, referred to cl. 6 of the conditions of tender and sale, which was to the effect that "the quantities and descriptions of the materials to be purchased and removed as shown in the schedule are believed to be correct and appropriate." It was also stipulated in the second sub-clause that "the tender and sale shall not be invalidated and no compensation for shortage, excess, fault or misdescription of the whole or any portion of the lots or items shall be admissible because of any divergence from the particulars entered in the schedule." The plaintiffs had the option of inspecting the goods before taking delivery but they did not do so. The goods were sent to the plaintiffs' place as desired by them. On delivery, the plaintiffs discovered that the goods were of wrought iron and not of steel. They, therefore, rejected them and instituted the suit for recovery of the sale price :

Held, that 'mild steel' and 'wrought iron' being similar, there was mere misdescription. Although the company intimated that they believed the goods to be of mild steel, they did not wish to give any guarantee. (1941) 192 Ind Cas 175 (Lah).

——S. 16

——S. 16—Goods sold under trade name—Warranty as to general merchantability.

Whether a sale was of goods under a patent or trade name or of goods by description, is a question of fact. Even if the sale be under a patent or trade name so as to bring the case within the proviso and to exclude the application of the first exception of S. 16 of the Sale of Goods Act, it is not certain that it cannot fall within the second exception which insists on the goods being merchantable. There may not be any warranty that goods sold under a trade name will be fit for any particular purpose, but there may still be a warranty as to general merchantability. (1948) 52 C W N 45.

——S. 16—Sale of goods by description—Stipulation that goods shall be of fair average quality and shall be passed by buyer as such—Goods examined and passed by buyer—Subsequent discovery of defect—Buyer's right to sue for damages.

A contract for sale of skins contained a stipulation that the skins shall be of fair average quality of description and be passed by the buyers as such. The goods were passed by the buyers but subsequently it was discovered that they were defective. In a suit by the seller for the price, the buyers claimed damages on the ground that the skins supplied did not fulfil the description of the contract :

Held, that the addition of the provision as to inspection by the buyers did not reduce the importance of the independent undertaking as to the quality and the buyers were not precluded from claiming damages by having inspected and accepted the goods.

An express condition that the goods shall be of fair average quality is inconsistent with the condition arising by implication that although the goods are warranted merchantable, discoverable defects are excluded. Such an express condition gives the purchaser a higher right than he would possess under a contract where the term would be merely implied in law.

Where the buyer elects or is compelled to treat any breach of a condition as a breach of warranty, though he is not entitled to reject the goods, he has a right to sue the seller for damages. AIR (Vol 24) 1937 Mad 40 : 1936 MWN 970 : 44 L W 676 : ILR (1937) Mad 479 : 1937-2 M L J 131 : 166 Ind Cas 313 (DB).

——S. 16—"Merchantable," meaning of—Latent and patent defect.

The word 'merchantable' in S. 16 (2) does not mean merely marketable or saleable but it is a relative term the test being 'are the goods merchantable or not under the particular description in the contract.'

The proviso to S. 16 (2) protects the seller only from such defects as are apparent on reasonable examination and, therefore, the fact that the buyer had examined the goods does not extinguish the liability of the seller for defects which are not patent or discoverable on examination. AIR (Vol 24) 1937 Mad 40 : 1936 MWN 970 : 44 L W 676 : ILR (1937) Mad 479 : 1937-2 M L J 131 : 166 Ind Cas 313 (DB).

——S. 16—Implied warranty—Patent or trade name—Merchantable quality, meaning of—Sale by description—Retailer and purchaser—Manufacturer and purchaser—Liability of manufacturer—Negligence—Nature of proof—Tort of actionable negligence—How established.

The first exception to S. 14, English Sale of Goods Act (equivalent to Sale of Goods Act) if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied but only if that purpose is made known to the seller 'so as to show that the buyer relies on the seller's skill or judgment." The reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express; it will usually arise by implication from the circumstances, thus to take a case like that in question of a purchase from a retailer, the reliance will be, in general, inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment; the retailer need know nothing about the process of manufacturer; it is immaterial whether he be manufacturer or not, the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make ; the goods sold must be goods of a description which it is in the course of the seller's business to supply ; there is no need to specify in terms the particular purpose for which the buyer requires the goods which is nonetheless the particular purpose within the meaning of the section because it is the only purpose for which anyone would ordinarily want the goods. The proviso does not apply to a case like the sale of a specified article the name of which is rather a patent or trade name within the meaning of the proviso to exception (i).

Whatever else 'merchantable' may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use : merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination. The statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (ii) does not apply where, no examination that the buyer could or would normally have made would have revealed the defect. In effect the implied condition of being fit for the particular purpose for which they are required and the implied condition of being merchantable produce in cases of this type the same result. There is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description.

The retailers are liable in contract, and so far as they are concerned, no question of negligence is relevant to the liability in contract. But as regards the manufacturers there is no privity of contract between the ultimate purchaser and them. The liability, if any, between them is in tort and the gist of the cause of action is negligence. The plaintiff is not required, to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances. But the mere sequence of cause and effect is not enough in law to constitute a cause of action in negligence, which is a complex concept involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage.

A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established, the mere fact that a man is injured by another's act gives in itself no cause of action ; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right ; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

The principle of Donoghve's case [(1932) A C 562] can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent; the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance. AIR (Vol 23) 1936 P C 34 : 1935 O W N 1327 : 43 L W 132 : 1936 A L J 120 : 70 M L J 513 : 1936 A W R 255 : 159 Ind Cas 667 (2).

——S. 16 — S. 114, Contract Act (Before 1930)—Mercantile contracts—Warranty.

Government invited forward purchasers by proclamation that the purchaser would get the wood by volume measurement, and the proclamation provided for the removal of wood in a certain time, and that the Government was not liable for the shrinkage.

Held, that the Government was not liable for the shrinkage, as there was no warranty as to the weight but the warranty was only as to the quality. (1910) 8 M L T 181 : (1910) M W N 488 : 7 Ind Cas 226 (DB).

——S. 16 (1)—Implied warranty of fitness—Essentials—"Particular purpose," explained.

Per Ameer Ali, J.—With regard to implied warranty of fitness under S. 16(1), the essential elements are disclosure of a particular purpose in a particular manner. There is no logical distinction between an implied warranty as to merchantability and warranty of fitness for a particular purpose. The one condition as to merchantability requires the goods to be reasonably fit to be sold as goods of the particular description. The other condition as to fitness, requires the goods to be reasonably fit for use for the particular purpose for which they were ordered and in both cases they are required to be intrinsically fit, and not fit having regard to some particular legislation or particular rules framed by the State or a third party. The question depends upon the scope to be given to the words "particular purpose". That governs the whole section. The article is not to be fit generally, not to be fit, as pleaded, "for the purpose of the plaintiff; it must be fit for a particular purpose notified to the defendant and notified in a particular way. The onus is on the plaintiff, not on the defendant, to show that he is entitled to take advantage of implied warranty, and it is desirable, so far as possible, that people should put their contracts in writing and not depend upon implied warranties. AIR (Vol 26) 1939 Cal 210 : ILR (1938) 2 Cal 88 : 182 Ind Cas 397 (DB).

——S. 16 (1)—Goods found to be not reasonably fit for purpose for which they are required—Buyers' right to reject.

Under S. 16 (1) there is an implied condition that the goods are reasonably fit for the particular purpose for which they are required and a purchaser, if he does not find them so, is legally entitled to reject them. AIR (Vol 26) 1939 Nag 19 : 1939 N L J 118.

——S. 16 (1), (2) — Contract for sale of specified article under trade name—Implied condition as to fitness for specified purpose—Whether exists—Condition that it should be of merchantable quality.

Under S. 16 (1), in the case of a contract for the sale of a specified article under its trade name, there is no implied condition as to its fitness for any particular purpose, while under S. 16 (2), where goods are bought by description, there is an implied condition that the goods shall be of merchantable quality.

Where the plaintiff is the distributor of Continental solid tyres and those tyres only, there cannot be any implied condition as to the fitness of the tyres for any particular purpose, although at the same time the goods sold must be of merchantable quality. (1935) 157 Ind Cas 12 (Rang).

——S. 18.

——Ss. 18 and 23—Breach of contract of sale of goods—Re-sale — Damages—Basis—Rules as to.

Where the title to the goods has not passed and there is no clause in the agreement giving the seller a right to re-sell the goods and there is a breach of the contract, the seller can only claim the difference between the contract rate and the rate prevailing on the date of the breach. If, however, the title to the goods has passed, the seller is entitled to claim the difference between the contract price and the price realised at the re-sale, provided he has sold the goods within a reasonable time and after due notice. It must be clearly proved that the goods that were sold were the goods that were meant for the buyer. 1950 ALJ 583 (DB).

——S. 18 — Agreement for sale of timber trees — Buyer entitled to cut them only if they attain particular girth within period of agreement—Title in trees—When passes.

If under an agreement for sale of certain timber trees the buyer is entitled to cut and remove them only if they attained a particular girth within the period specified in the agreement, the sale is of unascertained goods which are ascertainable from time to time during the period that the agreement remains in existence, and under S. 18 of the Sale of Goods Act, the property in the trees could not pass so long as the ascertainment has not been made. What trees would fulfil the requirements of the agreement and attain the minimum girth required under it is a matter which could not be known to the parties either at the time of the agreement or even later. AIR (Vol 35) 1948 All 396 : ILR (1948) All 562: 1949 ALJ 46 : 1949 AWR 153 (DB).

——S. 19.

See also S. 4.

——S. 19—Contract of storage of paddy and its subsequent sale—Storage period clause providing for exercise of option by seller—Property, when passes.

In a contract of storage of paddy and its subsequent sale, the paddy was, in the first place, handed over by the seller to the purchaser for storage, and although the purchaser was entitled to do as he liked with the paddy and to convert it into rice, as the purchaser actually did, yet under the terms of the agreement, the purchaser was looked upon nominally as being the bailee only of the paddy until such time as the seller decided that the time was favourable to him to sell and exercised that option and the purchaser was compelled to purchase it at the daily buying rate of that day :

Held, that the property in the paddy did not pass to the purchaser until the seller exercised his option. AIR (Vol 23) 1936 Rang 419 : 165 Ind Cas 308 (DB).

——S. 19 — Scope — Rule for determining the time when property in goods passes to buyer.

The rule for determining the time when the property in the goods passes to the buyer is contained in S. 19 which provides that in the case of a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Consequently, the intention of the parties is the decisive factor in determining the issue; and, if that intention is expressed in the contract itself, no difficulty arises. But where the contract contains no such express provision, the intention has to be gathered from the conduct of the parties and the circumstances of the case. The rules for ascertaining the intention are embodied in Ss. 20 to 24. The question in each case is what was the real intention of the parties, and that intention must, in the absence of an express term in the contract, depend upon the peculiar features of each transaction.

Where the circumstances make it clear that the parties to the contract intended that the buyer should become the owner of the goods on payment of the balance of the price; the major portion of the price had been paid by the seller; all the persons interested in the goods met in order to transfer the goods to the buyer who had advanced a large sum of money for their purchase and the price still due to each of the persons from whom the seller purchased the goods was then calculated and promptly paid by the seller's agent so that the property in the goods should pass to the seller and from him to the buyer :

Held, that nothing remained to be done to complete the transfer of ownership to the buyer and it could not be said that he made the payment to benefit the other creditors of the seller by facilitating the seizure of the goods in satisfaction of their claim. The buyer paid the money to discharge the claims of those who sold to the seller for the balance of the price and to acquire property in the goods and the intention of the parties was that he should become the owner of the goods as soon as he had made the payment. The passing of the property did not, therefore, depend upon the measurement and neither the attachment of the goods nor the order of adjudication of the seller after the payment could adversely affect the title which vested in him. AIR (Vol 22) 1935 P C 182 : 1935 OWN 980 : 39 CWN 1217 : 42 L W 469 : 37 PLR 659 : 37 Bom LR 866 : 1935 ALJ 1119: 2 BR 3 : 69 MLJ 467 : 1935 MWN 1125 : 14 Rang 1 : 1935 AWR 1299 : 62 I A 242 : 157 Ind Cas 891.

——S. 19—Conditional sale—Hire—Agreement for.

An agreement by which the hirer of a sewing machine agrees to pay regularly a fixed monthly rent for the machine and which provides that the hirer might at any time during the hire become the purchaser of the machine by payment in cash of the price mentioned in the agreement provided the payments of hire are regularly and duly made is an agreement for hire; and it does not become one for purchase until the specified conditions are fulfilled. (1904) 6 Bom LR 871 (873, 874) (DB).

——S. 20.

——Ss. 20 and 23—Unconditional contract for sale of specified goods — Property in goods when passes — Appropriation by buyer — Cotton Cloth and Yarn (Contracts) Ordinance (II of 1944) — Applicability —Completed sale whether governed by ordinance.

When there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the

time of payment of the price or the time for delivery of the goods or both is postponed. Where the goods are already in the custody or control of the buyer all that is required is that there should be an appropriation of the goods by the buyer in respect of the particular contract.

Where after the parties entered into a contract for sale an ordinance was passed by the Government fixing the price limit but there was nothing in the ordinance rendering the higher prices fixed under the earlier contracts illegal and the seller insisted on the buyer taking delivery at the contract rates but the latter evaded doing so and sought the benefit of the ordinance :

Held, that the buyer of the goods and not the seller was in breach in respect of the contract.

The provisions of the Cotton Cloth and Yarn (Contracts) Ordinance (II of 1944), will not apply to the case of a concluded sale made before the 15th day of August, 1943, though delivery is made or is contemplated to be made after the 19th day of August, 1943, because such delivery would take place not in pursuance of a contract of sale but in pursuance of the sale. The ordinance applies to all executory contracts whether before or after its commencement, but if there is an executed or completed sale, if it is before the 15th August, 1943, the ordinance will not apply; but it it is after the 15th August, 1943, though it may be before the 19th August, 1943, the ordinance will apply. AIR (Vol 35) 1948 Mad 122 : 1LR (1948) Mad 157 : 60 LW 337 : (1947) 2 MLJ 79 (DB).

——Ss. 20, 23—Transfer of shares of company—Title, when passes.

An agreement to transfer shares in a company accompanied with the actual instrument of transfer which has not been completed so far as the transferor could complete it, does not amount to a transfer-deed sufficient to cause title to pass. It by itself would be nothing more than an enforceable agreement to convey and until the transfer endorsement is signed, the shares would be unascertained goods and would not be in a deliverable state. But if the transferor signs both the agreement to transfer the shares and the transfer endorsement on the share certificate and communicates the fact to the transferee who countersigned the agreement of transfer in token of acceptance of the transfer, there is nothing more for the transferor to do and the title in the shares would pass to the transferee. It is then for the transferee to get the formalities of the transfer completed by cancelling the promissory note given to him by the transferor for the amount paid by the transferee for the transfer of shares, handing it over to the transferor and by getting the transfer registered in the company's books. Failure on the part of the transferee to do so does not entitle him to sue on the promissory note. A I R (Vol 28) 1941 Mad 769 : 1941 M W N 919: 1941-2 M L J 571: 200 Ind Cas 615.

——Ss. 20, 39—Place of sale.

Father having licensed shop for sale of liquid at G — His son having grocer's shop at N some 10 miles from but having no license to sell liquor — One H ordering liquor at son's shop to be delivered at N — Son bringing liquor and putting it in H's car at N — Payment made to father personally at N :

Held, that there was no sale at N but at G. AIR (Vol 25) 1938 Lah 529 : 40 P L R 226 : 39 Cr L J 762 : 176 Ind Cas 648.

——Ss. 20, 22, 25—Applicability.

There was an agreement between the vendor and the vendee for the sale and purchase of scrap iron at specified rate. Vendor resided at K and the vendee at C. The vendor weighed the goods at K and sent it to C. The Railway receipt and a hundi was sent by the vendor to his banker at C with instructions that the receipt should not be handed over to vendee till the payment; the banker presented the hundi to vendee which was duly accepted for payment but later, on the arrival of the consigment at C, the vendee refused to honour the hundi and take delivery. The vendor brought a suit for the full value of the goods on the ground that the goods had passed to vendee :

Held, that the suit was not maintainable. Section 25 (2) applied as the banker was instructed not to part with the receipt until payment and the presumption arose that the vendor intended to reserve the right of disposal of the goods and the property did not pass to the vendee till the payment was made.

Held, also that it was a matter of common knowledge that goods like scrap iron decrease in weight in transit and, therefore, the vendee was not resposible for the goods unless they were weighed at C. In such cases, S. 22 applied and not S. 20. AIR (Vol 25) 1938 Sind 18 : 173 Ind Cas 535 (DB).

——S. 21.

——S. 21—"Specific goods," meaning of.

A contract to sell some liquor out of a big cask containing much large quantity, the required quantity not being seperated or bottled, would not be a contract of sale of specific goods within the meaning of S. 21. The expression 'specific goods' necessarily means goods capable of being ascertained with certainty — certum est quod certum reddi potest. A sale of some specified quantity of liquor out of a storehouse of cask would not be capable of ascertainment until it was removed or separated. The words 'specific goods' would, according to their natural interpretation, mean goods whose delivery can be demanded in specie. AIR (Vol 28) 1941 Bom 106 : 43 Bom L R 95 : 42 Cr L J 552 : 194 Ind Cas 302 (DB).

——S. 23.

——Ss. 23 and 25—When property in goods passes—Contract for purchase of oil to be despatched by rail —Railway receipt to be in name of seller (consignor) and to be endorsed in favour of buyer (consignee) on receipt of full price — Partial loss of oil in transit — Who is to bear loss — Jurisdiction in respect of suit for claim in respect of such loss.

The plaintiff at L contracted with the defendants at D for the purchase of oil. The railway receipt for the oil to be despatched by rail was to be in the sellers' (consignors') name and was to be endorsed in favour of the buyer (consignee) on receipt of the full price of the consignment. The buyer paid the full price and on obtaining the endorsement found that some tins of the consignment received at L did not contain any oil and other tins leaky. In a suit by him filed at L for the price of the quantity of oil not delivered,

Held, that the property in the goods passed to the plaintiff only on his payment of the full price and obtaining endorsement of the Railway receipt on the arrival of the goods at L and as such the defendants, the sellers should bear the loss as the property in the goods continued to remain with them till they made the endorsement of the Railway receipt.

Further, the Court at L has jurisdiction to try such a suit. 1950 A L J 145.

——Ss. 23 and 25—Goods sent by seller by railway—Railway receipt addressed to self—Property, if passes to buyer.

Where goods are sent by railway by the seller, the railway receipt being addressed to self, the property in the goods does not pass to the buyer on delivery of the goods to the railway, and the seller when he enters into the contract with the Railway Administration does not act as the buyer's agent. As the buyer is not an original party to the contract, he is not entitled to sue the railway company for the loss of goods. AIR (Vol 35) 1948 Pat 36 : 29 P L T 99.

——S. 23—Scope—Consignment of goods to "self".

Having regard to the terms of S. 23 (2), a sale would be completed by the delivery of goods to the Railway for purposes of transmitting them to the buyer, provided that the seller did not reserve a right of disposal. Thus, if the seller delivered the goods to the railway for Conveyance to "self" there would not be such an appropriation as would pass or title to the purchase. In order to complete the transaction it would be necessary to endorse the railway receipt and deliver it to the buyer. If, on the other hand, the railway receipt was made out to the buyer (himself) this would become a document of title vesting in the buyer alone the right of ownership in the goods while in transit, the mere fact that the document of title was retained in the custody of the seller, though it might give him some equitable lien over the goods would not prevent the title from passing to the buyer. (1947) 1 M L J 249 : AIR (Vol 34) 1947 Mad 455.

——S. 23—Goods, if unconditionally appropriated.

According to the contract, the seller was to send the goods by rail to the godowns of the purchasers at Cuddalore. The buyers had agreed to pay advance on obtaining railway receipt but had agreed to pay the balance on approval of the goods on inspection in their godowns. They had also reserved the right to reject the goods and demand the advance back if they were not satisfied with the weight, quality and condition of goods :

Held, that the fact that the sellers placed the goods in the charge of railway did not mean that the goods were unconditionally appropriated to the contract. The goods were still subject to the approval of the buyers in their godown. The purchase and sale was, therefore, concluded at Cuddalore. A I R (Vol 32) 1945 Mad 383: I L R (1946) Mad 127: 1945-1 M L J 414 : 58 L W 278 : 1945 M W N 343 (DB).

——S. 23—Unascertained goods, what are.

A contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor would be an act of ascertainment and appropriation. AIR (Vol 28) 1941 Bom 106 : 43 Bom L R 95 : 42 Cr L J 552 : 194 Ind Cas 302 (DB).

——S. 23—Appropriation of goods — Passing of title to vendee.

A entered into a written contract for sale of rice with B. The paddy was sent to the mill of R for milling. R who had notice that the rice milled by him were sold by A to B and were to be appropriated to the contract between A and B, withheld the delivery thereof to B on a requisition by A to the effect that the sale price had not been paid. R subsequently delivered the rice to A :

Held that the property in the rice passed to B by virtue of S. 23, after appropriation of the rice to the contract and B became the owner thereof notwithstanding the non-payment of sale price by him. AIR (Vol 27) 1940 Rang 249 : 1940 Rang L R 361 : 191 Ind Cas 532 (DB).

——S. 23 — Sale of unascertained goods — Property when passes—Seller's lien.

Prima facie on a sale of ascertained goods, the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which in this connection does not mean expressed assent, but simply that the appropriation has been made in the manner contemplated by the parties. This prima facie rule may, however, be varied by the terms of the contract, or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intended it to pass.

A Common Law lien is possessory and depends on possession, but it also pre-supposes that the property in the goods has passed. A person cannot have a lien on his own goods. A I R (Vol 25) 1938 P C 152 : 42 C W N 677 : (1938) 1 M L J 834 : 1938 MWN 487 : 4 BR 549 : 67 CLJ 299 : 40 Bom L R 799 : 32 Sind L R 502 : ILR (1938) 2 Cal 381 : 65 I A 263 : 174 Ind Cas 564.

——S. 23 — Sale of unascertained goods — Property when passes.

Where ascertained goods are sold, the property in them would not pass to the buyer unless they were unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller. A I R (Vol 25) 1938 All 272 : 1938 ALJ 227 : 1938 A W R 149 : 175 Ind Cas 552 (DB).

——S. 23 — Sale of unascertained goods — Property, when passes—Right of re-sale.

Where the purchase is of unascertained goods the property would pass only if there was appropriation by the plaintiff of goods answering the description given in the contract, and such appropriation was assented to by the defendant. If the evidence as to appropriation is vague and no evidence has been adduced as to the defendant's assent, the property in the goods should be held not to have passed to the defendant and no right of sale accrued to the plaintiff. (1935) 157 Ind Cas 963 (DB) (Lah).

——S. 23 (1) — Property in goods — When passes — Goods not conforming to description.

Where goods that are appropriated to a contract do not conform in description to the goods contracted for, the property in them do not pass to the purchaser when they are handed over to the carrier or they are taken delivery of by the purchasers from the carrier. ILR (1950) All 112.

——S. 23 (2)—Bailee, who is.

Licence under Bombay Abkari Act prohibiting accused from selling liquor outside his shop — Accused taking out liquor from cask in shop, bottling it and delivering to servants in shop for transmission to customers at their houses :

Held, that the servant of the accused could be treated as a bailee within the meaning of S. 23 (2) and delivery to such servant would be effective delivery to the buyer himself. A I R (Vol 28) 1941 Bom 106 : 43 Bom L R 95: 42 Cr L J 552: 194 Ind Cas 302 (DB).

——S. 24.

——Ss. 24, 27—Scope—Goods delivered on jangad to broker, purchaser, mercantile agent and agent—Property, if passes.

By the delivery of goods to the broker even on jangad terms, no property can pass to him under S. 24.

Goods of jewellery may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purchase it. The goods in such cases are stated to be delivered for approval i.e., jangad. Section 24 covers that situation. Goods may be handed over to a mercantile agent also jangad, meaning, to be shown for approval to his customers. Under those circumstances, if the mercantile agent effects a sale, the title of the purchaser is protected under S. 27, provided there is no want of good faith. The mercantile agent who receives goods on jangad acquires no property by reason of S. 24, because he is not a buyer. He has, therefore, no title to pass on the property by reason of S. 24. The third contingency is where the owner delivers goods to an agent (who is not a mercantile agent falling within the definition of that expression as given in the Sale of Goods Act) on terms arranged between the owner and the agent. As one of the the terms of delivery, the goods may be given, jangad, i.e., for approval by a prospective customer or to be shown for approval.

To such a case neither S. 24 nor S. 27 applies, and the extent of the authority of the agent depends on the terms of his agency, and the provisions governing the relations of principal and agent as found in the Contract Act. It is clear that in that case also on property passes from the owner to the agent under S. 24 nor is a sale by him protected under S. 27. If this authority enables him to sell the goods the sale is authorized and binding on the owner. If the authority is exceeded, the question will have to be considered in the light of Ss. 227 and 228, Contract Act. AIR (Vol 26) 1939 Bom 435 : I L R (1939) Bom 454 : 41 Bom L R 609 : 186 Ind Cas 8.

——S. 24 — The term jangad does not mean "sale or return," wherever the same is found. When the goods are entrusted jangad, it cannot be assumed that they are goods to be sold on approval, rather than goods to be shown for approval. A I R (Vol 26) 1939 Bom 435 : 41 Bom L R 609 : I L R (1939) Bom 454 : 186 Ind Cas 8.

——S. 26.

——S. 26 — Contract — Specific performance—Concluded contract — Party by fresh negotiation attempting to reopen contract but negotiation failing — He is not precluded from enforcing concluded contract

If after a contract is concluded, one of the parties starts fresh negotiations, with a view to introduce new terms, and this is done under mistake but has no effect in altering the conduct of the other party, then even if the subsequent negotiations fail the party which attempted to reopen the concluded contract can enforce it specifically. (1890) 44 Ch D 616, Dissent. AIR (Vol 36) 1949 FC 211.

——S. 27.

See also Sale of Goods Act, S. 24.

——S. 27 — Agreement to sell tea estates — On payment of purchase money by plaintiff purchaser vendor putting him in possession of estate on October 15, 1935— All tea on garden to be absolute property of plaintiff who describing himself as proprietor of estate and selling tea through defendant brokers in his name—Plaintiff's dismissed against S who looked after plaintiff's estate till beginning of January 1936, on or about January 10, 1936, wrongly dispossessing plaintiff from estate and continuing in such unlawful possession until December 23, 1936, and during that period selling tea from estate through defendant brokers with Rs. 30,876 — Defendant passing sale price less his charges Rs. 2,346 to S — Sale in plaintiff's favour completed by registered conveyance on October 8, 1937 — After October 15, 1935, property in tea leaves held was in plaintiff and was wrongly converted by defendants — Costs of plucking manufacturing and selling tea.

In pursuance of an agreement of sale of a tea estate dated October 14, 1935, the plaintiff purchaser after payment of the purchase price of Rs. 2 lacs was put in possession of the estate on October 15, 1935, from which date all tea on the garden, whether growing, plucked or manufactured or in the process of manufacture was to become the absolute property of the purchaser and to be under his sole and absolute control. Thereafter the plaintiff described himself as proprietor of the tea estate to the defendant brokers who sold tea in his name. S was managing the estate as the plaintiff's agent. In the beginning of January, 1936, the plaintiff dismissed S. The plaintiff was wrongfully dispossessed of the tea estate on or about January 10, 1936 by S who continued in such unlawful possession till December 23, 1936. During that time S plucked tea from the estate, manufactured it and consigned 120, 117lbs. of tea to the defendant brokers who sold it for Rs. 80, 876 and paid the price less their charges Rs. 2,346 to S. The plaintiff contended that the tea so sold was his property. that the defendant wrongfully converted it and claimed its value. The sale in favour of the plaintiff was completed by the vendor by a registered conveyance on October 8, 1937 :

Held, that assuming that the registered conveyance of October 8, 1937, could not operate so as to pass the ownership in the tea estate to the plaintiff retrospectively on and from October 15, 1935, under the agreement of sale dated October 14, 1935, the property in the tea leaves was in the plaintiff and was wrongfully converted by defendants.

Held, also that the defendants had previously acknowledged the plaintiff as the owner of the estate and the tea produced on it. They knew that there was a doubt as to S's title in the garden and its tea. They were grossly negligent in not making enquiries to ascertain the same and were thus partisans in S's favour and, therefore, were liable for the price of tea sold minus their commission on the sales, that is Rs. 28, 530 and were not entitled to deduct therefrom the cost of plucking, manufacturing and selling tea which was incurred by S and was thus saved to the plaintiff. A I R (Vol 28) 1941 Cal 691 : 45 C W N 286 : ILR (1941) 1 Cal 285 : 198 Ind Cas 59.

——S. 27 — Agent advancing money for goods purchased on account of principal—Conversion.

It is well established that to entitle a person to claim relief on the ground of conversion or trover, he must show, not only title but also a right to present possession thereof.

Where the agent himself advanced the purchase money in respect of the goods purchased by him on account of the principal, the property in the goods cannot be said to have passed to the principal until the amount advanced by the agent for the purchase of the goods is paid to him. No question, therefore can arise, of conversion by the agent in respect of property title to which remains vested in him. Moreover, the agent by reason of his having purchased the goods on his own responsibility, though on account of the principal, is vis-a-vis the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The principal is not, therefore, entitled to possession of the goods even if the agent, notwithstanding the non-payment of the balance of the purchase-money, had intended that the property in the goods should pass to the principal. AIR (Vol 27) 1940 Mad 489 : 1940 M W N 187 (2) : (1940) 1 M L J 465: 51 L W 644 (2) : 193 Ind Cas 356.

——Ss. 27 to 30 — Disposal of property exhibited in criminal cases.

If the person disposing of the property belongs to any of the classes mentioned in Ss. 27 to 30, Sale of Goods Act, inasmuch as he can make a valid pledge or sale provided the requirments of the provisos are fulfilled, the property should be returned, not to the owner but to the pledgee or the buyer as the case may be. But where he does not belong to any of the classes mentioned above, he is not entitled to make either a valid pledge or sale and the property must be returned to the owner. AIR (Vol 24) 1937 Rang 385 : 39 Cr L J 25 : 171 Ind Cas 897.

——S. 27—Proviso—Scope—Plea of good faith.

To absolve himself from liability for having purchased goods from person who is not the owner thereof and to avail himself of the plea of purchase in good faith, the purchaser must bring his case within the proviso to S. 27. AIR (Vol 23) 1936 Rang 383 : 164 Ind Cas 1100.

——S. 27 — Owner entrusting motor bus to agent — Agent getting registration certificate transferred in his own name — Sale to innocent third person — Owner's right against purchaser — Rule where two innocent persons suffer by fraud of third.

The defendant who owned a motor bus arranged with another person A that the latter should run the bus as his agent and left with A a letter signed by himself (the defendant) and addressed to the District Magistrate requesting that the permit in respect of the bus be transferred to A. A altered this letter without the knowledge of the defendant into one addressed to the District Superintendent of Police requesting the latter to transfer the registration certificate to A. The registration certificate was accordingly transferred and the plaintiff purchased the bus from A in the bona fide belief that A was the owner :

Held, that the defendant was not, by leaving the registration certificate with A or by any conduct of his, precluded from denying A's authority to sell the bus and the plaintiff, therefore, acquired no valid title to the bus.

Unless the real owner has enabled the third party to occasion a loss by putting him directly in a position to do so by his (the real owner's) own act, the real owner cannot be made to suffer by the acts of the third party. AIR (Vol 22) 1935 Mad 850 : 1935 M W N 932 : 42 L W 431 : 69 M L J 691 : 158 Ind Cas 535 (DB).

——S. 30.

——S. 30—Scope of.

The general principle of law is that only owner can give a good title to another of his own property and the law has always done its best to protect the rights of the legal owners. The power given by S. 30 (2), is in a sense of compromise which enables, in certain circumstances, a person who is not a legal owner, to transfer the title. AIR (Vol 27) 1940 Rang 1 : 1939 Rang L R 649 : 185 Ind Cas 757 (FB).

——S. 30—Lender paying dealer on behalf of buyer to complete purchase of motor car—Property in car passes to buyer — Lender obtaining promissory note and hire-purchase agreement from buyer — Held, transaction was collateral security and not hire purchase.

Where the plaintiff lends money to the defendant in order to enable him to complete the purchase of a car and the money is paid to the dealer and the car is delivered to the defendant, the property in the car immediately passes to the defendant even though he executes an agreement of hire-purchase in favour of the lender in addition to the pro-note executed by him in his favour. Consequently the real nature of the transaction is not one of hire-purchase but that of collateral security for the loan in addition to the promissiory note already given by the defendant to the plaintiff. AIR (Vol 22) 1935 Lah 861 : 37 P L R 293 : 160 Ind Cas 503 (DB).

——S. 30—Scope.

In the case of a hire-purchase agreement, determination of question whether buyer of goods from the person in possession would be protected under the former S. 106, Exception I, Contract Act, or under the present S. 30, Sale of Goods Act, usually depends on whether the person in possession who transferred the goods was really a purchaser or hirer. AIR (Vol 21) 1934 Nag 78 : 13 N L R 213 : 148 Ind Cas 822.

——S. 30 — Two innocent parties suffering from fraud of third party—Who should bear loss.

Where one of two innocent parties must suffer from the fraud of the third, the loss should be borne by him who has enabled the third party to commit the fraud if he has neglected some duty owing to the other or has done something which has, in fact, misled the other. Whether an unpaid vendor is estopped from disputing the rights of a subsequent purchaser in good faith or not must depend on the circumstances of each case. AIR (Vol 20) 1933 Sind 401 : 27 S L R 249 : 149 Ind Cas 914 (DB).

——S. 30 (3)—Object.

Neither S. 30 (3) nor S. 119, Contract Act, was intended to provide a right to reject part of the goods under an indivisible contract of sale. AIR (Vol 19) 1932 Cal 879 : 59 Cal 928 : 140 Ind Cas 877.

——S. 31.

——S. 31—Seller despatching goods after due time—Rejection by buyer—Refusal of seller to take goods back—Sale by buyer after reasonable time—Suit by seller for damages—Maintainability.

The plaintiff and the defendant entered into a contract for sale of sugar. The plaintiff sent the sugar to the defendant after the time fixed for performance had expired. The defendant refused to accept the sugar and wrote to plaintiff offering to dispose of the goods in any way the plaintiff desired. The plaintiff did not give any instruction. After nine months, the defendant sold the sugar and sent the proceeds to the plaintiff after making the deductions for railway freight and for ahrat expenses. The plaintiff sued for breach of contract.

Held, that as the plaintiff had failed to carry out the terms of the contract, the defendant was justified in rejecting the goods; that by disposing of the goods afterwards, the defendant did not become liable on the contract and the suit for damages for breach of contract was not maintainable. AIR (Vol 20) 1933 All 404: 1933 ALJ 1000: 144 Ind Cas 82 (2) (DB).

——S. 31—Purchaser's liability for rent.

The mere fact that the purchaser suggested certain repairs for the articles hired does not render him liable for paying rent for the period during which he had no use of the articles hired. AIR (Vol 19) 1932 Lah 384: 33 PLR 482: 137 Ind Cas 234.

——S. 32.

——S. 32— Payment of price when delivery is at option of seller.

Where the delivery of the goods is under the contract, to be at the seller's option, there must be implied an additional term to the contract that the seller shall give to the buyer sufficient notice of his intention to make delivery and a reasonable time in which to arrange for funds with which to pay for the goods. When however, the seller has failed to exercise his option to deliver the goods on or before the last day, the contract becomes a contract to sell and deliver the goods on the last day and the buyer has to be ready and willing to take delivery of the goods and pay for them on that date. No notice to the buyer of intention to deliver on the last day is necessary. AIR (Vol 27) 1940 Rang 284: 1940 Rang L R 593: 191 Ind Cas 766 (DB).

——S. 32—Contract of sale of goods—Delivery to be made after full payment—Property, when passes to buyer.

A provision in a contract of sale for postponement of delivery until payment of the entire price will not per se stay the passing of the property in the goods sold. AIR (Vol 25) 1938 Lah 30: 39 PLR 778: 175 Ind Cas 440.

——S. 32—Place of payment.

It is a common thing for vendors to discount the bills in the place of where they carry on business, Nevertheless, the place of payment is the place where the bills are presented and where they are either met or dishonoured. AIR (Vol 22) 1935 Mad 663: 68 MLJ 504: 41 L W 519: 1935 MWN 554 : 156 Ind Cas 1041 (FB).

——S. 33.

——S. 33—Sale of wood of fallen trees—Delivery of possession, what is—Refund of purchase-money.

Defendant sold the wood of two trees which had fallen down to the plaintiff. The plaintiff cut up these trees but when he attempted to remove them from the grove of the defendant, he was prevented from doing so by defendant. There was no agree-

ment between the parties as to what should amount to delivery.

Held, that there was no agreement between the parties that anything should be treated as delivery and, therefore, the second part of S. 33, would apply that the goods should have been put into the possession of the buyer. The fact that the plaintiff had cut up the fallen trees did not amount to taking possession of them because the wood still remained in the grove of defendant, the possession would have passed to the plaintiff when he would put that wood into carts and take it away. Therefore, the plaintiff did not get possession and there was no delivery. As there was no delivery, defendant failed to carry out his part of the contract and, therefore, the plaintiff was entitled to a refund of the purchase-money. AIR (Vol 23) 1936 All 880: 1936 ALJ 1270: 1936 AWR 1010: 166 Ind Cas 287.

——S. 35.

——Ss. 35, and 36—Delivery of goods—Buyer not applying for—If commits breach of contract.

Under Ss. 35 and 36 of the Sale of Goods Act, the seller is not bound to deliver goods until the buyer applies for delivery. If the buyer does not apply for delivery he is responsible for the breach of the contract. AIR (Vol 39) 1952 Nag 76 : ILR (1949) Nag 555: 1949 NLJ 337.

——S. 35—Suit for non-delivery of goods—Proof of willingness and readiness to pay price—Duty of buyer.

In a suit for damages for non-delivery of goods, it is the duty of the buyer to satisfy the Court that he was ready and willing to pay the price. A letter from him to the seller that the latter should give delivery and take full amount only shows willingness but not readiness. If the buyer fails to satisfy the Court that he was "ready and willing" to pay the money, he is responsible for the breach of the contract on account of this failure. AIR (Vol 39) 1952 Nag 76: ILR (1949) Nag 555: 1949 NLg 337.

——Ss. 35, 44, 46 and 36—Charges for care and custody of goods—Right of seller—Period for which claim could be made—Seller, if entitled to lien over goods.

Reading together Ss. 35 and 36 of the Sale of Goods Act, the buyer has to apply for delivery of the goods, apart from any express contract, at the place at which they are at the time of the sale. It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom goods can be delivered. The seller is entitled to reasonable charges for care and custody of the goods under S. 44 of the Act up to the date when a proper application for delivery of the goods is made by the buyer.

The seller is not entitled to any lien under S. 46 (1) (a) of the Act over the goods in respect of charges for care and custody recoverable under S. 44. The seller is entitled to recover them by an action against the buyer. If the seller however keeps the goods so that he may be the better able to enforce the payment in respect of the claim for the charges on account of care and custody, he cannot add to his claim any charges in respect of the further retention of the goods. AIR (Vol 38) 1951 Nag 148: ILR (1951) Nag 40: 1950 NLJ 363.

——S. 35—Duty of buyer to apply for delivery—Sale of ready goods—If relieves buyer from duty to apply.

S. 35 of the Sale of Goods Act makes it obligatory on the buyer to apply for delivery of the goods, and the seller is not bound to deliver unless the buyer applies therefor. The section makes no distinction between the sale of ready goods and the sale of forward goods, and does not render an application for delivery unnecessary in the case of ready goods. The buyer can only be relieved from his statutory obligation to apply for delivery by an express stipulation to the contrary. A I R (Vol 34) 1947 Bom 293 : I L R (1948) Bom 91: 48 Bom L R 821 (DB).

——S. 35.

——Buyer's right to delivery—Vendee, accepting delivery order—Effect.

Ordinarily and normally a party buying goods is entitled to call upon the vendor to give him physical delivery of the goods but by agreement a purchaser may take constructive delivery by accepting the delivery order. The delivery order which the purchaser takes is an effective order—an order which can ultimately be translated into actual goods. It is not correct to say that as soon as the vendor hands over the delivery order to the purchaser, he has performed the contract and discharged all his obligations under the contract and that although the delivery order did not result in any goods being delivered to the purchaser, the purchaser has no cause of action against his vendor. When the delivery order is given on a third person, in law that third person is the agent of the vendor for the purpose of giving delivery to the purchaser. Unless the purchaser had agreed to make that third person his agent and had asked him to hold the goods on his behalf, the purchaser has every cause of action against the vendor for non-delivery of the goods if the goods in fact were not delivered. AIR (Vol 31) 1944 Bom 21: 45 Bom L R 906: 211 Ind Cas 93.

——S. 35—Condition regarding delivery — Breach, when occurs.

Where term in a contract provided that the delivery should be given as and when the goods arrived at A and the goods arrived at A on December 21, 1942 and the buyers demanded delivery on December 9, 1942 but demand was not complied with.

Held, that the contract was broken on December 21, 1942 and it was the date to be taken for the assessment of damages. AIR (Vol 31) 1944 Mad 418: 1944 MWN 275: (1944) 1 MLJ 391: ILR (1945) Mad 180 (DB).

——S. 35—Purchaser's duty to inform seller regarding failure of delivery.

The proposition that a purchaser who has obtained a delivery order is, in law, bound to inform the seller of the goods which he has purchased that he has failed to obtain delivery is incorrect. AIR (Vol 27) 1940 All 405: 1940 ALJ 395: 1940 AWR 354: 190 Ind Cas 109 (DB).

——S. 35—Time for delivery.

Buyer applying for delivery—Time within which seller is bound to comply with demand depends on circumstances of contract. AIR (Vol 22) 1935 P C 67: 1935 OWN 496: 1935 MWN 390: 1 B R 440: 41 L W 775: 61 CLJ 230: 68 MLJ 635: 37 Bom L R 538: 58 Mad 670: 39 CWN 632: 62 I A 89: 154 Ind Cas 1097.

——S. 35—Contract of sale — Purchaser under no obligation to apply for delivery — Seller's duty to tender delivery.

Where, under a contract, it was not the duty of the purchasers to give notice to the sellers when they would take delivery but it was the right of the sellers to select the time at their option when they would give delivery, and the sellers arranged to give delivery but due to repairs in mill, delivery was not given fully and although the sellers were aware of this, they took no steps to arrange delivery at some other mill,

Held, that if the sellers did not, in the circumstances, elect to tender delivery of rice at some other mill or otherwise to fulfil their contract, then they could not blame the buyers for the trouble into which they had fallen. AIR (Vol 22) 1935 Rang 166: 156 Ind Cas 561 (DB).

——S. 36.

——Ss. 36, 44, 46 and 35 — Charges for care and custody of goods—Right of seller—Period for which claim could be made—Seller, if entitled to lien over goods.

Reading together Ss. 35 and 36 of the Sale of Goods Act, the buyer has to apply for delivery of the goods, apart from any express contract, at the place at which they are at the time of the sale. It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom goods can be delivered. The seller is entitled to reasonable charges for care and custody of the goods under S. 44 of the Act up to the date when a proper application for delivery of goods is made by the buyer.

The seller is not entitled to any lien under S. 46 (1) (a) of the Act over the goods in respect of charges for care and custody recoverable under S. 44. The seller entitled to recover them by an action against the buyer. If the seller however keeps the goods so that he may be the better able to enforce the payment in respect of the claim for the charges on account of care and custody, he cannot add to his claim any charges in respect of the further retention of the goods. AIR (Vol 38) 1951 Nag 148 : ILR (1951) Nag 40 : 1950 NLJ 363.

——S. 36—Place of delivery.

Where the place of delivery has not been mentioned, the place of delivery is where the vendors have their office and where they accepted the indents. AIR (Vol 30) 1943 Bom 229 : 45 Bom L R 405 : 208 Ind Cas 301.

——S. 36 (2) — Time for delivery—Contract silent—"Reasonable time"—What is—Determination—Considerations.

When a contract of sale is silent as to the time within which the contract is to be performed, the law implies a reasonable time for its performance. A reasonable time is implied under S. 36 (2) of the Sale Goods Act. "Reasonable time" must in each case depend upon the particular circumstances, the nature of the commodity, the question of transport, the times during which the contract was entered into and so on. AIR (Vol 34) 1947 Bom 293 : ILR (1948) Bom 91 : 48 Bom LR 821 (DB).

——S. 37.

——S. 37 (1) and (3)—Sale of goods of certain quality and quantity—Seller tendering short quantity or part of goods tendered utterly worthless—Breach of warranties — Rights and obligations of buyer.

Where a contract is made to sell certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, and the quantity is named with the qualification of "about," or "more or less" or words of like import, the contract applies to specific lot; and the naming of the quantity is not regarded as in the nature of a warranty but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight. In the latter case, if the seller tenders a quantity which is very short of the warranty and out of the total goods tendered half are utterly worthless, the seller is guilty of a breach of two warranties. Section 37 (1) of the Sale of Goods Act entitles the buyer in such circumstances to reject the goods, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate. Sub-section (3) of S. 37 does not apply to the case, as a mixing of an inferior quality is not a mixing of goods of different description. A breach of warranty in the matter of quantity may entitle the buyer to reject the goods outright or at any time even after receipt of some of the goods. AIR (Vol 36) 1949 Nag 178 : ILR (1948) Nag 543 : 1947 NLJ 429 (DB).

——S. 37 (1)—Mixed delivery—Rights of parties.

Where the seller delivers to the buyer goods he had contracted to sell mixed with goods of a different description, the buyer may reject the whole. But if the buyer does not reject the goods on this ground but repudiates the contract altogether, it is not open to him after the time for the delivery has expired to raise the belated plea that the goods were not according to the contract.

Whether a repudiation of one instalment is a repudiation of the whole contract and absolves the sellers from the duty to tender the remaining instalments is a matter of fact in each case.

Where the buyer repudiates an instalment and the seller, instead of treating the whole contract as repudiated, elects to keep the contract alive so far as the remaining instalments are concerned, he preserves the contract alive for benefit of the other party as well. He remains subject to all his own obligations. AIR (Vol 20) 1933 Mad 176: 1933 MWN 39 : 64 MLJ 199: 37 LW 210: 56 Mad 304 : 141 Ind Cas 632 (DB).

——S. 38.

——S. 38—Goods deliverable by instalments—Breach in connection with one instalment—Whole contract, if may be rescinded.

Where goods under a contract are deliverable by instalments the general rule certainly is that a breach by one party in connection with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But this is subject to qualification. If the breach is of such a kind or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. (1948) 52 CWN 45.

——S. 38—Instalment delivery—Anticipatory breach—Election to keep contract alive — Effect — Divisibility of contract—Question of fact.

Whether a repudiation of one instalment is a repudiation of the whole contract and absolves the sellers from the duty to tender the remaining instalments is a matter of fact in each case.

Where the buyer repudiates an instalment and the seller, instead of treating the whole contract as repudiated elects to keep it alive so far as the remaining instalments are concerned, he preserves the contract alive for benefit of the party as well. He remains subject to all his own obligations. AIR (Vol 20) 1933 Mad 176 : 1933 MWN 39 : 37 LW 210 : 56 Mad 304 : 64 MLJ 199 : 141 Ind Cas 632 (DB).

——S. 38 (2)—Applicability—Tests.

In applying sub-s. (2) of S. 38 to a particular case, the main tests to be considered are, first, the quantitative ratio which the breach bears to the contract as a whole, and secondly the degree of probability that such a breach will be repeated. AIR (Vol 30) 1943 All 370 : 1943 ALJ 411 : 1943 AWR 224 : ILR (1943) All 752 : 210 Ind Cas 55 (DB).

——S. 38 (2) — Condition to cancel whole contract—Breach of one item—Rescission of entire contract.

Where a contract for the sale of goods contains an express condition entitling one party in certain circumstances to cancel the whole contract, a breach of one item of the contract (refusing to take delivery of one instalment) would entitle the other party to treat the whole contract as cancelled and he can refuse to

carry out the remainder. AIR (Vol 30) 1943 All 370 : 1943 A L J 411 : 1943 A W R 224 : I L R (1943) All 752 : 210 Ind Cas 55 (DB).

——S. 38 (2) — Severable contract — Default in one instalment—Effect.

A default in payment for one or more instalments does not, by itself, necessarily amount to a repudiation of the whole contract by the buyer, the question in every case being one of the intention of the parties.

There was a contract between the parties whereby they agreed to give and take delivery of 1500 bags of corn in three instalments of 500 bags each. After the default of the first instalment, a suit was filed in respect of that instalment and similar action was taken when there was default in the second instalment. At the time of such suit there was also a default in respect of the third instalment. When a suit was filed in respect of the third defaulted instalment, it was contended that the cause of action for the second and the third suit was the same and the third suit was, therefore, barred by O. 2, R. 2, Civil P. C.

Held, that no such objection was taken to the second suit from which the intention of the parties could be gathered; the contract gave rise to three separate obligations and, therefore, to three separate causes of action. The suit was not, therefore, barred by O. 2, R. 2, Civil P. C. A I R (Vol 25) 1938 Rang 364 : 178 Ind Cas 538 (DB).

——S. 39.

——S. 39—Contract — Policy of insurance — Policy should be for sufficient and adequate amount.

The object of a seller having to insure the goods under a C. I. F. contract is clearly to afford a reasonable protection and indemnity to the buyer against the risk of the goods being lost at sea and whether the amount for which the goods are insured is proper or not can only be determined by considering whether the amount for which the policy is insured does or does not in fact afford a reasonable protection and indemnity to the buyer. The buyer is entitled to have his full interest in the goods insured and what the seller is bound to insure is the value the buyer has to pay under the contract and not the value of the goods at the place of shipment. A I R (Vol 33) 1946 Bom 469 : 48 Bom L R 313 : 226 Ind Cas 503.

——S. 39 — Contract—C. I. F. contract — Incidents of.

Under a C. I. F. contract, the seller can give symbolical delivery of the goods by rendering to the buyer three documents, viz., a bill of lading, an invoice, and a policy of insurance. In law the tendering of these document is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price. A I R (Vol 33) 1946 Bom 469 : 48 Bom L R 313 : 226 Ind Cas 503.

——S. 39 — Contract — C. I. F. contract—Invoice—Requisites of — To what invoice buyer is entitled, stated.

Where an invoice under a C. I. F. contract mentions and identifies the goods which the buyer has purchased; gives the price; and states what amount is due and payable by the buyer, it satisfies all the requisite conditions of an invoice.

The invoice to which the buyer is entitled is the invoice relating to the contract between him and his seller and not to an invoice relating to a different contract, viz., the contract between the seller and the firm from which the seller purchases the goods. A I R (Vol 33) 1946 Bom 469 : 48 Bom L R 313 : 226 Ind Cas 503.

——S. 39 — Contract — C. I. F. contract—Policy of insurance under—Nature of.

The policy of insurance which a seller is under an obligation to tender to the buyer a C. I. F. contract must be such a document as would enable the buyer to sue on the policy. Unless there is an express stipulation to the contrary, nothing short of an actual policy of insurance properly stamped is a good tender under a C. I. F. contract. For instance, no broker's cover note, or certificate of insurance, or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary C. I. F. contract. A I R (Vol 33) 1946 Bom 469 : 48 Bom L R 313 : 226 Ind Cas 503.

——S. 39 (1)—Delivery to carrier — Goods delivered to railway company for transmission, seller being consignee—No delivery to buyer.

No doubt there may be delivery to the buyer even though the seller retains right of disposal in the goods delivered; but the mere putting of goods on the railway wagons does not necessarily amount to delivery to the buyer. Section 39 says that the goods must be delivered to the carrier for transmission to the buyer. The section further says that such delivery to the carrier would prima facie be deemed to be delivery to the buyer; the use of the words prima facie shows that even if there be delivery to the carrier for transmission to the buyer, circumstances may exist which would prevent such delivery from amounting to delivery to the buyer. Where the consignee was not the buyer but the seller it cannot be said that the goods were being transmitted to the buyer or that the Railway had been directed to carry the goods to the buyer and the seller merely retained some right of disposal. In such a case delivery to the Railway company cannot be deemed to be delivery to the buyer. AIR (Vol 33) 1946 Cal 245 : 80 C L J 170.

——S. 39 — C. I. F. contract—Effects of—Breach—Cancellation of contract — Validity—Test—Contract partly typewritten and partly printed — Printed part in conflict with typewritten—Effect.

The tender of the goods under a C. I. F. contract is effected by the tender of the bill of lading and accompanied in case the goods have been lost in transit by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. In the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer provided, of course, that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time.

Where a contract is partly typewritten and partly printed, if the typewritten and printed portions of the contract can be read together, effect must, of course, be given to all the provisions but if the printed portion cannot be reconciled with the typewritten portion, the typewritten portion must prevail. A I R (Vol 29) 1942 Mad 139 : (1941) 2 M L J 281 : 54 L W 217 : 1941 M W N 769 : ILR (1942) Mad 33 : 201 Ind Cas 244 (DB).

——S. 39 — Sale of goods — Mate's receipt—Bills of lading—Non-payment of price — Claim by seller for damages.

On 4th May 1926 the brokers entered into three contracts with three mills respectively for the purchase of 250 bales. On the same day they sold the same quantity of 250 bales to a certain Export Company, carrying on business in Calcutta. The conditions of all the contracts were identical. Clauses 3 and 4 of the terms were "3, Payments to be made in cash in exchange for delivery order of sellers or for Railway receipts or for Dock receipt or Mates' receipts (which Dock's receipts or Mates' receipts are to be handed by a Dock or ship's officer to the sellers representative)". "4. The buyers hereby acknowledge that so long as such Railway receipts or Mates' receipts (whether in sellers' or buyers' name) are in

possession of the sellers, the lien of the sellers as unpaid vendors subsists both on such Railway receipts or Dock's or Mates' receipts and the goods they represent until payment in full." Delivery free alongside export vessel in the port of Calcutta was stipulated. The Export Company, in due course, had engaged freight from the ship owning company, the appellants. The terms of the engagement were taken as evidence by a document called a shipping order from the appellants' Calcutta branch to the ship's Officer, it was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta and that the receipt of cargo issued by the ship, that is, the Mate's receipt, must be exchanged for bill of lading. On May 4, 1926, the Export Company gave shipping instructions to the brokers, the respondents, which they passed on in the same terms to the three mills. On May 17 and 18, 1926, two of the mills sent alongside certain parcels to the two vessels which were owned by the appellants' who received the parcels in accordance with the shipping engagement between themselves and the Export Company, and issued Mate's receipts as presented to them for signature by the mills. These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms: "Please receive on board from the above mills the undernoted goods, shipping documents for which have been taken out in the name of the Export Company and had the Mate's receipt to our sircar. In three cases on the same day as the Mate's receipts were severally given and in one case on the following day, the appellants issued the respective bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the Mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the Export Company by the appellants. At these several dates, the respondents were not themselves in possession of the Mate's receipts which they obtained from the mills a few days later against payment. When they thus obtained the Mate's receipts, they tendered them to the Export Company, who defaulted in payment. Thereupon the respondents, on May 27, 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price and were entitled to retain the relative Mate's receipts, and that bills of lading must not be issued by the appellants until Mate's receipts were surrendered to them. By that time, however, the Export Company, having the bill of lading in their possession, had resold the goods to purchasers in Japan and had drawn Bills of Exchange for the price on the purchasers. These Bills of Exchange they had discounted with a bank and had endorsed to them by way of security the bills of lading. On June 12, 1926, the respondents, as they could get no satisfaction from the Export Company and as the appellants replied that they had passed bills of lading on the shipper's (that is, the Export Company's) own letter of guarantee and referred the respondents to the shippers, issued their writ, claiming payment of the price from the Export Company and damages from the appellants. In due course the vessels proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. The respondent brokers claimed damages as in trespass or conversion. It was said that the direction in the mill's document that the receipts were to be given to the mill's sircars amounted to sufficient notice, especially when coupled with the course of business in the trade according to which payment is to be made against the Mate's receipts, which thus constitute a sort of security:

Held, (i) that the sale being free alongside, the property prima facie passed when the goods were appropriated by delivery alongside in implementation of the contract. Clause 4 imported that notwithstanding cl. 3, the property had passed when the goods were delivered alongside, that is, placed in possession of the shipowners. The result was that the sellers had parted with both property and possession. "Lien must, therefore, be used in a different sense, as meaning either an equitable lien or a hypothecation or the Common Law right or licence to resume possession. The result was that the sellers had, after delivery alongside, nothing left except the equitable charge which is only enforceable by equitable remedies against the buyers or person taking with notice of the equity, or a licence to resume possession which is personal or contractual as between the sellers and buyers. In neither case was there left to the sellers a Common Law or possessory lien, which, if it existed, would have been a right in the nature of property and would have supported an action in conversion or trespass;

(ii) that as the receipt itself acknowledged shipment by the Export Company, the mere direction to give the receipt to the mills sircar was too obscure and ambiguous to countervail the clear recognition of property in the Export Company;

(iii) that under all the circumstances of the case not only was there no timeous express notice to the appellants, but there was no ground for imputing implied notice. The case must be regarded as one in which shipowners who, for their own protection, stipulated with the shippers that bills of lading were to be given in exchange for Mate's receipts waived that provision, and without notice, issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if, under such circumstances, they were held responsible;

(iv) that the equitable lien or personal license which was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach of contract against the Export Company, or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants. AIR (Vol 18) 1931 Cal 373 (S B), Reversed. AIR (Vol 25) 1938 P C 152 : 42 C W N 677 : 1938-1 M L J 834: 1938 M W N 487 : 4 B R 549 : 67 C L J 299: 40 Bom L R 799 : 32 S L R 502 : I L R (1938) 2 Cal 381 : 65 I A 263 : 174 Ind Cas 564.

—— Ss. 39, 20—Place of sale.

The petitioner had a shop at G duly licensed for the sale of liquor. His son R had an ordinary grocer's shop with no license to sell liquor in N which was some 12 miles from G. The Excise Authorities of N having been informed that the son was selling liquor without license got hold of a gentleman, named H and induced him to order from the son's shop a bottle of whisky and a bottle of gin to be delivered to him at N. Accordingly, the order was taken and when H went to get the whisky and gin, it was placed in his car and he paid for it. The petitioner was present and the money in payment of the liquor was actually given to him:

Held, that the son was merely acting as the agent of H for the purchase of whisky and gin from the petitioner at G where the petitioner was perfectly entitled in law to sell it. The mere fact that the delivery by the agent to his principal took place in N and that the money was paid to the vendor in N did not mean that the sale took place there. The fact that delivery was made in N and that payment was made to the petitioner in N did not alter the case. AIR (Vol 25) 1938 Lah 529 : 40 P L R 226 : 39 Cr L J 762 : 176 Ind Cas 648.

——S. 39 (2)—Delivery to carrier when delivery to buyer — Seller's right to price.

Having regard to sub-s. (2) of S. 39, it is clear that the seller cannot claim a decree against the buyer unless he can establish that he has placed the consignee of the goods in a position to claim delivery thereof from the carrier. A delivery to the carrier would be tantamount to a delivery to the purchaser only if this is done. The mere delivery to a carrier without taking a receipt from him and without intimating his name to the consignee or without sending the receipt taken from the carrier to the consignee would not entitle the seller to claim the price of the goods from the purchaser. It is only on proof of these two matters in addition to the delivery of the goods to the carrier that the seller can claim a decree against the buyer. This, of course, would not be the case if the carrier be the nominee of the purchaser in which case the mere proof of delivery of the goods to such a carrier would entitle the seller to claim the price of the goods from the purchaser. AIR (Vol 24) 1937 Lah 785 : 40 P L R 789 : 174 Ind Cas 932.

——S. 39—C. I. F. contract—Incidents of — Buyer, when guilty of breach — Appropriation, when complete—Property in goods, when passes.

A contract of C. I. F. kind by a seller is performed by tendering to the buyer documents, enabling him to obtain delivery of the goods. If the contract for sale provides for payment being made by a draft upon the buyer, the buyer is bound to accept the draft upon tender of the documents. The delivery he is entitled to against payment is not of the goods contracted for but of their symbol represented by the bill of lading and other documents. Upon payment, he can, upon arrival of the ship, demand the goods themselves and should these be not forthcoming or when forthcoming, not be of the nature contracted for all his remedies at law are open to him. If, therefore, a buyer fails to pay the draft and take delivery, he is clearly guilty of a breach of the contract.

When the documents are to be delivered payment of the draft, 'appropriation' is not complete until payment of the draft.

In C. I. F. contracts, the property in the goods does not pass to the buyer on the mere acceptance of the draft but passes only on the payment of the draft. There is no right of 're-sale' under the law unless the property has passed to the buyer. AIR (Vol 24) 1937 Lah 566 : 174 Ind Cas 945.

——S. 39—Applicability.

Sale of goods—Order obtained at T — Goods despatched from D — Suit from price :

Held, that the provisions of S. 39 were applicable. AIR (Vol 21) 1934 Lah 44 : 144 Ind Cas 828.

——S. 39—C. I. F. contract—Agreement that sellers may tender goods —Validity—Tender of goods alone —Breach of contract by buyer.

When payment is to be made against the tender of documents and not against the tender of goods and when none of the relevant documents are tendered at the time of the payment but only the goods are tendered, the purchaser commits no breach of the contract in not taking up the goods.

But where the evidence showed that the parties had agreed that the respondent firm should release the goods at the Indian port and bring them up to Delhi and that the goods themselves should be tendered in Delhi where payment was to be demanded, and the sellers had duly tendered the goods:

Held, that the contracts in question were not normal C. I. F. contracts and that the procedure carried out by the respondents was in conformity with the settled practice of the parties and the tender of the goods was valid and lawful.

A clause in an indent in a c. i. f. contract that the sellers could, in case of need, substitute for the draft and relevant shipping documents their own invoice is lawful and in such cases, invoice could be legally tendered. AIR (Vol 20) 1933 Lah 453 : 34 P L R 266: 142 Ind Cas 413 (DB).

——S. 39—C. I. F. contract — Buyer's right to insist on delivery — Tender of shipping documents—Whether sufficient — Buyer's failure to accept draft — Damages, computation of — Jurisdiction — Place where goods are to be delivered.

The buyer in a c.i.f. contract cannot insist on actual delivery of goods being called upon for payment and mere tender of shipping documents is sufficient performance on the part of the seller to entitle him to claim payment, though the tender of shipping documents does not exonerate a seller for any other duty under such a contract. The seller is under the duty of delivering goods of the stipulated quality at the port mentioned in the contract.

Where, in the case of a c. i. f. contract the buyers fail to accept the drafts and cannot be made to pay for the goods purchased, the sellers are only entitled to the difference between the contract price and the price of the goods on the date of the breach. The date of performance in a c. i. f. contract is the date on which the documents ought to have been tendered.

In the case of a c. i. f. contract, the place where the documents are to be tendered or symbolical possession of the goods sold is to be given, or price for the goods is to be paid is not necessarily the only place which would decide the question of jurisdiction. The place where the goods are to be delivered is equally material in deciding the question of jurisdiction. AIR (Vol 19) 1932 Sind 9 : 26 S L R 167 : 139 Ind Cas 114.

——S. 39—Cancellation—Assignment of a mortgage bond—Validity.

A notice cancelling an assignment of a mortgage bond should, in order to be effective, at least signify an intention to bring a suit to cancel it. AIR (Vol 1) 1914 Mad 624 : 1 L W 419 : 15 M L T 331 : 27 M L J 134 : 23 Ind Cas 607 (DB).

———S. 42.

——S. 42—Mere act of retention of goods for four days—If constitutes acceptance.

It is manifest from S. 42 of the Sale of Goods Act that the mere act of retention of goods is not enough to constitute acceptance unless such retention is continued for a reasonable time without the fact of rejection being communicated to the seller. Hence where only 4 days had elapsed between the receipt of the goods and the filing of the suit for the amount paid and damages, it cannot be said that there has been an acceptance of the goods. ILR (1950) All 112.

——S. 42—Rejection of goods accepted without reservation after lapse of reasonable time is no rejection — Payment made for goods received and goods sent for being mended are acts inconsistent with the ownership of the seller within the meaning of S. 42.

A agreed to supply B 10,000 feet of fire hose pipe of certain quality. A supplied 7986 feet hose pipe in instalments between 28th April 1942 and 8th May 1942. Each consignment of the pipe was accompanied with an intimation from A to reject the pipes within three days if they were not found to be of the quality agreed upon. The payment for the goods supplied was made by B in full by 15th May 1942. A was first intimated of the defective quality of goods on 7th July 1942. Further B had sent the hoses for rubberization to C :

Held, that rejection of goods was not made within a reasonable time, that the acts of B of sending the hoses for rubberization to C and of making a payment for hoses received were inconsistent with the

ownership of A and that B must, therefore, be deemed to have accepted the goods, within the meaning of S. 42, Sale of Goods Act. AIR (Vol 33) 1946 Mad 69 : 1945-2 M L J 418 : 1945 M W N 677 : 58 M L W 588 : I L R (1946) Mad 548 (DB).

——S. 42—Acceptance—Re-sale by purchaser.

Where a purchaser who has an opportunity to examine the goods does not do so but re-sells them, he loses his right to refund of the price if the goods are subsequently discovered to be defective. AIR (Vol 19) 1932 Lah 52 : 32 P L R 734 : 135 Ind Cas 498 (DB).

——S. 44.

——Ss. 44, 46, 35 and 36 — Charges for care and custody of goods—Right of seller—Period for which claim could be made—Seller, if entitled to lien over goods.

Reading together Ss. 35 and 36 of the Sale of Goods Act, the buyer has to apply for delivery of the goods, apart from any express contract, at the place at which they are at the time of the sale. It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom goods can be delivered. The seller is entitled to reasonable charges for care and custody of the goods under S. 44 of the Act up to the date when a proper application for delivery of the goods is made by the buyer.

The seller is not entitled to any lien under S. 46 (1) (a) of the Act over the goods in respect of charges for care and custody recoverable under S. 44. The seller is entitled to recover them by an action against the buyer. If the seller however keeps the goods so that he may be the better able to enforce the payment in respect of the claim for the charges on account of care and custody, he cannot add to his claim any charges in respect of the further retention of the goods. AIR (Vol 38) 1951 Nag 148 : ILR (1951) Nag 40 : 1950 N L J 363.

——S. 45.

——Ss. 45, 46, 54 — Commission agent's right of re-sale.

Under the Sale of Goods Act, there is no question about it that the commission agent is entitled to the remedy given to an unpaid seller in S. 45 and in S. 46 and an unpaid seller has a right of re-sale as limited by the Act. Under S. 54, the unpaid seller can re-sell after giving due notice. A I R (Vol 23) 1936 Oudh 308 : 1936 O W N 528 : 12 Luck 247 : 162 Ind Cas 745 (DB).

——S. 46.

——Ss. 46, 44, 35 and 36 — Charges for care and custody of goods—Right of seller—Period for which claim could be made—Seller, if entitled to lien over goods.

Reading together Ss. 35 and 36 of the Sale of Goods Act, the buyer has to apply for delivery of the goods, apart from any express contract, at the place at which they are at the time of the sale. It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom goods can be delivered. The seller is entitled to reasonable charges for care and custody of the goods under S. 44 of the Act up to the date when a proper application for delivery of the goods is made by the buyer.

The seller is not entitled to any lien under S. 46 (1) (a) of the Act over the goods in respect of charges for care and custody recoverable under S. 44. The seller is entitle to recover them by an action against the buyer. If the seller however keeps the goods so that he may be the better able to enforce the payment in respect of the claim for the charges on account of care and custody, he cannot add to his claim any charges in respect of the further retention of the goods. AIR (Vol 38) 1951 Nag 148 : I L R (1951) Nag 40 : 1950 N L J 363.

——Ss. 46 and 54 — Applicability — Seller parting with goods before payment — Effect — Right to re-sell—Re-sale—Liability to buyer.

Sections 46 and 54 of the Sale of Goods Act do not apply to and do not contemplate the case where the buyer has already taken delivery of the goods bought by him. These sections contemplate that the seller (unpaid) has not parted with possession of the goods sold, and while he is in possession he has the right of re-sale. When possession is taken by the purchaser such possession is not transferred to the vendor by the buyer subsequently leaving the goods at the seller's door. In such cases the seller has neither the right (except at the request of the buyer) nor the duty to re-sell the goods. It he disposes of the goods, he is liable on the footing of conversion. AIR (Vol 36) 1949 Bom 334 : 51 Bom L R 480.

——S. 46—Defendants buying with their own money on behalf of plaintiff — Notice demanding balance of purchase-money — Right to re-sale — Implied consent.

The plaintiff sent an order to the defendant's firm to fill three Kothas of wheat containing a thousand maunds each. The order was dated 12th May 1930. Rs. 1200 were remitted by way of advance or earnest money. The defendants purchased wheat sufficient for filling two kotha and submitted accounts to the plaintiff. As the price of wheat was falling, they gave three notices to the plaintiff in the month of July 1930 demanding the balance of the purchase-money and stating that if the balance were not sent, they would sell the goods. The plaintiff absolutely ignored these three notices and gave no further instructions :

Held, that the defendants had implied authority to sell at the market rate; the silence of the plaintiff may be treated as giving implied consent. A I R (Vol 23) 1936 Oudh 308 : 1936 O W N 528 : 12 Luck 247 : 162 Ind Cas 745 (DB).

——S. 46—Re-sale—Measure of damages.

Purchaser's failure to take delivery — Re-sale — Damages in such cases are to be calculated on the differenee between the contract rate and the rate prevailing in the market and the date of breach of contract. (1937) 39 P L R 945.

——Ss. 46, 51—Stoppage in transit, right of.

Section 46 must be read with S. 51 and if it is proved as a matter of fact that transit is at an end and the goods are at home, then the right of stoppage of the unpaid seller has gone. AIR (Vol 23) 1936 Sind 200 : 30 S L R 154 : 165 Ind Cas 559 (2) (DB).

——S. 46 — Plaintiff investing money — Loss, recovery of — Re-sale, right of — Proof of passing of property to defendant should be given.

In a suit for recovery of a sum of money being the amount of loss sustained by the re-sale of cotton which the defendant had purchased through the plaintiff, even though when the plaintiff has invested his own money in the transaction he is entitled to recover the loss in the same way as if he had been dealing with the defendant as his principal, yet it is necessary to show that the property in the goods had passed to the defendant so as to give a right to the plaintiff to re-sell the goods. (1935) 157 Ind Cas 963 (DB) (Lah.).

——S. 46—Return of hired article—Acquiescence of owner — Contract, if rescinded.

If an owner acquiesces in the return of the article hired under a hire-purchase agreement, the reception of the article by him and his acquiescence amounts to rescission of the contract. AIR (Vol 19) 1932 Lah 384 : 33 P L R 482 : 137 Ind Cas 234.

——Ss. 46 (2) and 56—Contract for sale of unascertained goods by description — Breach by buyer — Measure of damages—Crucial date—Date of breach or of re-sale.

Plaintiff entered into a contract with the defendant for the sale of 31 bales of a special kind of yarn which then formed part of a larger stock lying in the Mills godown, and delivery was to be made a month hence. The defendant failed to take delivery on the due date and the plaintiff subsequently resold the goods at a loss and sued the defendant for damages. The goods were never ascertained either on the date of the contract or at any time up to the date of breach which occurred when the defendant failed to take delivery on the due date. They were not ascertained till after the re-sale by the plaintiff.

Held, that under Ss. 18 and 23 of the Sale of Goods Act the property in the goods did not pass to the defendant as they had not been appropriated and set apart and so remained unascertained goods of a particular description under S. 46 (2) read with S. 56 of the Act, the plaintiff was entitled to sue the defendant for damages for non-acceptance of goods and the loss to be ascertained was not the loss at the date of the re-sale but the loss at the date of the breach, (i. e.) the date on which delivery was to have been taken. AIR (Vol 36) .1949 Nag 199 : ILR (1948) Nag 867 : 1948 N L J 561 (DB).

——S. 47.

——S. 47—Lien for storing charges.

The vendor and purchaser can make it a term of the contract that the vendor will have a lien on the chattel for storing charges. AIR (Vol 30) 1943 Nag 141 : 1943 N L J 86 : I L R (1943) Nag 272 : 207 Ind Cas 145.

——S. 49.

——S. 49 — Termination of lien — Goods sold and delivered — Cost of repairs not paid by vendee — Vendor taking goods for further repairs — Vendor, held had no lien on goods for cost of original repairs. AIR (Vol 30) 1943 Nag 249 : 1943 N L J 397 : I L R (1944) Nag 37 : 209 Ind Cas 356.

——S. 50.

——S. 50—Stoppage in transit — Vendee insolvent—Railway receipt made out in name of vendee both as consignor and consignee—Right of stoppage.

The right of stoppage in transit is an equitable right which arises wholly from the insolvency of the buyer and is based upon the plain reason of justice and equity that one man's goods shall not be applied to the payment of another. The right continues so long as the goods are in the possession of a carrier or other bailee for transmission in his capacity as such to the buyer and are made deliverable to him and it is immaterial whether the document obtained from the carrier or other bailee for transmission of goods is made out in the name of the buyer both as consignor and as consignee of the goods or not, provided, of course, the goods are delivered for transmission by the vendor and not by the buyer. A I R (Vol 23) 1936 Sind 106 : 30 SLR 148 : 163 Ind Cas 875.

——S. 50—Transit, when ceases.

Where the first consignment of the goods purchased by the insolvent vendee had actually been unloaded in the godown of the vendee without payment of freight before the countermanding order was given by the vendor, the right of the freight is waived and the consignment ceases to be in transit and the vendor has no right over it. AIR (Vol 23) 1936 Sind 106 : 30 SLR 148 : 163 Ind Cas 875.

——S. 50—Non-payment of frieght—Presumption.

Mere non-payment of frieght although it sometimes raises a presumption that the transit is not at an end, is not sufficient and each case must depend on its own merits. A I R (Vol 23) 1936 Sind 106 : 30 SLR 148 : 163 Ind Cas 875.

——S. 53.

——S. 53 — Unpaid seller's right of lien — Effect of delivery chit.

The delivery chit did not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller, and irrespective of whether the original seller had received the purchase price of the goods, he is entitled to refuse delivery to the holder in the exercise of his right of lien as unpaid vendors. The delivery chit, therefore, does not fall within the purview of S. 53 (1). A I R (Vol 28) 1941 Sind 78 : I L R (1941) Kar 89 : 195 Ind Cas 137 (DB).

——S. 54.

——S. 54—Applicability—Unpaid seller parting with possession—Right of to re-sell — Possession if transferred to him by buyer leaving goods at seller's door —Liability of seller selling same.

Sections 46 & 54 do not apply to and do not contemplete the case where the buyer has already taken delivery of the goods bought by him. These sections contemplated that the unpaid seller has not parted with possession of the goods sold and while he is in possession he has a right of re-sale. When possession is taken by the purchaser, such possession is not transferred to the vendor by the buyer subsequently leaving the goods at the seller's door. In such cases the seller has neither the right (except at the request of the buyer) nor the duty to re-sell the goods. If he disposes of the goods he is liable on the footing of conversion. AIR (Vol 36) 1949 Bom 334 : 51 Bom L R 480.

——S. 54—Right of unpaid seller to resell.

Under S. 54, the unpaid seller can re-sell after giving due notice. A I R (Vol 23) 1936 Oudh 308 : 1936 OWN 528 : 12 Luck 247 : 162 Ind Cas 745 (DB).

——S. 54—Re-sale—Commission.

Where an unpaid vendor seller sells the goods in exercise of his right of re-sale, it is not open to him to claim a resale commission in respect of the goods sold. The fact that property had passed to the buyer does not make any difference. A I R (Vol 18) 1931 Sind 26 : 25 SLR 271 : 129 Ind Cas 912.

——S. 54 (4)—Contract containing arbitration clause rescinded on seller exercising right of resale — Arbitration clause is not wiped out and reference to arbitration can be made.

Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence reference to arbitration can be made in pursuance of the arbitration clause. AIR (Vol 28) 1941 Lah 427 : I L R (1942) Lah 788 : 198 Ind Cas 17 and 45 P L R 287 : A I R (Vol 30) 1943 Lah 295 : 212 Ind Cas 411, Overruled. A I R (Vol 33) 1946 Lah 116 : 48 P L R 116 : ILR (1946) Lah 672 : 227 Ind Cas 546 (FB).

——S. 54 (4) — Rescission does not completely annul contract — Contract is still kept alive for providing means for claiming damages.

Harries C. J. — The term "rescission" as used in S. 54 (4) does not mean complete and total annulment of the contract and by such rescission the parties are not placed in the same position as if they had never entered into contract. As sub-s. (4) reserved to the seller the right to claim damages in spite of rescission the contract must be regarded as existing at least for the purpose of claiming such damages. Consequently it must be regarded as existing for providing the means for claiming such damages.

(Distinction between frustration and rescission pointed). AIR (Vol 33) 1946 Lah 116 : 48 P L R 116 : ILR (1946) Lah 672 : 227 Ind Cas 546 (FB).

——Ss. 54 (4) and 60—Rescission of contracts under, distinction between (Per Harries C. J.)

There is no real distinction between rescission of contract under S. 60 and that under S. 54 (4). Under S. 60, one party may accept the other's repudiation and thereby relieve himself from all further obligations under the contract. In other words, he can regard the contract as rescinded and he, by his option, rescinds the contract. Under S. 54, sub-s. (4), the seller is not bound to re-sell when power is given to him to re-sale in the contract. But if he elects to re-sell. he thereby rescinds the contract or treats it as resinded. The rescission is as much at the option of the party not in default under S. 54 sub-s. (4), as it is under S. 60. In both the cases it is by the act of the party not in default that the contract is rescinded. Once the party who is not in default has elected to pursue a certain course, he puts an end to the contract and it is rescinded. Both are cases of rescission without prejudice to a right to claim damages. In other words, both are cases of rescission absolving the parties from all future obligations, but in each case the contract is kept alive for the purposes of assessing damages for breach. A I R (Vol 33) 1946 Lah 116 : 48 PLR 116 (FB).

——S. 54 (4)—Nature of right to resell—Revision.

Contention that right of re-sale was exercised under S. 54 (2) and not under S. 54 (4), as the seller had a lien under S. 47 cannot be allowed to be raised in revision for the first time as it would spring a surprise on the other party. AIR (Vol 30) 1943 Lah 295: 45 PLR 287 : 212 Ind Cas 411.

——S. 55

——S. 55—Mandatory injunction—Right to relief—Discretion of Court.

Injunction is a discretionary relief to which the plaintiff is not entitled as of right in every case. Where the order of the Court is likely to be rendered nugatory, it would be a fit case in which the mandatory relief asked for should not be granted. AIR (Vol 37) 1950 All 505.

——S. 55 — Forfeiture clause respecting earnest money—Legality.

Since earnest money is part of the sale price, it is forfeited when the transaction falls through. Hence a forfeiture clause in respect of earnest money on breach of the contract by vendee is not repugnant to the general principles of law governing contracts of sale. AIR (Vol 31) 1944 Nag 73 : 1943 N L J 490 : ILR (1943) Nag 740 : 218 Ind Cas 161 (DB).

——S. 55—Contract of sale embodied in compromise decree—Failure of buyer to complete payment—Part payment by buyer—Forfeiture.

Where a compromise decree embodying a contract of sale directs the purchaser to pay the price by instalments and does not provide for forfeiture of any part payment made, on the failure of the purchaser to complete payment, so far as the part payments made are concerned, the same codsiderations will apply as would apply to an ordinary contract of sale on the terms of the compromise. AIR (Vol 29) 1942 Sind 37 : ILR (1941) Kar 495 : 199 Ind Cas 438 (DB).

——S. 55—Applicability and scope.

Plaintiff obtained a decree in execution of which, by a warrant of attachment, the right, title and interest of the judgment-debtor in two immovable properties were attached. The judgment-debtor having failed to satisfy the decree, the Sheriff was directed to sell by public auction the right, title and interest of the judgment-debtor in those properties. Notice was issued to claimants inviting claims. As a result of the notice, the defendant filed an affidavit of claim in which he claimed to be a secured creditor, and also claimed priority over the plaintiff in respect of a mortgage executed by the judgment-debtor in his favour. The plaintiff disputed the defendant's claim to priority. During the investigation of the claim the defendant came to a settlement with the plaintiff, the terms of which were recorded in writing signed by the respective attorneys of the plaintiff and the defendant. The agreement provided (1) that the defendant was to pay certain sum to the plaintiff within four weeks in full settlement of his claim (2) that on such payment the plaintiff was to execute an assignment of the judgment debt with all the benefits of the decree within four weeks and the defendant was to be at liberty to raise the attachment at his cost. After the execution of the agreement but before the expiry of four weeks, the judgment-debtor was adjudged insolvent. The defendant thereafter refused to complete the purchase and hence the plaintiff instituted a suit to recover the agreed amount as price of the decree bargained and sold and in the alternative the same amount as damages for breach of contract :

Held, that the parties intended to enter into an oral agreement for sale of the decree, credit being given to the defendant at his option for four weeks, and the plaintiff undertaking to give to the defendant an assignment of the judgment-debt in writing upon payment within four weeks. The agreement, therefore, was an agreement of sale out and out and the suit fell within S. 55 (1), and that the plaintiff was entitled to maintain an action for the price.

Held, further that even if it be assumed that the agreement was a mere agreement to sell, the circumstances showed that the defendant wished to buy the plaintiff off and that the intention of the parties was that the defendant was to take the decree as it was with the right to enforce it as it was. Neither of the parties had in contemplation the possibility that the judgment-debtor might subsequently to the date of the consent terms become insolvent, and those consent terms were certainly not subject to any implied condition that the debtor should remain solvent. In the circumstances of the case, the plaintiff was entitled to maintain the claim under S. 55 (2). AIR (Vol 26) 1939 Bom 84 : 41 Bom L R 33 : 180 Ind Cas 858 (2).

——S. 55—Date for payment fixed—Condition authorising re-sale on failure to pay—Default—Suit to recover price.

The plaintiff firm sold by a deed a kotha of barley to the defendant firm. The price plus weighing and other charges was to be paid on certain date but the buyer had the option of paying before that date. One of the conditions of the contract was that the kotha was to be kept locked by the seller until the price was paid and if the price was not paid as contracted, the seller was to be at liberty to re-sell the barley after giving a week's notice to the buyer. The defendants had not paid the full price on the contract date and the plaintiffs sued them for the balance of the price :

Held, that the intention of the parties was that property should pass as a matter of fact. The contract did not reserve to the seller the right to sell the goods pending the fulfilment of a condition precedent. The buyer could insist on delivery at any time by paying the price. In any case the seller had a right to sue for the price under S. 55 (2). AIR (Vol 25) 1938 Lah 30 : 39 P L R 778 : 175 Ind Cas 440.

——S. 55—Scope.

Unpaid vendor has a right under S. 107, Contract Act to re-sell or under S. 55, Sale of Goods Act, to sue the purchaser for price of goods. AIR (Vol 22) 1935 Nag 66 : 31 N L R 159 : 156 Ind Cas 156.

——S. 56

——Ss. 56, 57 — Breach of contract'— Measure of damages.

In a suit for damages by vendor or purchaser on a breach of contract the criterion of damages is to be the market price at the date of the breach. Where the option as regards time lies with the purchaser and the goods are ready for delivery, the vendor's damages should be based primarily on the market price prevailing at the date when the contract was repudiated. Where the contract is kept alive by the other party and the repudiation is not acted on, it is the agreed date of delivery of the goods according to the contract which will govern the measure of damages, AIR (Vol 30) 1943 Nag 210 : 1943 N L J 125 : ILR (1943) Nag 772 : 207 Ind Cas 167.

——S. 56—Vendee paying earnest money but committing default — Earnest money, forfeiture of—Vendee's right to recover balance of purchase money—Vendor's right to set off damages.

Even in respect of sale of goods, it is customary in India to receive sums of money by way of deposit or earnest and such sums are forfeited when default is committed by the vendee.

Where a contract for sale of goods has failed through default of the vendee, he is entitled to recover the balance of the purchaser-money paid by him (excluding the earnest money) and the vendors can only resist the claim by seeking to set off against the said sum any damages which they might have incurred by reason of the vendee's non-performance of the contract. But before they substantiate their claim, they should prove their readiness and willingness to perform their part of the contract and that they were in a position to perform the contract on the date fixed for its performance. AIR (Vol 28) 1941 Mad 108 : :52 L W 251 : 1940 M W N 756 : 193 Ind Cas 751.

——S. 56—Breach of contract to purchase shares—Measure of damages.

The defendant offered to purchase and the plaintiffs agreed to sell 200 shares in certain company on March 3, 1937. As a result of the refusal of the defendant to pay for the shares and to take delivery thereof, the plaintiffs notified to the defendant by registered notice dated June 29, 1937, that in the event of the defendant failing to take delivery of the shares within a week, the same would be sold thereafter at his risk and account. The plaintiffs sued for the difference plus interest and some other charges. On the date of the notice the market had fallen considerably. The shares were, however, not re-sold until September 6, 1937, due to the failure of the plaintiffs to give instructions to their brokers to sell the shares. No reasons were given as to why the plaintiffs waited so long :

Held, that in order to succeed, the plaintiffs had to show the market price at the date of the breach of sale or at the date of sale effected as soon as reasonably possible after the breach and the presumption was that they were holding on to the shares in the hope of a rise. In such circumstances, the speculation was the speculation of the plaintiffs and not of the defendant. AIR (Vol 26) 1939 Lah 260 : 41 P L R 797 : 184 Ind Cas 43.

——S. 56 — Assessment of damages — Credit to be given for earnest money.

Where the vendor sues for damages for breach of contract, he must give the defendant credit for any earnest money paid by him in assessing the amount of damages suffered by reason of the defendant's breach. AIR (Vol 23) 1936 All 566 : 1936 AWR 697 : 1936 A L J 937 : 164 Ind Cas 317.

——S. 56—Agreement for sale of property—Repudiation by purchaser—Purchaser, when entitled to recover purchase money.

A person who had repudiated a contract for sale of land without justifiable reason cannot sue to recover the purchase-money from the vendor who objects to the repudiation and is willing to perform the contract. He can recover only if the vendor had also treated the contract as at an end or a reasonable time has elapsed beyond which it is not right for the vendor to sit down and do nothing, either indicating of his intention to treat the contract as still in existence or to treat it as at an end or to sue for specific performance. AIR (Vol 22) 1935 Mad 903 : 1935 M W N 1081 : 69 M L J 536 : 42 L W 677 : 158 Ind Cas 827.

——S. 56 — Measure of damages — Ascertainment.

The plaintiff had made the highest bid for a pawn shop on March 1, 1933, and it was knocked down to him. The conditions of the sale were that the purchaser was to pay one-fifth of the bid immediately after the fall of the hammer, and that the sale was subject to the confirmation of the Municipality. He failed to pay one-fifth of the purchase price for this pawn shop and, therefore, the Municipality could not or did not confirm the sale, and the pawn shop in question was put up again on March 28. It was put up for sale for the period of one year, which was the period of the original sale, and as the highest bid was only Rs. 6,000 it was again put up for sale, apparently on the same day for a period of three years and then fetched Rs. 36,000 or Rs. 12000 for each of the year. On this the Municipality claimed that they had suffered a loss for the year in question of the difference between Rs. 13,600 and Rs. 12,000. The plaintiff paid the difference under protest. In his suit claiming refund.

Held, that the Municipality, by their action in reselling the pawn shop license for a period of three years instead of one year, prevented any measure of the damages for the breach of the contract being ascertained at all and the plaintiff was entitled to the refund claimed. A I R (Vol 22) 1935 Rang 143 : 156 Ind Cas 726.

——Ss. 56, 55 and 58 — Motor car — Seller seizing car — Right to sue on cheque given by hirer.

The respondent purchased from the appellant a second-hand car for Rs. 2,100 on what is ordinarily understood to be a hire-purchase system. Rs. 1,000 was to be paid in advance and the remaining Rs. 1,100 was to be paid by instalments spread over 8 months and on the payment of the full amount, the property in the car was to pass to the hirer. The car was delivered to the respondent on payment of Rs. 50 in cash and Rs. 950 by means of a cheque. Within 3 days, the respondent found out that the car had defects and countermanded payment of the cheque. The appellant sued for Rs. 950 on the basis of the cheque.

Held, that the conduct of the appellant in seizing the car amounted to a cancellation of the agreement and the appellant was not entitled to claim anything.

Held, further as there was a total failure of consideration a suit on the cheque was also not maintainable. A I R (Vol 20) 1933 Lah 470 : 144 Ind Cas 484.

——S. 57.

——S. 57—Contract Act S. 73—Measure of damages — Rights of purchaser in case of non-delivery.

Where according to the terms of the contract, on failure of delivery of goods by vendor within stipulated time, the purchaser was empowered to purchase those goods at market rates and recover the difference from the vendor, if is assumed that the goods would be worth to him, if he had them, what they would fetch in the open market, and that if he could get others in their stead, he could obtain them at that rate. If the purchaser sells them at a price greatly in advance of the then market value that presumption is rebutted and the real value of goods to him is proved by the very fact of this sale to be more than market value and the loss sustained must be measured by that price, unless he is to be permitted to make profit by the breach of contract, he compensated for

a loss he never suffered. A I R (Vol 34) 1947 Sind 22 : 225 Ind Cas 145.

——S. 57 — Measure of damages.

The measure of damages in case of a breach of a contract for sale is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the price for delivery in the contract. A I R (Vol 31) 1944 Nag 279 : 1944 N L J 283 : I L R (1944) Nag 749.

——S. 57 — Suit for purchase price paid under abortive sale — Liability, when arises.

A suit by a purchaser for recovery of the purchase money paid under an aborative sale is one for money had and received to his account and when there is no consideration and the sale fails ab initio, the liability to refund the purchase money arises when it is received by the vendor. A I R (Vol 27) 1940 Mad 794 : 1940-2 M L J 273 : 1940 M W N 884 : 52 L W 289 : I L R (1940) Mad 864 : 194 Ind Cas 408 (D B).

——S. 57 — Vendor and purchaser — Transfer of Property Act (IV of 1882), S. 55 (6) (b) — Vendee prepared to pay whole purchase price — Contract falling through no fault of vendee — Vendee, if can recover price paid as well as earnest money — Whether entitled to a charge for such money.

Where according to the agreement of sale, the vendee had paid the earnest money and was in the process of paying the balance, and ready to pay it all, and was asking for performance by the vendors of the contract which they had entered into with him and the transaction fell through not because of any default of his the vendee is entitled to recover not only that part of the purchase price which he has already paid, but also those money which have been paid by him by way of earnest and is also entitled to a charge for such money on the property. A I R (Vol 25) 1938 Rang 367 : 178 Ind Cas 822.

——S. 57—Contract of sale—Earnest money, nature of — Breach on purchaser's part — Earnest money, if forfeited — Purchaser contending non-forfeiture — Proof that agreement prevents forfeiture—Necessity of.

Earnest money is a guarantee for the performance of the contract. If the transaction goes forward if is a part of the purchase price, but if it falls through on account of the default of or breach by the vendee, it is forfeited, in the absence of a contract either express in its terms or to be inferred from the whole contract. If the purchaser says that the earnest has not been forfeited, though the breach is on his part he has to show that the agreement prevents the forfeiture. This he can do, if the contract says so in plain terms, or if the same can be inferred from all the terms of contract itself. A I R (Vol 23) 1936 Cal 51 : 40 C W N 659 : 63 Cal 804 : 161 Ind Cas 166.

——S. 57 — Wrongful neglect or refusal to deliver goods, what is.

The plaintiffs and defendants who were merchants entered into a contract by which the plaintiffs were to purchase from the defendants certain goods to be delivered on a certain date. Delivery was not to be made to the plaintiffs themselves, but to one of four exporting companies referred to in the contract, and plaintiffs had to send to the defendants at least six days before the due date what was known as a 'transfer form.' On this transfer form would be intimated the name of the firm to which the goods were to be delivered. The plaintiffs sent a registered letter to the defendants in which they intimated that delivery was to be made to a certain S & Co. and that letter was refused by the defendants. On the same day the plaintiffs wrote to S & Co., to inform them that the defendants would make the delivery and to request them to take delivery and make payment to the defendants. Delivery was not made by the defendants and the plaintiffs sued them for damage :

Held, that by not sending a transfer form to the defendants, the plaintiffs had broken the contract and hence were not entitled to damages. A I R (Vol 22) 1935 Mad 619 : 42 L W 35 : 1935 M W N 882 : 157 Ind Cas 751.

——S. 57 — Suit for damages by purchaser—Vendor not possessing goods—Tender of price by purchaser — Necessity of.

In order to prove that a buyer is ready and willing to perform his part of the agreement, it is not necessary for him to show that he actually made a tender of the price. When the seller does not possess the goods it is an act of supererogation on the part of the buyer to take the money to the seller and make an actual tender thereof. 32 P L R 828 : (1932) 135 Ind Cas 606 (D B).

——S. 58.

——S. 58 — Though a party to a contract for sale of goods can obtain a decree for specific performance if his case is covered by S. 58 of the Act it does not follow that breach of an implied negative covenant cannot be restrained by injunction merely because covenant is contained in a contract for sale of goods. A I R (Vol 27) 1940 Cal 466 : I L R (1940) 2 Cal 53 : 191 Ind Cas 847.

——S. 58 — Part performance—Conditions of applicability of the doctrine.

One of the necessary conditions for applying the doctrine of part performance is that the contract to which the act of part performance referred, must be such as in its own nature is enforceable by the Court. A I R (Vol 20) 1933 Mad 364 : 150 Ind Cas 660.

——S. 58 — Part performance — Agreement of sale of immovable property of Hindu minor entered into by guardian — Doctrine of part performance, if applies.

An agreement of sale of immovable property of a Hindu minor entered into on his behalf by his natural guardian, assuming the same to have been entered into for necessity, is not binding on the minor and enforceable specifically against him although the debts binding on the minor are discharged by the consideration paid for the sale. Consequently, the doctrine of part performance does not apply to such a contract. A I R (Vol 20) 1933 Mad 364 : 150 Ind Cas 660.

——S. 59.

——S. 59 — Breach of warranty — Rejection of goods.

Under S. 59, the buyer is not, by reason of a breach of warranty, entitled to reject the goods. He may set up against the seller the breach of warranty in diminution or extinction of the price. (1940) 42 P L R 172.

——S. 59 — Breach of warranty of petrol consumption of car — Reasonable damages.

Where, in a case of a breach of warranty as to the petrol consumption of a motor car, the damages were assessed at the extra running costs on the supposed life of the car as 200,000 miles and damages to the extent of Rs. 3,000 were awarded :

Held, that it was quite unreasonable and the amount of damages should be reduced to Rs. 2,000. A I R (Vol 21) 1934 All 392 : 154 Ind Cas 320 (I) (D B).

——S. 59 — Breach of warranty — Notice to claim damages.

What is reasonable time for giving notice of intention to claim damages for breach of warranty is a question of fact depending on the circumstances of each case. AIR (Vol 19) 1932 Lah 52 : 32 P L R 734: 135 Ind Cas 498 (DB).

——S. 59—Contract to sell—Warranty—Breach of—Inferiority—Proof of—Suit for damages—Custom of trade—Evidence Act, S. 3.

In a suit for damages for breach of warranty in a contract for sale of goods, the plaintiff need not prove inferiority of quality by an examination of the whole of the goods received by him. It is enough if a fair number of samples taken from different portions of the bulk is shown to be inferior.

The plaintiff must show how he has dealt with the goods and what damage he has suffered. But where the custom of trade fixes a definite scale for calculating damages for inferiority, no such proof need be given. 29 Cal 587 Reversed. (1902) 6 C W N 495 (502) : 29 Cal 323 (FB).

——S. 59 (1) — Breach of warranty — Measure of damages.

The measure of damages in a case of breach of warranty is not the full consideration which has passed from the party affected by such a breach. Any benefits received by him under the contract must be taken into consideration and the damages recoverable will be the excess only of the value of the one over the other; the measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be. AIR (Vol 26) 1939 Oudh 186 : 1939 O W N 339 : 180 Ind Cas 879 (DB).

——S. 60.

——S. 60 — Repudiation of contract by one party — Other party not accepting repudiation — If entitled to sue for damages before expiry of time for performance—Contract Act, S. 39.

Under the English common law, if one of the parties to a contract repudiates it the other party may accept the repudiation and treat the contract as discharged and sue for damages or he may refuse to accept the repudiation in which case the contract subsists for all purposes and he is therefore not entitled to sue for damages for its breach before the expiry of the time for its performance. The law in India is the same and neither S. 39 of the Contract Act nor S. 60 of the Sale of Goods Act is different in its effect from the English Common Law. ILR (1948) 2 Cal 11.

——S. 60 — Breach of contract by buyer — Seller's right of re-sale—Delay due to act of buyer—Effect.

Upon a breach of a contract by the buyer, the seller is bound under S. 60 to treat the contract of sale as cancelled and exercise his right of re-sale within a reasonable time of the breach. But when the delay on the part of the seller is mainly due to the unreasonable and unfair attitude of the buyer with a view to gain time, the seller cannot be said to have acted with undue delay in not exercising his right of resale immediately.

Where a contract is for sale of unascertained goods, there is no right of re-sale or right to recover insuring and warehouse charges, etc. but so long as goods are not appropriated, it is open to the parties to agree as between themselves, that in spite of the fact that the property in goods has not passed, the seller will have the right of re-sale against the buyer in breach and also to recover godown rent and insurance charges. Section 62 expressly recognises that right. A I R (Vol 25) 1938 All 272 : 1938 A L J 227 : 1938 A W R 149 : 175 Ind Cas 552 (DB).

——S. 60—Contract for sale—Anticipatory breach — Right to elect—Consequences.

Where a party to a contract repudiates it by an anticipatory refusal to perform the contract before the time of performance the other party may either treat the contract as subsisting or treat it as rescinded; but if he elects to treat the contract as still in force, he keeps it alive for the other party as well. He remains subject to all his own obligations and liabilities under it, and is bound to show, when he seeks to enforce the contract, that he has fulfilled the conditions precedent which were binding on him. A I R (Vol 22) 1935 Mad 345 : 1935 M W N 230 : 41 L W 440 : 157 Ind Cas 640.

——S. 61.

——S. 61 — Failure of consideration — Recovery of money.

Where the defendant has sold the orange crop of his garden to the plaintiffs, it is the duty of the defendant to deliver possession to the purchasers and the purchasers are under no duty to find an additional amount out of their own pockets to pay off a creditor of the defendant who has attached the crops in execution of his decree against the defendant. The purchasers are entitled to recover the money paid since the consideration for the payment of it has failed. That right is specially reserved under S. 61 (1). A I R (Vol 30) 1943 Nag 332 : I L R (1943) Nag 762 : 1943 N L J 508 : 210 Ind Cas 625.

——S. 61—Purchaser obtaining possession of subject-matter of contract before payment of purchase price—Interest on purchase-money—Liability for.

If in cases where Courts of Equity would grant specific performance, the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price. he must, in the absence of express agreement to the contrary, pay interest on his purchase-money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money.

The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until :it is paid is well-established and applies to compulsory purchases. A I R (Vol 28) 1941 P C 114 : 1941 A W R 76 : 8 B R 197 : 197 Ind Cas 186.

——S. 61—Practice of medical practitioner to charge interest at certain rate.

A creditor can claim interest (1) on the ground of agreement, (2) on the basis of a statute and (3) on the ground of usage. The practice of a medical practitioner to charge interest at 1 per cent. per mensem does not amount to usage. The mere writing on the bills that interest at 1 per cent. per mensem will be charged cannot amount to a contract.

Where no notice is given, the plaintiff can claim interest only under S. 61, Sale of Goods Act, for the price of medicines supplied, and no other statute is applicable. AIR (Vol 28) 1941 Oudh 254:1941 O W N 108 : 1941 A W R 70 : 16 Luck. 701 : 192 Ind Cas 885 (DB).

——S. 62.

——S. 62—Scope.

It is always open to the parties to agree to terms under which the question of appropriation or the passing of the property to the buyer would not arise. A I R (Vol 25) 1938 All 272 : 1938 A L J 227 : 1938 A W R 149 : 175 Ind Cas 552 (DB).

——S. 64.

——S. 64—Auction-sale — Purchaser depositing purchase money with auctioneer—Sale going off due to default of seller — Auctioneer's liability to return deposit to purchaser — Position of auctioneer — Auctioneer handing over money to seller—Whether still liable — Liability of auctioneer and seller, whether joint and several—Successive actions, if permissible.

The position of an auctioneer is that of a stakeholder. Where a deposit is made of a portion of the purchase-money in an auction-sale and later on it is found that the vendor had no title to convey, a case arises in which a deposit was made on a consideration which had failed and an action would lie against an auctioneer for money had and received even in a

case where the deposit is handed over by the auctioneer to the seller.

When a purchaser wants the return of the deposit made to an auctioneer on a consideration which had failed, he is not seeking to enforce any contract against the agent. He is bringing an action which, in English Law, is well known, viz., an action for money had and received. Hence, when money is paid by the purchaser under a mistake of fact on a consideration which was supposed to exist but eventually turned out to be without any substance, the purchaser is entitled to ask for the return of the deposit which was made with the auctioneer.

On failure of consideration for sale, the purchaser brought a suit against the auctioneer for return of the purchase-money which was deposited with him by the purchaser. The seller applied under the U. P, Encum. Estates Act during the pendency of the suit and the suit was stayed under the provisions of that Act. In the proceedings under that Act, the purchaser got his claim registered against the seller for damages including the return of the earnest money paid to the auctioneer and obtained a decree for the same. It was contended that as the purchaser had obtained a decree against the seller no decree could be passed in the suit which had been stayed against the auctioneer :

Held that the mere fact that the purchaser had obtained a decree against the seller could not prevent him from obtaining a fresh decree against the auctioneer regarding the deposit because the liabilities of the auctioneer and the seller, though arising out of one transaction and in a way allied to each other, were joint and several, and therefore, successive actions could be maintained on such liabilities. There could be no objection to the two decrees being granted subject to the condition that if any money was realised in execution of one decree, it would have to be credited in the other and the purchaser will not have any right to recover the amount twice over. A I R (Vol 29) 1942 All 90 : 1941 A L J 756 : 1941 A W R 365 : 199 Ind Cas 302.

SALE OF GOODS ACT (ENGLISH) (1893, 56 & 57 VIC C 71)

——S. 10.

——S. 10 — Stipulation as to time of delivery — If essence of contract.

Unless a different intention appears from the terms of the contract, stipulations as to the time of delivery are not the essence of a contract of sale of goods. (1910) 13 O C 143 : 6 Ind Cas 1011.

——S. 14.

——S. 14—The first exception to S. 14, English Sale of Goods Act (equivalent to Sale of Goods Act), if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment." A I R (Vol 23) 1936 P C 34 : 1935 O W N 1327 : 43 L W 132 : 1936 A L J 120 : 1936 A W R 255 : 70 M L J 513 : 159 Ind Cas 667 (2).

SALES TAX

See also Local Sales Tax Acts.

——Levy of — Point of time for — Payment of price if determines liability to tax—Non-delivery of goods —Liability.

In the case of an ordinary retail sale for cash across the counter of a shop, the stages of agreement, appropriation of the goods to the contract, delivery, payment of the price and passing of the property are all practically simultaneous. But in more complicated transactions for the sale of goods to be produced or manufactured, the stages may be spaced in time in various ways. Where the time selected is as in general the time of the delivery of the goods to the purchaser, liability for the tax would not depend on the price being paid, for the goods may be delivered on credit and the purchaser may default in payment. The general rule would be inapplicable to a case where the goods are never delivered. A I R (Vol 34) 1947 PC 94 : 1947 O A (PC) 12 : 1947 AWR (PC) 12.

SALT

See (1) Bombay Salt Act, 1890.
(2) Salt Act, 1882.

SALT ACT (12 of 1882)

——S. 9.

——S. 9—Notification No. 41, Rr. 3, 9—Offence under R. 8.

An offence under R. 8 of Notification No. 41 issued under S. 9, Salt Act, can be made out only if the contraband salt has been produced or manufactured in the State from which it has been imported into British India. The fact that it has been imported from the State does not give rise to a presumption that it was produced or manufactured in the State. AIR (Vol 21) 1934 Lah 967 : 36 PLR 248 : 36 Cr LJ 463 : 153 Ind Cas 951 (DB).

——S. 9 — Offence under R. 9 — Essence of — Presumption of non-payment.

The essence of the offence under R. 9 of the Notification No. 41 issued under S. 9, is that duty has not been paid in the State where the salt was obtained. It cannot be presumed that duty was in fact not paid and the prosecution has to prove it. AIR (Vol 21) 1934 Lah 967 : 36 PLR 248 : 36 Cr LJ 463 : 153 Ind Cas 951 (DB).

——S. 9—Abetment of offence—Abetment of offence under Salt Act — Punishment prescribed under S. 9 —Punishment under Penal Code, S. 117, is illegal.

The punishment under Penal Code, S. 117, for abetment of an act which is an offence under Salt Act (1882) and not an offence under Penal Code, is illegal for the reason that Salt Act, S. 9, prescribes specific punishment for the abetment of such an offence. It is illegal to proceed under S. 117, Penal Code, which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by the provisions of S. 9, Salt Act (1882). AIR (Vol 17) 1930 Oudh 497 : 1930 Cr Cas 1161 (DB).

——S. 9—Offence under—Whether punishable under Penal Code, 1860.

Doing anything in contravention of the Salt Act or of any rule made thereunder is not a separate offence under Penal Code; similarly the abetment of an act in contravention of the Salt Act or of any rule made thereunder is not a separate offence under the Penal Code. AIR (Vol 17) 1930 Oudh 497 : 1930 Cr C 1161 (DB).

——S. 9 (a) — Abetment of offence under Salt Act — Conviction under S. 117, Penal Code—Legality.

A person guilty of abetment of an offence under S. 9 (a) of the Salt Act may be convicted and sentenced under S. 117, Penal Code, where it is proved that the act amounted to an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding ten. A I R (Vol 19) 1932 All 18 : 1931 ALJ 986 : 53 All 642 : 33 Cr L J 236 : 136 Ind Cas 91 (DB).

——S. 9 (a)—Abetment, meaning of.

The abetment referred to in S. 9 is simply abetment within the meaning of the Indian Penal Code, which may be abetment by a single person. It can be punished under S. 117, Penal Code, if the offence falls within the scope of that section. AIR (Vol 18) 1931 Bom 140 : 33 Bom L R 56 : 32 Cr L J 471 : 55 Bom 353 : 130 Ind Cas 25 (DB).

——S. 9 (a) — Abetment of offence under Salt Act—Punishment under Penal Code, S. 117—Legality.

The punishment under S. 117, Penal Code, for abetment of an act which is an offence under the Salt Act and not an offence under Penal Code, is illegal for the reason that the Salt Act prescribes in S. 9 (a) specific punishment for the abetment of such an offence. It is illegal to proceed under S. 117, Penal Code, which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by the provisions of S. 9, Salt Act. AIR (Vol 17) 1930 Oudh 497 : 1930 Cr C 1161 (DB).

——S. 9 (c)—Prescribes punishments for abetment of all kinds of offences under Salt Act.

Clause (c), S. 9 embraces all abetments whether aggravated or mitigated in their nature. The section does not provide for any execution in respect of such abetments as provided for by Penal Code, S. 117, and the punishment prescribed by the said section is for all abetments of acts which are declared to be offences by the provisions of Salt Act. AIR (Vol 17) 1930 Oudh 497 : 1930 Cr Cas 1161 (DB).

——S. 15.

——S. 15—Applicability.

Section 15 does not apply where salt is unlawfully manufactured at an unauthorised place to which S. 18 applies while S. 15 applies in the case of an authorised place. Non-compliance with the provisions of S. 118 renders the search irregular. AIR (Vol 11) 1924 All 437 : 5 LRA Cr 38 : 25 Cr LJ 463 : 77 Ind Cas 815.

——S. 27.

——S. 27—'Importation,' meaning of.

There is nothing in S. 27 to bear out the contention that importation into a part of the territories mentioned in S. 1 is to be taken as meaning only importation from outside those territories, and not importation from one part of the territories into another part. AIR (Vol 11) 1924 Lah 160 : 69 Ind Cas 460.

SALVAGE

See also (1) Contract Act, S. 168.
(2) Equity.
(3) Shipping.

——Salvage lien — Applicability — Sale of property in execution of rent decree—Payment by third party to auction-purchaser to enable judgment-debtor to obtain release and with intention to take a subsequent mortgage of property — Right to plead lien, against prior mortgagee.

A person who advances money in lieu of a subsequent mortgage in his favour in order to discharge the liability which the mortgagor had undertaken to the auction-purchaser of his property in execution for securing a release of that property is in no better position than the mortgagor himself with reference to his claim for recognition of a lien as against a prior mortgagee or charge-holder of that property at whose instance that property was sold in respect of the sum advanced by him. The principle of salvage lien does not apply to such a case, where a person having no interest in the matter comes forward to discharge a burden on the property. AIR (Vol 39) 1952 Pat 81 : 27 Pat 421 (DB).

——Abandonment of interest in property lost—Intention.

Fire breaking out at wax refinery — Wax flowing into river and collected by general public and brought and sold in market — Company not asserting right to wax :

Held, that the company must be deemed to have abandoned its right of ownership over the wax and the issue of a press announcement after the salvage was complete in assertion of its right by the company was immaterial. AIR (Vol 28) 1941 Rang 166 : 1941 Rang LR 153 : 194 Ind Cas 887 (DB).

——Salvage reward — Measure of.

Salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and general scale.

The ingredients of a salvage service are; (1) enterprise in the salvers risking their own lives to save their fellow creatures and to rescue the property of their fellow creatures; (2) the degree of danger and distress from which the property is rescued—whether it were in imminent peril or almost certainly lost; (3) the degree of labour and skill which the salvers incurred and displayed at the time occupied. In this case His Lordship found the 2nd and 3rd points in plaintiff's favour and that the time occupied was one day and awarded a sum of Rs. 2,000 where the defendants admitted his barge to be worth not more than Rs. 10,000. (1904) 27 Mad 187 (189, 190).

SAMANODAKAS

See Hindu law—Succession.

SAME TRANSACTION

See Criminal P. C., Ss. 233, 234 and 235.

SAMHITA

See Hindu law—Texts.

SANCTION

See (1) Civil P. C., Ss. 91, 92.
(2) Criminal P. C., Ss. 195 to 199 and 476.

SANCTION TO PROSECUTE

See Criminal P. C., Ss. 188, 195, 197 and 476.

SANTALS

See Hindu law—Marriage—Forms.

SANTHAL

See (1) Sonthal Parganas Act.
(2) Sonthal Parganas Justice Regulation.
(3) Sonthal Parganas Settlement Regulation.

SANYASI

See Hindu law—(1) Ascetic.
(2) Succession.

SAPINDA

See Hindu law—Succession.

SAPTAPADI

See Hindu law—Marriage.

SAPURDAR

See Civil P. C., S. 145.

SARAIS ACT (22 of 1867)

——S. 3.

——S. 3—Revision.

An order of District Magistrate under S. 3 calling upon certain persons to register their sarais, not being a judicial order, is not subject to the revisional jurisdiction of the High Court. AIR (Vol 28) 1941 Lah 71: ILR (1940) Lah 577 : 42 Cr LJ 448 : 193 Ind Cas 564 (DB).

SARANJAM INAM

See Grant.

SARBARAHKAR

See (1) Land Tenures.
(2) Local Tenancy Acts.

SARBARAHKARI TENURE

See Land Tenures.

SARKHAT

See Deed.

SARVAMANIAM

See Grant.

SAUNJHI TENURE

See Land Tenures.

SAURASHTRA MAMLATDARS' COURTS ORDINANCE (1948)

——Applicability after the passing of Ordinance 41 of 1949.

Where on the date of promulgation of Ordinance 41 of 1949, a tenant is in possession of land who, because of S. 4 of Ordinance 28 of 1949 has to be deemed to be a person lawfully cultivating the land and must be deemed to be a tenant as such, the repeal of Ordinance 28 of 1949 by Ordinance 41 of 1949 would not have the effect of making the tenant's possession unlawful. As the tenant's possession is lawful the relationship of the parties would be governed by the provisions of Ordinance 41 of 1949 and under S. 61 of that Ordinance the Mamlatdar can decide all questions mentioned in that section but in doing so, he has to act under the Ordinance and not under the Mamlatdars' Courts Ordinance. AIR (Vol 38) 1951 Sau 23 (DB).

SAURASHTRA STATE PUBLIC SAFETY MEASURES ORDINANCE (9 of 1948.)

——Delay in supplying grounds of detention—Valid reasons—Desirability of avoiding delay.

The fact that a District Magistrate was in correspondence with the government for considering the release of the detenu is no ground for delaying the supply of the grounds of detention to him. If he wants to file an application to the Court he must have a copy of the grounds — It is desirable that the grounds are supplied without any delay. A1R (Vol 37) 1950 Sau 12 : 3 Sau L R 48 (DB).

——Detention—Court when can interfere.

In the case of a detention under the Saurashtra State Public Safety Measures Ordinance unless there is any internal evidence to show that the District Magistrate has not applied his mind to the question the High Court would have no power to interfere. If it finds that the District Magistrate was satisfied then the order must stand. A I R (Vol 37) 1950 Sau 12 : 3 Sau L R 48 (DB).

SCHEDULED DISTRICTS ACT (14 of 1874)

——Agency Rules.

Agency Rules framed under the Scheduled Districts Act are, in spite of the fact that the Act has been repealed by Government of India (Adaptation of Indian Laws) Order, 1937, still in force. A I R (Vol 31) 1944 Pat 297 : 10 C L T 51 : 23 Pat 442 : 25 P L T 116 : 1944 A W R 485 (DB).

——Agency Rules, R. 49 —Appeal.

Order refusing to re-hear appeal decreed ex parte is appealable as decree under R. 49. A I R (Vol 31) 1944 Pat 297 : 10 C L T 51 : 23 Pat 442 : 25 P L T 116 : 1944 A W R 485 (DB).

——Agency Rules, R. 50.

Before accepting substituted service by affixing of summonses, the Court should satisfy itself that conditions of O. 5, R. 17, Civil P. C. are satisfied. A I R (Vol 31) 1944 Pat 297 : 23 Pat 442 : 10 C L T 51 : 1944 A W R 785 : 25 P L T 116 (DB).

——The Act does not affect the privilege of the tenure-holders of paying customary rent in any way. AIR (Vol 25) 1938 Cal 866 : 68 C L J 381 : I L R (1939) 1 Cal 101 : 179 Ind Cas 479 (DB).

——Privy Council—Scheduled Districts Act, 1874—Rules under.

The provision in the rules for administration of civil justice made in pursuance of the Scheduled Districts Act, 1874, that the order of the Board of Revenue is to be final, does not affect His Majesty's prerogative to grant special leave to His Majesty. A I R (Vol 23) 1936 P C 108 : 63 Cal 990 : 1936 O W N 313 : 1936 A W R 282 : 1936 R D 99 : 43 L W 603 : 2 B R 437 : 38 Bom L R 484 : 70 M L J 633 : 1936 A L J 656 : 40 C W N 900: 63 C L J 363 : 1936 M W N 693 (1) : 63 I A 207 : 161 Ind Cas 673 (PC).

——Subsequent Acts.

The Scheduled Districts Act does not apply to Acts of the Indian Legislature passed after that Act. AIR (Vol 15) 1928 Mad 1181 : 52 Mad 1 : 28 M L W 614 : 55 M L J 584 : 115 Ind Cas 824 (FB).

——Agency Rules, R. 8 — 'Hearing the appeal.'

The words 'hearing the appeal' in Rule 8, cannot be construed as meaning nothing more than the officer to whom the appeal is represented. They imply that the appellant is entitled to be given an opportunity of being heard in support of his appeal and that he has a right to be heard if he appears. (1905) 28 M 404 (405) (DB).

——S. 3.

——Ss. 3, 4 and 5 — Power of Local Government to rectify mistake in earlier Notification—Notification of 1929 correcting mistake in Notification of 1897 and declaring that Bengal Alluvion and Diluvion Regulation is not in force in Cachar — Validity—If binding on Courts of Law.

Under S. 3 (c) of the Scheduled Districts Act it is exclusively for the Local Government to decide as to whether or not a mistake of fact occurred in any declaration made under cl. (a), which required rectification under cl. (c). The Courts of Law are not competent to enquire into the question as to whether the decision of the Local Government on this point is correct or not. On the other hand, under S. 4 of the Act, a declaration under S. 3 is binding on all Courts of Law.

Accordingly, the Notification dated 6th July, 1929, issued by the Local Government under S. 3 (c) of the Scheduled Districts Act purporting to correct a mistake of fact in Notification dated 1st April, 1897, and declaring that the district of Cachar should be excluded from the territories in which the Bengal Alluvion and Diluvion Regulation, 1825, was declared to be in force by the said Notification, is binding on all Courts of Law. The mistake corrected by the Notification of 1929 is a mistake of fact, and is not a a mistake of law. Whether a particular law was in force at a certain time in a certain district is certainly a question of fact and not of law, and any mistake committed by the Local Government in this respect can be corrected by the powers conferred under S. 3 (c) of the Act.

The Notification of 1897 issued under S. 3 (a) of the Act was neither in form nor in substance a declaration made under S. 5 of the Act. It purported not to extend any law to the District of Cachar but only to declare the law that was in force in this district at a particular time, and the Local Government was quite within its rights to rectify any mistake in the Notification under S. 3 (c) of the Act. I L R (1946) 1 Cal 283 : 50 C W N 378 (DB).

——S. 5-A.

——S. 5-A—Vizagapatam Agency Rules, R. 56.

R. 56 is not ultra vires as it does not restrict the operation but only modifies Madras Estates Land Act, S. 191.

Rule 56 of the Vizagapatam Agency Rules as it changes the period of limitation under S. 191, Madras Estates Land Act is a provision substituting one period, namely six weeks, (which was thought to be more proper) for another and is therefore a modification.

Rule 56 therefore is not ultra vires not being a rule restricting the operation of S. 191, Madras Estates Land Act but only modifying it.

Per Curgenven J. (contra) R. 56 of the Vizagapatam Agency Rules offends against the provisions of S. 191, Madras Estates Land Act and it deemed to prevail upon it restricts the operation of the Act and is therefore ultra vires. AIR (Vol 17) 1930 Mad 963 (DB).

——S. 6.

——S. 6—Effect on rules made under, of repeal of the Act by the Government of India (Adaptation of Indian Laws) Order, 1937.

The wording of the Government of India (Adaptation of Indian Laws) Order, 1937, leaves no room for doubt that the Scheduled District Act of 1874, was alone repealed but the notifications, appointments, regulations, directions, determinations and the rules made by notifications were allowed to remain valid. Hence the rules made under the Act would be valid even after the repeal of the Act. 1950 R D 68.

——S. 6 — Rules framed by Governor of Assam, Rr. 15 to 22—Transfer of criminal case from Court in Naga Hills district to Court outside that district—Power of Assam High Court—Criminal P. C., S. 526.

Rules 15 to 22 of the Rules framed by the Governor of Assam in pursuance of S. 6, Scheduled Districts Act, appear to exclude the operation of the Criminal P. C. to the administration of justice in the Naga Hills district. There is nothing in the Rules framed by the Governor of Assam which authorises him to transfer a criminal case pending in one of the Courts of the Naga Hills district to a Court outside that district. Therefore, the High Court to Assam which is authorised to exercise such powers only as the Governor of Assam should have exercised, is not competent to transfer a case from a criminal Court in the Naga Hills district to a Court outside that district in the province of Assam. AIR (Vol 36) 1949 Assam 69 : 51 Cr L J 147 (DB).

——S. 6.—Interpretation.

The word 'restriction' is necessary to cover the case of an area and restriction in S. 6 applies to area. AIR (Vol 17) 1930 Mad 963 : 1930 M W N 475.

——S. 6—Act XI of 1816, S. 4—Rules made under the Act — Offence committed in Nala State — Jurisdiction of Agent for the Mewas Estates—High Court — Power of, to call for additional evidence on appeal by accused — Criminal P. C., S. 438.

The Agent for Mewas Estate can try the case of a murder committed at the village in the Nala State. The High Court of Bombay can hear an appeal of an accused convicted by the Agent (S. 4 of Act XI of 1846 and Rule 44 made thereunder) and, if necessary, can under the provisions under S. 428 of the Criminal P. C., obtain any additional evidence. AIR (Vol 3) 1916 Bom 313 : 18 Bom L R 789 : 17 Cr L J 533 : 36 Ind Cas 581 (DB).

——S. 8.

——S. 8—"Other territory", meaning of.

The words "other territory" referred to in S. 8, Scheduled Districts Act, do not apply to territories outside British India. AIR (Vol 26) 1939 Pesh 25 : 183 Ind Cas 99 (DB).

SCHEME.

See (1) Civil P. C., Ss. 47 and 92.
(2) Companies Act, Ss. 153, 153-B, 215 and 234.
(3) Presidency Towns Insolvency Act, Ss. 28-32.
(4) Provincial Insolvency Act, Ss. 38-40.
(5) Religious Endowment.
(6) Religious Endowments Act, S. 18.

SCHEME SUIT.

See (1) C. P. Code, S. 92.
(2) Rel. End. Act, S. 18.

SCHOOL.

——Expulsion of student — See Specific Relief Act S. 46.

SCHOOL ADMISSION REGISTER.

See Evidence Act, S. 35.

SCHOOL-MASTER AND PUPIL.

See Specific Relief Act, S. 45.

SEA CUSTOMS ACT (8 of 1878).

——S. 1.

——S. 1—Nature of orders.

Every order of a Custum's Officer under the Act, in whatever connection passed, cannot be regarded as in the nature of an adjudication by a tribunal. AIR (Vol 25) 1938 Mad 608 : 1938 M W N 341 : 47 L W 505 : I L R (1938) Mad 1040 : 181 Ind Cas 821 (DB).

——S. 1—Object of Act — Liability of ship's agents.

The object of the See Customs Act was to authorise the Customs Authorities to release the ship provided there was some person within the jurisdiction who would be answerable for such claims as either the ship would have been answerable for, if she had remained within the jurisdiction, or the carrier would have been answerable for, if he had been within the jurisdiction.

The liability of the ship's agents for acts of the ship is co-extensive with that of the ship, specially when there is no allegation that the ship's agents have done any acts subsequent to the landing of cargo which has caused the loss, and for which they are liable irrespective of the liability of their principals. AIR (Vol 18) 1931 Sind 124 : 25 S L R 222 : 133 Ind Cas 77.

——S. 1 — Intention and scope — Provisions are for protection of merchants as well as public—Customs officers can act on their own initiative.

The provisions under the See Customs Act are in some cases to be read with the provisions of the Indian Merchandise Marks Act (Act 4 of 1889), relating to false trade description and they are intended nor only for the protection of manufacturers and merchants against the piracy of their marks, but also for the protection of the public, against the supply of goods of an inferior or unknown quality, under cover on a well-known brand. Under the Sea Customs Act, as amended by the Merchandise Marks Act, although ordinarily action thereunder is taken upon information received from the manufacturer or merchant aggrieved, there is nothing to prevent the customs officers from acting upon their own initiative. AIR (Vol 15) 1928 Cal 1 : 46 C L J 455 : 106 Ind Cas 277 (DB).

——S. 18.

——Ss. 18, 19 (a) — Merchandize Marks Act, Ss. 10 and 11—Collector of Customs—Power of—Detention of goods.

It is duty of the Collector of Customs to shop any goods falling under S. 18 of the See Customs Act, as amended by the Merchandize Marks Act from being brought into British India. The enabling power given to the Governor-General in Council to frame rules under S. 19 (a) cannot override the prohibiting language of S. 18 or the implied power of detention under S. 19 (a). (1907) 34 C 511 (513, 514) (FB).

——S. 19.

——S. 19—Notification under — "Books issued" by person, includes books written as well as published by him.

The meanings given to the word "issue" is "that which proceeds from any source". The phrase "books issued by M. N. Roy" in the notification of Governor-General in Council issued under S. 19 of the Sea Customs Act would include books written by him as well as books published by him. AIR (Vol 24) 1937 Cal 49 : 38 Cr L J 691 : I L R (1937) 1 Cal 774 : 169 Ind Cas 60 (DB).

——S. 19 (9)—Proclamation under—Legality of.

Under the See Customs Act, the Government can prohibit the export of specified articles or things but description of different commodities ejusdem generis under a vague description, is not enough. AIR (Vol 2) 1915 Bom 232 : 40 Bom 301 : 17 Bom L R 1087 : 33 Ind Cas 205.

——S. 23.

——S. 23—Goods imported by G. I. P.

Stores purchased and imported by the G. I. P. Ry. Company into India for the use of the undertaking are at the time of importation goods belonging to Government and therefore not chargeable with customs duty. AIR (Vol 10) 1923 Bom 423: 25 Bom L R 470 : 73 Ind Cas 468.

——S. 29.

——S. 29—Custom duty — Wholesale price — What is — Absence of middlemen.

A vacuum oil company P imported large quantities of lubricating oil of Bombay, and it was dealt with by distribution direct to consumers, without the intervention of any dealer or middleman. Large consumers entered into annual contracts to buy the whole of their oil at a fixed rate, and were allowed a discount varying from 2½ per cent to 15 per cent, which depended upon the quantity of oil taken during the year. But only one price was charged to oil consumers whether buying in annual contracts or otherwise.

A thirty days' credit was allowed on all contracts. For the purpose of book-keeping. P invoiced the goods to Bombay at cost price plus a small manufacturer's profit and in their bills of entry entered up the invoice price plus the costs of insurance, freight and landing charges at Bombay. P sold the lubricating oil at price above 70 per cent over the invoice price. The branches incurred several "service charges" i. e., expenses in connexion with their sales.

Held, (1) that the real price of the oil for the purpose of levying the custom duty under S. 30 was the wholesale cash price less the trade discount as provided by S. 30 (a) as that price was capable of being ascertained, and Cl. (b), S. 30, did not come into operation.

(2) That the wholesale price could include the expenses in the nature of service charges expended in Bombay.

(3) That allowing thirty days credit did not prevent the sale from being at a cash price.

(4) That the price was still wholesale cash price notwithstanding the fact that the oil was sold direct to the consumers without the intervention of middlemen.

(5) That the allowance under the annual contracts could be properly described as a trade discount, as it was allowed to a large customer such as would normally be allowed to a person in trade. A I R (Vol 17) 1930 Bom 597: 32 Bom L R 1308 (DB).

——S. 30.

——S. 30—Value of goods, determination of— Jurisdiction.

The jurisdiction to determine the real value of the goods is vested by the Legislature in the Customs Officers and where the officer has conformed to the statutory provision of the law in arriving at his decision, the Court cannot sit in appeal against it or retry the question at issue. In such a case, the question of burden of proof hardly arises. A I R (Vol 23) 1936 Sind 127 : 30 SLR 304 : 164 Ind Cas 583.

——Ss. 30 (a), (b), 29 — Charge under S. 420, Penal Code, for causing false declaration of real value of goods—Essentials to be proved by prosecution.

In a charge under S. 420, I. P. C., that the accused caused a false declaration to be made of the real value of goods imported by him, it is not sufficient to prove that the Customs Officers, in fact, applied S. 30 (b), See Customs Act, or that the importer sought to have the real value determined under S. 30 (b). It is incumbent on the prosecution to prove that these conditions were fulfilled which entitled the Customs Officers to apply S. 30 (b) and not S. 30 (a). In other words, it is incumbent on the prosecution to prove that the wholesale cash price, less trade discount, for which goods for the like kind and quality are sold, or are capable of being sold at the time and place of importation' was not ascertainable. Hence when no attempt is made by the prosecution to prove what "was the real value" of the goods under S. 30 (a) nor to prove that the price mentioned in S. 30 (a) could not be ascertained, the prosecution must be deemed to have failed to prove that the accused caused a false declaration to be made of the real value of the goods imported by him. AIR (Vol 29) 1942 Cal 351 : 46 CWN 414 : 43 Cr L J 651 : I L R (1942) 2 Cal 62 : 201 Ind Cas 338 (DB).

——S. 30 (a)—Whole-sale price, what is — Time and place of sale—Overhead charges, effect of.

The appellants were the importers of Ford Motor cars into India. They used to issue from time to time a price list, and the terms of business were that the retail price to be charged by the distributor to the public was that stated in the price list current at the time of arrival of the vehicles in India, and the price payable by the distributor to the appellants was the same price less a discount of 20 per cent. The distributor had to pay this price before obtaining delivery. Delivery was given by the appellants "free on rail" save in the case of the authorised dealers for the District of Bombay itself—viz., Ford Automobile (India), Limited — to whom delivery was made at their own warehouse in Bombay. The price mentioned in the price list was in all cases for a vehicle in running order, and the same was true of the contract between the appellants and the distributors :

Held, that the price of the appellants to their distributors was wholesale price. It was a cash price. The cars being invoiced a few days before the arrival of the ship and the price being fixed then, the sales were sales at the time and place of importation in every reasonable sense.

Held, also, that the overhead charges had no bearing upon matter arising under S. 30 (a). AIR (Vol 25) 1938 PC 15: 65 IA 32 : (1938) ALJ 87 : 42 CWN 257: 4 B R 287 : 1938 O W N 188 : 47 L W 205 : (1938) MWN 134 : (1938) 1 MLJ 161 : 66 C L J 466: 40 Bom LR 269 : 1938 A W R 23 : 32 S L R 264 : ILR (1938) Bom 249 : 172 Ind Cas 771.

——S. 30 (a)—Applicability and scope.

The application of cl. (a) of S. 30 does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily at the time of making out the bill of entry, there will not be an actual price relating to the goods themselves and complying with the requirements of cl. (a). As a rule, therefore, the price appropriate to the goods under assessment will, under the clause, be deduced, if at all, from actual prices relating to the other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a "whole-sale cash price less trade discount," the clause is not inapplicable for want of sales of other goods. The goods under assessment may, under cl. (a) be considered as members of their own class even although at the time and place of importation, there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. A I R (Vol 25) 1938 PC 15 : 1938 A W R 23 : (1938) 1 M L J 161 : 66 C L J 466 : (1938) A L J 87 : 42 CWN 257 : 4 BR 287 : 1938 OWN 188 : 47 LW 205: (1938) MWN 134 : 40 Bom L R 269 : ILR (1938) Bom 249 : 65 IA 32 : 32 SLR 264 : 172 Ind Cas 771.

——S. 30 (a)—Applicability— 'Ascertainable', meaning of.

In the application of S. 30 to the facts of a given case, some thing may depend upon the exact force attributed to the requirement that the price must be

"ascertainable." The word imports 'more than could be satisfied by the result of a mere estimate'. On the other hand the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by cl. (a) upon the basis of an actual price, though some adjustment may be needed to eliminate the difference, e.g., between cash and a month's credit. AIR (Vol 25) 1938 PC 15 : 1938 ALJ 87 : 42 CWN 257 : 4 BR 287 : 47 LW 205: 1938 OWN 188 : 1938 MWN 134 : (1938) 1 M L J 161 : 40 Bom L R 269 : 66 C L J 466 : 1938 A W R 23 : I L R (1938) Bom 249 : 32 SLR 264 : 65 IA 32: 172 Ind Cas 771.

——S. 30 (a), (b)—Construction—"Time and place of importation" — Significance of — Import of cars — Whole-sale cash price— Sale at the place of importation—Dissection of actual price paid.

A reasonable interpretation should be given to the words "time and place of importation" in S. 30 (a). 'Time' cannot refer to the precise moment of time at which goods are imported, that is, unloaded from the ship. There must be reasonable time in which a sale can take place. "Place of importation" cannot mean the exact spot of land on which goods are landed, whether on the wharf or on the shore. It must cover a wider area than that, and generally speaking, "place of importation" means the place, whether Bombay, Madras, Karachi, or elsewhere, as the case may be, at which the goods are imported. In dealing with commodities the market price of which may vary from day to day, one would have to take the price ruling on the day of importation in considering the price at which goods of a like kind and quality were capable of being sold.

The plaintiffs who were importers into India of Ford motor cars acquired them from the manufacturing company in Canada. They ordered from the manufacturing company such number of cars as they required and were charged free on board the Canadian port. The manufacturers paid the freight and insurance in the first instance, but debited those charges against the plaintiffs who arranged for the sale of the cars in India through various agents. They had one principal agent in Bombay City, namely the Ford Automobiles (India), Ltd., and they had other distributing agents in other parts of India. In practice, the various distributing agents in India informed the plaintiffs what their requirements will be for the purchase of cars, and at intervals, say once or twice a month, the plaintiffs sent to Canada an order for such number of cars as their distributing agents have intimated that they are ready to take. The price which the distributors pay was not fixed, or indeed discussed at the time when the order for a car was given; but when the car arrived in Bombay, the plaintiffs fixed the retail price at which the different models were to be sold in India. That price was published in a list which was available to all the dealers, and the price which the plaintiffs charged to the dealers was that retail price less 20 per cent. As soon as the cars arrived in Bombay, the dealers were notified, and they then had to come and pay the price which they ascertained from the price lists supplied to them. They had to pay that price in cash, and then they take delivery of the goods. If the dealer was in Bombay, delivery was made at his place of business. If the dealer was at some other place, then delivery was made at the appropriate Railway Station in Bombay, and the price lists showed that the prices were f.o.r., main ports of entry. As the cars were not in running order when they arrived, a fixed sum was allowed to cover cost of assembly and overhead expenses were also incured by the importers :

Held, the only contract of sale which took place was the contract which was completed when the dealers were notified of the arrival of their goods and the price to be paid, and when in pursuance of that notification, they paid the price and the goods were delivered. That transaction amounted to a sale which took place at Bombay, the place of importation, and at the time of importation, that is to say, within a reasonable time, one or two days after the actual landing of the goods.

Held, also, that the case fell within the exact words of S. 30 (a), and not within S. 30 (b).

Held further, that the price was a wholesale cash price and in determining it, it was not legitimate to dissect the actual price paid, deduct from it such portions as may be ascertained to represent something other than the price of the goods, e.g., the cost of service, and then say that the residue left was the wholesale cash price of the goods. AIR (Vol 23) 1936 Bom 356 : 38 Bom L R 283 : 60 B 551 : 169 Ind Cas 104 (DB).

——S. 30 (a), (b)—Scope—Importing of goods—Customs duty—Ascertainment of real value of goods—Principles—'Wholesale cash price,' meaning of.

The appellants manufactured lubricating oils in America which they imported into India and thereafter direct to consumers. There were no other oils of the like kind and quality. The oils were consigned from America upon invoices charging the importing branch with the cost price plus a small manufacturing profit. All oils were disposed of direct to consumers and never to dealers whether for purposes of resale or otherwise. The selling price to consumers was much above the entry price :

Held, that the words "wholesale cash price" in S. 30 were used in contradistinction to retail price, that in no sense could the price charged to consumers for the machinery oils imported by the appellants be regarded as such "a wholesale cash price" nor was it possible by further inquiry to extract any such price from any other available material, and that accordingly their real value must, for the purposes of duty, be determined in accordance with S. 30 (b).

The wholesale cash price primarily in view is that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles.

The alternative basis of assessment indicated in S. 30 (b) is not only to be a "dernier resort" but for the great bulk of dutiable goods in their infinite variety it must be the only available basis. AIR (Vol 19) 1932 P C 168 : 34 Bom L R 1057 : 55 C L J 520 : 36 CWN 854: 36 L W 156 : 56 B 313 : 63 M L J 437: 1933 M W N 81 : 59 I A 258 : 137 Ind Cas 535.

——S. 30 (a), (b)—"Wholesale cash price—"Wholesale cash price" means the market price at the time and place of importation.

The expression "wholesale cash price" used in S. 30, Cl. (a) of the Sea Customs Act clearly indicates that it must mean the wholesale cash price for which the goods of like kind and quality are sold, or are capable of being sold, at the time and place of importation. Those words clearly indicate that it must be the price which the importers here would be able to realise on wholesale disposal of the goods by them to any person after importation. The expression could not be construed as meaning the price which they may have paid for the purpose of importing goods to Bombay. Clause (b) of S. 30, of the Act only applies when the wholesale cash price, of the goods imported, is not ascertainable. This clause is added in order that the real value might be ascertained where no wholesale cash price is ascertainable. 67 Ind Cas 267 : 24 Bom L R 198 : 47 Bom 174 : AIR (Vol 9) 1922 Bom 12 (DB).

——S. 30 (b) — Construction—Real value—What is —Proof.

Section 30 (b) does not lay down that the real value of imported goods is the cost at which those particular goods are delivered, but 'the cost at which goods of the like kind and quality could be delivered'

at that place. The mere fact that an importer paid a particular price for particular goods is not sufficient to prove that that price is the real value for the purposes of S. 30 (b). It must be shown that goods of the like kind and quality could not be delivered at that place at a lower price. AIR (Vol 29) 1942 Cal 351 : 46 C W N 414 : 43 Cr L J 651 : ILR (1942) 2 Cal 62 : 201 Ind Cas 338 (DB).

——S. 30 (b)—Scope.

The words "of the kind and quality" used in Cl, (b) of S. 30, must be deemed also to cover the goods themselves. AIR (Vol 24) 1937 Sind 293 : 39 Cr L J 123 : 32 S L R 87 : 172 Ind Cas 374 (DB).

——S. 32

——S. 32—Procedure—Object.

The procedure under S. 32 protects a trader as well as the State.

Sea Customs Act intends to prescribe different procedures for different classes of goods. There is no question of option. If it is ad valorem goods, there is a special class of procedure, Ss. 30 and 32. If it is tariff value goods then the assessment is under the general powers and the power to detain under the general power. If S. 32 applies, there is no other procedure. AIR (Vol 27) 1940 Cal 174 : I L R (1939) 2 Cal 541 : 189 Ind Cas 556.

——S. 32—Application of S. 415, Penal Code.

The fact that S. 32, refers to the delivery of goods detained by the Collector does not exclude the application of S. 415, Penal Code, in appropriate cases when it is clear that the acts necessary to constitute an offence under that section and to attract its application in fact exist. Whether, when they exist in circumstances which also attract the application of the Sea Customs Act, or whether it is wise to apply the Penal Code, in full force to such acts is a matter of policy. AIR (Vol 24) 1937 Sind 293 : 39 Cr L J 123 : 32 S L R 87 : 172 Ind Cas 374 (DB).

——S. 32 — Applicability — Goods under-valued — Option of Government to buy.

Section 32 does not empower an importer to compel the Customs officer either to accept his declared value as correct or if he challenges it to buy the goods on behalf of Government at the declared value. The option lies with Government to buy the goods in fit cases and not with the importer. The use of the expression "may" in the first part of S. 32 makes it abundantly clear that the option lies with the Customs Officer to detain the goods for the purpose of that section if he so wishes. It is only when the Customs Officer acts under that section that the procedure laid down in the rest of the section comes into play. AIR (Vol 23) 1936 Sind 127 : 30 SLR 304 : 164 Ind Cas 583.

——S. 37

——S. 37 — Sale of goods in bonded warehouse—Increase of import duty—Liability of buyer to pay increased duty.

Where, after the date of a contract for sale of goods lying in a bonded warehouse, the import duty on the goods was raised :

Held, that the seller was entitled to refuse to give delivery of the goods until the proper price, that is to say, the agreed purchase price plus the increased duty had been tendered by the buyer. The fact that duty had not been paid by the seller was immaterial. AIR (Vol 20) 1333 : Mad 24 : 1932 M W N 946 : 63 M L J 565 : 36 L W 583 : 56 M 334 : 139 Ind Cas 847 (DB).

——S. 64

——Ss. 64, 85—Object—Construction.

In giving effect to the words of Ss. 64 and 85, the Court must be satisfied that an enforceable claim existed at the date of suit.

In enacting Ss. 64 and 85, the object of the Legislature was to authorise the Customs Authorities to release the ship, provided that there was some person within the jurisdiction who would be answerable for such claims as either the ship would have been answerable for, if she had remained within the jurisdiction, or the carrier would have been answerable for, if he had been within the jurisdiction and unless the claim can be established against the carrier or the ship it cannot be established against the ship's agent who has made the declaration under the Sea Customs Act. AIR (Vol 19) 1932 Bom 330 : 34 Bom L R 634 : 138 Ind Cas 793.

——Ss. 64 (c), 167 (17)—Penalty, nature of.

The penalty referred to in S. 64 (c), as being imposed under S. 167 (17) is a penalty imposed upon the master of the vessel and the penalty so imposed upon the master of the vessel is one for which the ship's agents, by virtue of that declaration, bind themselves to be liable as agents. But the liability of such person is not personal, but is that of an agent for the ship. AIR (Vol 27) 1940 Bom 294 : 42 Bom L R 532 : 191 Ind Cas 867.

——S. 64, cl. (d)—Nature of liability.

The liability referred to in cl. (d), S. 64 is a liability of the ship's agents as agents, and therefore, that liability must be limited by the liability of the ship as principal, and there is no force in the argument that whereas the liability of the ship ceases after the period of one year, the liability of the ship's agents continues thereafter. AIR (Vol 24) 1937 Sind 11 : 30 S L R 345 : 168 Ind Cas 330 (DB).

——S. 79

——S. 79—Cargo Boat rules of—The Rangoon port, rule 1—Plying, meaning of—"Plying for landing and shipping of merchandise within port" meaning of.

The word ply in rule 1 means to do an action repeatedly and not necessarily plying for hire. The words "plying for landing and shipping of merchandise within port" need not be restricted in meaning to both landing and shipping merchandise within port. They mean boats which ply for the landing and boats which ply for shipping or both. (1911) 4 Bur L T 215 : 12 Cr L J 476 : 12 Ind Cas 84.

——S. 85.

See also, Sea Customs Act, S. 64.

——S. 85—Goods dealt with under S. 85 (b), whether in charge of Customs.

Section 85 must be read as a whole and whereas in a small port, the Custom Authoritres themselves land and take charge of the goods, in the large ports this is done by the Port Trust as their agents for this purpose. But it cannot be said that the goods are anytheless in charge of the Customs when they are dealt with under Cl. (b) instead of under Cl. (a). AIR (Vol 24) 1937 Sind 293: 39 Cr L J 123: 32 SLR 87: 172 Ind Cas 374 (DB).

——S. 87.

——S. 87—Consignment containing packets of cotton cord not declared in bill of entry—Silk scarves described as haberdashery in bill of entry—Goods detained and re-assessed—Final order of Assistant Collector referring to payment of correct duty under S. 87—Importer applying under S. 45, Specific Relief Act, for order upon Custom Authorities to proceed under S. 32, Sea Customs Act—Act done by Customs Authorities, held concerned revenue and High Court had no jurisdiction to interfere by reason of Government of India Act, 1935, S. 106. AIR (Vol 27) 1940 Cal 174: ILR (1939) 2 Cal 541: 189 Ind Cas 556.

——S. 167.

See also Sea Customs Act, S. 64.

——S. 167—Interpretation—Acts mentioned in S. 161—Ordinary criminal law applies.

The use of the expressions "offence" and "Penalty" in respect of the acts and omission specified in S. 167 of the Sea Customs Act is not by itself sufficient to show that such acts or omissions are declared as

crimes; whether they are crimes or not depends upon the ordinary criminal law of the land. AIR (Vol 13) 1926 Sind 40: 20 SLR 100: 88 Ind Cas 980.

——S. 167 (17)—Scope.

Measurement need not be taken on board the vessel —To ascertain deficiency the Assistant Collector may obtain his materials vicariously through his officers for calculation — Special Tribunal trying offence under S. 167 (17) after giving fair hearing—Government can claim immunity from a civil suit—Court decision on adjudication—Liability of ship's agent for penalty imposed under S. 167 (17) not personal—Suit for recovery of penalty imposed under S. 167 (17) barred under S. 226, Government of India Act—Suit to set aside order of Assistant Collector under S. 167 (17) — Limitation is governed by Art. 14, Limitation Act. AIR (Vol 27) 1940 Bom 294: 42 Bom L R 532: 191 Ind Cas 867.

——Ss. 167 (17), 182—Scope—Measurement, place of.

The first part of col. 1 of S. 167 (17), refers to the goods not being "found on board the vessel". The word "found" means actually or physically existing on board. This part refers to a case where all the goods on the board have disappeared or are non-existent. The second part of col. 1 deals with the case where "the quantity so found is short," that is to say, the quantity existing on board the vessel is short or deficient and the deficiency is not accounted for to the satisfaction of the Customs Officer. The word "found" in the second part must have the same meaning as in the first part of the column, and cannot here mean "ascertained" or "measured". The deficiency must be in the quantity of the goods on board, but the principal point of dispute is as to the place where the deficiency, if any, must be ascertained. There is, however, nothing in the section to indicate that the measurements must be taken only on board the vessel, and nowhere else. There is nothing to prevent the measurement of the quantity on board being made at another place and at a later date provided the time and place are so reasonably arranged as to ensure that for the purposes of the Act the measurement is a measurement of the goods on board. It does not necessarily follow that a measurement of goods landed can never be a measurement of the goods on board. If, however, a measurement not taken on board is wrong and illegal under any circumstances, the fact that that has been the practice followed by the Customs Authorities for thirty years, or the fact that other companies also take measurements of the oil imported by them according to the same practice, or the fact that at the port of loading the oil was also conducted to the vessel through pipe line from the reservoirs of the exporters will not legalize an illegal measurement taken at the port of discharge. AIR (Vol 27) 1940 Bom 294: 42 Bom L R 532: 191 Ind Cas 867.

——S. 167 (17)—Trial by Special Tribunal—Effect.

A Special Tribunal provided by the Sea Customs Act is competent to try an offence under S. 167 (17). If the Special Tribunal operates as provided by the Act and gives a fair hearing to both sides, the Government can claim immunity from a civil suit.

A Court decision is no less an adjudication than a summary dismissal of a suit or of an application in Court after the two sides have been heard. AIR (Vol 27) 1940 Bom 294: 42 Bom L R 532: 191 Ind Cas 867.

——S 167 (70)—Jurisdiction of High Court—High Court can only intertere if principles of natural justice have not been carried out.

Appeals do not lie to the High Court from the decision of the Customs authorities. The High Court speaking generally has no jurisdiction in revenue matter. But the High Court is entitled to see that the principles of natural justice have been carried out.

A Machwa left Bombay for another port with a manifest showing that it had loaded twelve boxes of matches at Bombay. Actually it had taken no such cargo. On its voyage it touched a Portuguese port and took the said cargo there. The Tindal of the Machwa was prosecuted under S. 167, Cl. 70, the goods respecting which the offence took place were liable to confiscation. During the inquiry the Superintendent of Salt Revenue required him to give an answer with reasons as to why a sentence should not be passed against him under S. 167, Cl. 70

Held, that the Tindal was given before the Superintendent a fair notice of the charge made against him and that he had a fair opportunity of making his answer. Therefore the customs authorities and not the High Court had jurisdiction. AIR (Vol 16) 1929 Bom 462: 31 Bom L R 1052 (DB).

——S. 167 (72)—Search warrant, issue of.

A search warrant under S. 96, Criminal P. C. cannot be issued in proceedings by the Customs Authorities under S. 167 (72), Sea Customs Act. AIR (Vol 21) 1934 Bom 104: 36 Bom L R 96: 35 Cr L J 1024: 149 Ind Cas 1021 (DB).

——S. 167 (78)—Obstruction, what is.

Mere evasion or disobedience to a lawful order is not an obstruction to the officer who issues the order. Obstruction implies some actual resistance offered to the public servant in the discharge of his duties.

Failure to stop when asked to stop by a Customs Officer who has the right to stop suspected smugglers is not an obstruction to the Customs Officer. AIR (Vol 24) 1937 Mad 208: 44 L W 885: 1936 MWN 1339 (2): 38 Cr L J 263: (1937) 1 MLJ 178: 166 Ind Cas 656.

——S. 168.

——S. 168—Applicability.

Section 168 does not apply only to some lighter or other boat which actually lands goods from a Machwa, but also applies to a Machwa used in the removal of goods loaded under a false manifest and carried from one port to another. AIR (Vol 16) 1929 Bom 462: 31 Bom L R 1052 (DB).

——S. 182.

See also, Sea Customs Act, S. 167.

——S. 182—Mode of ascertaining deficiency.

It is by comparing the quantity discharged with the manifested quantity that the deficiency is ascertained, and the penalty is based on the calculation of the figures which are checked and sent to the Assistant Collector by the Customs Inspector who makes the calculation. It is not necessary that the Assistant Collector should do everything personally, and there is nothing wrong in his obtaining his materials vicariously through his officials for calculation. AIR (Vol 27) 1940 Bom 294: 42 Bom L R 532: 191 Ind Cas 867.

——S 182—Confiscation and penalties, adjudication of.

The Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by the Customs Officers under Section 182. Therefore, the Customs Officers must proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such inquiries, as the present one are instituted. AIR (Vol 9) 1922 Bom 30: 24 Bom L R 245: 46 Bom 732: 66 Ind Cas 872 (DB).

——S. 188

——Ss. 188, 191—Goods seized on suspicion of smuggling—Confiscation by Collector—Civil suit, competency of.

Certain silk goods which were suspected by the Customs Authorities to be smuggled, were seized by them and an inquiry was held by the Inspector of

Customs at which the owner of the goods was heard and was represented by the Advocates and no facility was refused to him to put forward whatever evidence he had to adduce or arguments he wished to present in support of his case. The records of the case were sent to the Collector of Customs and Salt Revenue who passed an order confiscating the goods which had been seized, holding that they had been smuggled. This order was passed without any further hearing being afforded to the owner. The owner thereupon applied under S. 188, to the Central Board of Revenue which held on revision that the order of the Collector of Customs was right and could not be interfered with. The owner brought a suit for a declaration that the order of the Central Board of Revenue was not valid and binding on him.

Held, that even if it was true that the procedure of the Collector was not correct, there was a definite remedy provided by the Act and, therefore, the owner had no right of suit. AIR (Vol 29) 1942 Mad 704: (1942) 2 MLJ 193: 55 L W 498: 205 Ind Cas 218.

——S. 188, proviso—Construction.

The proviso in S. 188, which is limited to adjudications under S. 182 does not necessarily involve the narrower construction of the opening words of the section. AIR (Vol 25) 1938 Mad 608: ILR (1938) Mad 1040: 181 Ind Cas 821, Reversed. AIR (Vol 27) 1940 P C 105: 6 B R 731: 44 CWN 709: 1940 MWN 610: 52 L W 1: (1940) 2 MLJ 140: 1940 OWN 679: ILR (1940) Mad 599: 71 CLJ 576: 42 Bom L R 767: ILR (1940) Kar P C 194 Sup.: 1940 AWR 132: 67 I A 222: 188 Ind Cas 231.

——S. 188—Construction.

It cannot be inferred that the heading of the chapter—"Procedure relating to Offences, Appeals, etc" indicates that the appeals are correlated with the offences. The chapter is one relating to procedure and not a chapter relating to offences. The heading of the chapter is of no material assistance in the construction of S. 188. AIR (Vol 25) 1938 Mad 608: ILR (1938) Mad 1040: 181 Ind Cas 821. Reversed. AIR (Vol 27) 1940 P C 105: 6 B R 731: 44 CWN 709: 1940 MWN 610: 52 L W 1: (1940) 2 MLJ 140: 1940 AWR 132: 1940 OWN 679: 71 CLJ 576: ILR (1940) Mad 599: 42 Bom L R 767: ILR (1940) Kar P C 194 Sup.: 67 I A 222: 188 Ind Cas 231.

——Ss. 188, 182—"Decision or order", meaning of.

The words "decision or order" in S. 188 are wide words and are of a more general nature than the adjudications referred to in S. 182 which are also referred to as awards in S. 186 and are not confined to adjudications under S. 182 but include decisions by an Officer of Customs as to the rate of duty applicable to particular goods, which necessarily involve the determination of the particular category in the tariff classification into which the goods fall. AIR (Vol 25) 1938 Mad 608: ILR (1938) Mad 1040: 181 Ind Cas 821, Reversed. AIR (Vol 27) 1940 P C 105: 6 B R 731: 44 CWN 709: 1940 AWR 132: 1940 MWN 610: 52 L W 1: (1940) 2 MLJ 140: 1940 OWN 679: ILR (1940) Mad 599: 71 CLJ 576: 42 Bom L R 767: 67 I A 222: ILR (1940) Kar P C 194 Sup.: 188 Ind Cas 231.

——S 188—Decisions or orders.

Adjudications as to confiscations, increased rates of duty or penalties made under the power conferred by S. 182, are decisions or orders within the meaning of S. 188. AIR (Vol 25) 1938 Mad 608: ILR (1938 Mad 1040: 181 Ind Cas 821, Reversed. AIR (Vol 27) 1940 P C 105: 6 B R 731: 44 CWN 709: 1940 MWN 610: 52 L W 1: (1940) 2 MLJ 140: 1940 OWN 679: 1940 AWR :132: 71 CLJ 576 : ILR (1940) Mad 599: 42 Bom L R 767: ILR (1940) Kar P C 194 Sup.: 67 I A 222: 188 Ind Cas 231.

——Ss. 188, 191—Exclusion of jurisdiction of Civil Courts.

By Ss. 188 and 191, a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself and it enables the appeal to be carried to the supreme head of the executive Government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts. An order of the Collector of Customs dismissing an appeal under S. 188 from a decision of the Assistant Collector of Customs regarding the rate of duty assessable on particular goods which is confirmed by the Governor General in Council under S. 191, excludes the jurisdiction of the Civil Court to entertain a suit to challenge the merits of that decision.

Section 32, Government of India Act, does not affect the validity of an Act of Indian Legislature which creates an obligation and provides an exclusive code for its determination; such an obligation is not covered by sub-s. (2) of S. 32. Hence an exclusion of the subject's right of resort to the Civil Courts by Ss. 188 and 191, Sea Customs Act, would not be ultra vires of the Indian Legislature. AIR (Vol 25) 1938 Mad 608: ILR (1938) Mad 1040: 181 Ind Cas 821, Reversed. AIR (Vol 27) 1940 P C 105: 6 B R 731: 1940 AWR 132: 44 CWN 709: 52 L W 1: 1940 MWN 610: (1940) 2 MLJ 140: 1940 OWN 679: ILR (1940) Mad 599: 71 CLJ 576: 67 I A 222: 42 Bom L R 767: ILR (1940) Kar P C 194 Sup: 188 Ind Cas 231.

——Ss. 188, 191—Decision of Chief Customs Authority modified by Governor-General-in-Council — Powers of Civil Courts to question.

The Legislature intended that the sole remedy open to those who were aggrieved by a decision or order passed by an officer of customs under the Sea Customs Act, should be the appeal to the Chief Customs Authority provided by S. 188. The order passed by Governor General in Council under S. 191 of the Act can in no case be questioned in the Civil Courts except possibly orders which, while purporting to be made under it are clearly outside it. An order by Governor General in Council enhancing penalty would possibly be such an order. Generally speaking, however, what the section contemplates are revisional orders of an executive character. AIR (Vol 26) 1939 Cal 763: ILR (1939) 1 Cal 257: 48 CWN 445: 187 Ind Cas 542.

— Ss. 188, 191 — Excess customs duty levied — Appeal to Central Board of Revenue dismissed — Suit on Original Side of High Court for declaration that order of Board was ultra vires—Maintainability.

Duty on the goods desired to be imported being enhanced between the date of arrival of the goods and the date of the plaintiff's taking delivery, the Customs Authorities demanded a higher duty than would have been payable previously. The plaintiffs paid the increased amount under protest and appealed to the Central Board of Revenue taking up the position that because of delay in the office of the Appraiser or some such excuse, they should have been charged with the lower instead of the higher rate of duty. The appeal was dismissed and the plaintiffs filed a suit in the High Court against the Secretary of State for a declaration that the order of the Central Board of Revenue was ultra vires and for refund of excess duty paid :

Held, (i) that the matter was entirely one of revenue and by S. 106 (2), Government of India Act, the jurisdiction of the High Court was barred;

(ii) that the suit was barred by S. 188, Sea Customs Act, which provides the remedy and the tribunal to which an appeal has to be made if a grievance is believed to exist in regard to any decision or adjudication of a Customs Officer and the section further provides that every decision of the tribunal men-

tioned, namely the Central Board of Revenue, shall be final subject to revision under another section, namely S. 191 of the Sea Customs Act. AIR (Vol 24) 1937 Mad 536 : 45 L W 394 : 172 Ind Cas 70.

——S. 191.

See Sea Customs Act, S. 188.

SEARCH

See Criminal P. C., Ss. 51, 96, 101 to 103 and 105.

SEARCH WARRANT

See Criminal P. C., Ss. 94 to 99.

SECOND APPEAL

See Civil P. C., Ss. 100, 102, 103, 104, 107, 108, O. 41, and O. 42, R. 1.

SECONDARY EVIDENCE

See Evidence Act, Ss. 65 and 91.

SECRETARY OF STATE

See also (1) Civil P. C., S. 80.
(2) Master and Servant.
(3) Tort.

——Status of — Contract with — Concurrence of other members of Council.

The Secretary of State for India is one of His Majesty's five principal Secretaries of State, and as such can discharge most if not all of the duties of the other four, as they can discharge most, if not all of his duties. He is an officer of the British Government in the fullest sense.

A contract is none the less made with the Secretary of State though he has to obtain the concurrence of others (members of his Council) before making it, and that he and they are designated by status as liable to be sued or to sue on it as a corporate body.

The personality of the Secretary of State is not merged in any corporation by the statute (1858) for the better Government of India nor in that of the Council. (1913) 17 C W N 735 : 19 Ind Cas 765 (PC).

——Corporation.

The "Secretary of State" is merely a name under which the Government is to be sued and does not denote either an individual or a corporation. 37 Mad 113 : 23 M L J 181 : (1912) M W N 786 : 12 M L T 224 : 16 Ind Cas 947 (DB).

——Represents Crown.

Where the Crown is a proper party to a suit, the Secretary of State is alone the proper representative. (1910) 34 Bom 618 : 12 Bom L R 34 : 5 Ind Cas 621 (DB).

——Necessary party—Public Demands Recovery Act.

Where a sale under Public Demands Recovery Act is null and void, because the certificate was null and void, and a suit is brought for recovery of possession, the Secretary of State is not a necessary party. (1910) 11 C L J 385 : 14 C W N 606 : 5 Ind Cas 341 (DB).

——Whether necessary party — Suit for declaration of title and possession of land sold under — Certificate for public demand.

Where a certificate was issued under the Public Demands Recovery Act against a person who, according to the plaintiff was not the rightful owner and the plaintiff sued for a declaration of his title to the property, it was held that the suit being not one to set aside a sale but to obtain a declaration of title, the Secretary of State was not a necessary party. (1909) 1 Ind Cas 313 (DB) (Cal).

SECURITIES ACT (10 of 1920)

——S. 5.

——S. 5—Valid endorsement, what is.

Where the promissory note is made in favour of B and his executors or administrators or his or their order and the original promisee B under the promissory note is dead an endorsement on the pro-note in favour of B's daughter by the Registrar of the High Court under his signature is invalid under S. 5, as the signature of the Registrar cannot be said to be that of the holder or even made on behalf of the holder or anyone mentioned in the pro-note or entitled thereto. AIR (Vol 28) 1941 Cal 458 : I L R (1941) 1 Cal 328: 45 CWN 449: 196 Ind Cas 48 (DB).

——S. 5—Object.

Section 5, Govt. Securities Act, was enacted only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of the assignor in the war bonds and Government promissory notes deposited by the assignee with the Government is not affected by S. 5. AIR (Vol 27) 1940 Mad 878 : (1940) 2 M L J 278 : 52 L W 247 : 1940 M W N 841 : 193 Ind Cas 597 (DB).

——S. 5—Government promissory note, transfer of, how made.

Government promissory note can only be transferred by endorsement on the note itself. AIR (Vol 26) 1939 Cal 746 : I L R (1939) 2 Cal 52 : 41 Cr L J 134: 185 Ind Cas 214.

——S. 12.

——Ss. 12, 13—Construction—Effect of S. 13.

Sections 12 and 13 must be read together. The mere fact that there nas been a dispute to which S. 13 applies does not deprive S. 12 of its operation and does not relieve the applicant from the obligation to deliver the promissory note and pay the prescribed fee. AIR (Vol 28) 1941 Cal 458 : I L R (1941) 1 Cal 328 : 45 C W N 449 : 196 Ind Cas 48 (DB).

——S. 13.

——S. 13—Effect.

The effect of S. 13 is to relieve the prescribed authority of deciding on the merits of the dispute inter partes in a case to which the section applies. But the prescribed authority is still entitled to call upon the applicant to satisfy it of the justice of his claim from other points of view. AIR (Vol 28) 1941 Cal 458 : I L R (1941) 1 Cal 328 : 45 C W N 449 : 196 Ind Cas 48 (DB).

——S. 13 (1), Expl. 5, 12 — "Final decision," meaning of.

Per McNair, J.—It is immaterial whether an appeal is to be taken or is not to be taken for the construction of "final decision" under S. 13. The only question which is relevant is whether the time has or has not expired. If it has not expired, there is no final decision within the meaning of the section.

Per Bench. — Where the daughter of the original promisee of a pro-note is declared entitled thereto during her life and the period of limitation for an appeal from that decision has not expired, the Bank would be justified in refusing to renew it in favour of the daughter inasmuch as the decision cannot be said to be a "final decision" that the daughter is "entitled to" the note. AIR (Vol 28) 1941 Cal 458 : 45 C W N 449 : I L R (1941) 1 Cal 328 : 196 Ind Cas 48 (DB).

——S. 16.

—— Ss. 16, 21—Renewed promissory note constitutes new contract free from equities and dispute.

Section 16 provides in terms that a renewed Government promissory note is to be deemed to constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him. The holder of a renewed note obtains a new promise from the Government free from any equities or disputes which might have attached to the prior note. AIR (Vol 24) 1937 Bom 145 : 38 Bom L R 1205: 168 Ind Cas 652, Reversed on another point. AIR (Vol 25) 1938 P C 191: 4 B R 677: 42 C W N 957: 1938 M W N 753 : 48 L W 8 : 67 C L J 456: (1938) 2 M L J 169 : I L R (1938) Bom 502 : 19 P L T 625: 65 I A 286 : 1938 A L J 807 : 40 Bom L R 868 : 32

S L R 786 : 1938 O W N 1009 : 1938 A W R 197: 175 Ind Cas 327.

— S. 16—New promissory note, new contract.

Section 16 makes it clear that when a new note is issued, it constitutes a fresh contract between Government and the person to whom it is issued, and is free from any infirmities of the old note. AIR (Vol 24) 1937 Bom 145 : 38 Bom L R 1205 : 168 Ind Cas 652 (DB).

[Reversed on another point in A I R 1938 PC 191 : 1938-2 M L J 169 : 175 Ind Cas 327.]

——S. 16 — Holder's rights Holder in due course without notice of fraud committed by endorser — Rights of.

Plaintiff entrusted a Municipal debenture to defendant 1 for recovering interest. Defendant 1 forged plaintiff's signature and endorsed the same in favour of defendant 2, A Bank, for securing advances made to him. The bank then renewed the same in its own name. Defendant 1 then obtained a loan from defendant 3, M Bank to pay off defendant 2 who endorsed the debenture in favour of defendant 3 and handed it over to him as a security f r the loan advanced. Plaintiff sued to recover the debenture or its value.

Held, even if the old Municipal debenture be treated as stolen property the proceeds of such property in the form of new debenture could not be recovered from defendant 3 who were holders in due course without notice of fraud.

Held, further that even if they had notice of renewal and consequently of forgery, they had no notice of any trust in favour of defendant 1. AIR (Vol 15) 1928 Bom 436 : 30 Bom L R 1225 : 52 Bom 810 : 112 Ind Cas 824 (DB).

——S. 16—Renewal of forged debenture — Endorsement of renewed debenture—Rights of the endorsee.

Fourteen debentures issued by the Bombay Port Trust were entrusted by plaintiff to defendant 1. Defendant 1 forged the plaintiffs' signature on the debentures and endorsed them in favour of the bank, defendant 2, as security for the loan advanced to him. The bank got the debentures renewed for the original amounts and new debentures were issued in their name. In the new debentures there was a distinct reference to renewal. Defendant 1 took a loan from defendant 5 and paid off defendant 2 who endorsed the new debentures in favour of defendant 5 who retained them as security for the loan. The plaintiff sued to recover the debentures or their value from the defendants.

Held, that defendant 5 was entitled to retain these documents. There is a distinction between a promissory note full of endorsements, and a promissory note which is a clean document. A person in the position of defendant 5 is not obliged before he becomes the holder of the new debentures to enquire into the title of the old debentures, nor to call for their production, and search through all the old debentures. AIR (Vol 15) 1928 Bom 434 : 52 Bom 807 : 30 Bom L R 1222 : 114 Ind Cas 389 (DB).

——S. 18.

— S. 18—Scope.

Section 18 does not give the plaintiff more time than he would otherwise have under the Limitation Act. That section says no more than that when the Government has made a payment due upon a security, it shall be discharged from all liability in respect of the security after the lapse of six years from the date on which the payment was due. AIR (Vol 20) 1933 Mad 376 : 64 M L J 172 : 37 LW 302 : 142 Ind Cas 286 (DB).

— S. 21.

——Ss. 21, 12 — Construction — Govt. officer when issuing renewed note not exacting security Third party suffering — Govt. paying damages, whether can be indemnified — Exclusion of Common Law right to be indemnified—Construction of statutes.

It is a general principle of law that when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. The principle is of the widest general application. It is often said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. But it is merely said that the person is entitled to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that request to his damage.

There may indeed be cases where the person charged with the statutory duty is also charged with the responsibility of deciding in a judicial or quasi-judicial capacity whether it is proper to exercise the duty in any particular case, so that he could not be regarded as acting on the applicant's request, but solely on his own statutory responsibility. Such cases would depend on the particular construction of the particular statutes. There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, it is not necessary that the plaintiff (the Officer concerned) should have been other than a free agent. He may act on the defendant's request, not under compulsion but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled does not per se debar him from saying that he has acted upon the assertion or claim or request of the applicant.

As a matter of construction, it cannot be said that S. 21, has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity undoubtedly existing under the Act of 1886, which embodied the law on this matter until it was repealed and replaced by the Act of 1920. A statute is prima facie to be construed as changing the law to no greater extent than its words or necessary intendment require. If it had been intended by the insertion of S. 21 in the Act of 1920 to abrogate the Common Law indemnity existing under the repealed Act, the Legislature would have used words clearly expressing that intention, so as to secure that save as provided by S. 21, there should be no right of indemnity. On the contrary, S. 21 should be construed as giving an added statutory right, which is different from and in no way inconsistent with the Common Law right. That latter right is not complete merely because the officer has acted upon the request; to make it effective, it is necessary that a further condition should be fulfilled, namely, that 'the act should turn out to be injurious to the rights of a third party." Thus the Common Law right is required in a case where the officer, though satisfied by the applicant when he issues the renewed note of the justice of his claim, is wrongly satisfied. Though both he and the applicant are acting in perfect good faith and without suspicion, they may be, unconsciously, infringing the rights of the true owner of the note, and guilty of converting it. Cases in which the Common Law implies the indemnity are generally cases when the officer would not have thought of demanding an indemnity

under S. 21. These are mostly, if not always, cases where the risk is due to the fraud of some other persons. Section 21, if construed as to exclude the Common Law right, would put the burden of this risk on the Government, unless in every case the officer exacted the statutory indemnity under S. 21. This however, would place a serious and unnecessary burden on the course of renewing the notes which is a practice in constant use and to be facilitated, not obstructed. On the construction, the Common Law indemnity would be operative in the cases, presumably rare on the average, where it turns out eventually to be wanted because of some concealed fraud. On the other hand, the officer would generally exercise the right to require the express indemnity before issuing the renewed note, wherever he can say that he is satisfied, but still he is conscious that there are circumstances of doubt or otherwise which lead him to refuse to issue the renewed note without the express indemnity.

A lady was the indorsee and holder of a Government promissory note. A broker having possession of the note on her behalf, forged her indorsement to it in his favour and indorsed it for value to the Bank of India. The Bank, acting in good faith, applied to the Public Debt Office under the Securities Act, 1920, to have a renewed promissory note payable to them issued in exchange for the note which the Bank gave up in exchange. The Government Officer of the Public Debt Office, while issuing the renewed note, did not exact security under S 21 of the Act. The lady, becoming aware of the fraud, sued the Secretary of State in conversion and recovered the appropriate damages. The Secretary of State then brought an action against the Bank claiming to be indemnified against the loss thus sustained by him on the principle that the Public Debt Office had issued the renewed note at its request and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights :

Held, that the Secretary of State had a Common Law right to be indemnified by the Bank. This right was not excluded by his failure to exact indemnity under S. 21. A I R (Vol 24) 1937 Bom 145 : 38 Bom L R 1205 : 168 Ind Cas 652 Reversed. A I R (Vol 25) 1938 P C 191 : 4 B R 677 : 42 C W N 957 · 48 L W 8 : 67 C L J 456 : 1931 M L W 753 : 1938-2 M L J 169 : 19 P L T 725 : I L R (1938) Bom 502 : 1938 A L J 807 : 65 I A 286 : 40 Bom L R 868 : 1938 W N 1009 : 1938 A W R 197 : 32 S L R 786 : 175 Ind Cas 327.

——S. 21—Discretion in issuing duplicate bonds.

The issue of duplicate bonds is discretionary, and no liability can be fastened on the Government on the basis of the refusal to issue them. A I R (Vol 16) 1929 Lah 236 : 114 Ind Cas 697 (D B).

——S. 24.

——S. 24, Rules under — R. 13—Applicability—Rule applies to promissory notes lost or destroyed.

A person cannot claim interest after the date fixed for repayment by merely delaying presentation of his bond.

Rule 13 (2) applies only in the case of promissory notes which are lost or destroyed and when payment has to be made on the basis of such loss or destruction, and not when the bonds were missing for a time and were eventually found and presented for payment. A I R (Vol 16) 1929 Lah 236 : 114 Ind Cas 697 (D B).

SECURITY.

See (1) Mortgage.
(2) T. P. Act, Ss. 58 to 63, 65 to 69 and S. 100.

SECURITY BOND.

See also (1) Civil P. C., S. 145; O. 38, R. 2 and O. 45, R. 7.
(2) Criminal P. C., Ss. 106 to 126 and 514.

——Construction — Deposit in Court — Security bond by which property is mortgaged — Condition in bond to pay the party entitled to the amount interest till her death and to deposit amount taken, when required — Cancellation of bond and release of property from encumbrance, whether possible before the widow's death.

The amount of compensation in respect of acquisition of land belonging to the late husband of the respondent herein was deposited in Court. But as the estate in her hands was a life estate, the amount could not be given to her without sufficient safeguards. Hence the petitioner applied to the lower Court to give security by way of mortgage of his property and to receive the amount in Court deposit. The bond executing the mortgage contained inter alia the following clause : "I shall pay every year to the petitioner for her life as aforesaid the interest that accrues every year and after her life, I shall deposit the said sum of rupees into Court within such time as the Court may fix". Some time later the petitioner by an interlocutory application prayed the Court that the security bond or mortgage might be cancelled and the property released from encumbrance since the money received by him from Court had been deposited by him in Court. On the question whether on a construction of the security bond the petition for cancellation of the bond and release of the property from encumbrance was premature.

Held, that the clause in the bond that the mortgagor would continue to pay interest, even if he wants to redeem the mortgage, till the widow dies, was a clog on the equity of redemption which could not be availed of to defeat the cancellation of the bond.

The right to redeem as well as the right to foreclose, or sell, should be reciprocal and co-extensive and if the mortgagee can ask for the money even during her lifetime in case of default of payment of interest by the mortgagor regularly, it stands to reason that the mortgagor should also have the privilege of redeeming the mortgage before the happening of the certain event at an uncertain time. The clause does not create an inhibition in the mortgagor from paying the mortgage money within the outer limit of the period, namely, the death of the widow.

Held further, that another way of looking at the bond would be not to construe it as a mortgage deed, but as a security bond executed in favour of the Court in which case there can be no agreement by which the mortgagor would be prevented from redeeming the mortgage in the usual course of things. A I R (Vol 36) 1949 Mad 768 : 62 L W 317 : 1949 M W N 302 : (1949) 1 M L J 468.

——Decree in favour of minor in 1927—Money withdrawn by guardian on giving security — Bond executed in favour of Court — Suit in 1941 by minor on attaining majority to recover money withdrawn by guardian — Decree — Application to execute in the original suit to recover amount mentioned in the security bond—Maintainability—If barred by S. 48. C. P. Code — Limitation — Proper form of security bond.

A minor represented by his maternal grandfather obtained a decree for a certain sum in O. S. No. 351 of 1927 and the grandfather as next friend was allowed to draw out that sum under O. 32 R. 6, C. P. Code on the execution of a security bond under which the executant undertook to pay any amount that may be found to be payable to the minor if within 3 years of his attaining majority he raised any dispute and claimed to recover any money from his guardian in respect of the decree amount. This bond was not executed in favour of the presiding Judge of the Court nor in favour of any person but in favour

of the Court. The minor after becoming a major in January, 1941, instituted a suit in 1941 against his erstwhile guardian for rendition of account and for recovery of the amount payable to him on the taking of an account. The guardian died pending the suit and his wife was brought on record as his legal representative. An ex parte decree was passed in favour of the respondent against the assets of the guardian in the hands of the legal representative. When the quondam minor filed in 1942 an execution application in O. S. No. 351 of 1927 to recover the amount mentioned in the security bond, on the question whether the procedure adopted by him was in accordance with law and whether it was not barred under S. 48, C. P. Code.

Held, that in no sense can his application be said to be in execution of the decree in O. S. No. 351 of 1927. That decree had been satisfied long ago and what is now sought to be enforced is not the liability of judgment-debtor in that suit and as such S. 48 of the C. P. Code had no application whatever to the case. Though the application was not maintainable as an execution application it was really an application invoking the inherent powers of the Court to enforce the security bond filed before it and has to be treated as an independent application in O. S. No. 351 of 1927. The Article of the Limitation Act which is most proper to apply to the case is Art. 181 and as the application was filed within three years of the minor attaining majority, it was in time, for it could not be said that time began to run even before he attained majority.

Their Lordships directed that in future no security bond should be accepted by any Court unless it was executed in favour of a person, be he the presiding officer of the Court or the Chief Ministerial officer of the Court. A I R (Vol 36) 1949 Mad 152 : 61 L W 606 : 1948 M W N 626 : (1948) 2 M L J 287 (D B).

——**Construction — Surety undertaking to bring back amount if appeal is allowed — Appeal allowed in part — Effect on liability — Reference to order of Court in pursuance of which bond was executed for purposes of construing it — Permissibility.**

A Security bond provided that if the appeal pending in the High Court be dismissed, the bond will stand cancelled and if the appeal be allowed and decree of the trial Court set aside, the amount taken out by the party should be brought back into Court. The decree having been only varied, on a construction of the security bond.

Held : If it is reasonably clear that the contingency in which the bond is sought to be enforced would not fall within the language of the condition it is not permissible to override that language in the light of what the parties intended if they did not succeed in expressing that intention in suitable language. If, on the other hand, on fair reading of the bond in the light of the surrounding circumstances—the most important of such circumstances being the order pursuant to which the security is given—the Court considers that the contingency in which the security is sought to be availed of falls reasonably within the language of the condition which is sufficiently wide to comprehend it, there is no rule compelling the Court to adopt the stricter of the two constructions to both of which the language may be susceptible. Judged by this test the security bond in question would cover a partial allowance of the appeal as well as its total allowance. The surety was accordingly liable. A I R (Vol 35) 1948 Mad 302 : 1948 M W N 41 : 61 L W 84 : (1948) 1 M L J 75 (D B).

——**Enforcement — Procedure — Security bond for stay of execution — No one named by name in bond — Forfeiture — Mode of enforcement — Suit — Maintainability — Procedure.**

A security bond executed by a surety as a condition for stay of execution of a decree must be given to some person and is not to be intended to be a mere undertaking to the Court. It is the duty of the Court to see that the formalities required are strictly observed. If the surety executing such bond binds himself to some officer of the Court, the latter can, under the order of the Court, assign the security to the party who wishes to avail himself of it. Such a party would be in a position to enforce the bond. But when the bond is not executed in favour of any named person, and the bond does not contain the name of any person in whose favour it is made, no suit will lie to enforce the bond by the successful party. The only way of enforcing the liability under the bond is by the Court making an order in the suit upon an application to which the surety is a party, that the property charged be sold unless before a day named the surety finds the money. AIR (Vol 34) 1947 Bom 484 : 49 Bom L R 542 (D B).

——**Time-limit for filing—Draft bond filed in time—Testing of security exceeding time prescribed — Whether ground for rejection of application to accept security filed.**

Where an application by the petitioners to accept security furnished as per direction of the Court was dismissed on the ground that though the draft bond was filed in time the testing of the security exceeded the time-limit allowed for filing of the bonds.

Held, that the application to accept security should be restored. It was sufficient compliance with the order, if the security had been tendered in time, and it was not necessary that the testing of security itself should be within that time. If a party concerned carries out the order of Court directing him to furnish security and, in doing so, does all that lies in his power within the time by way of tendering security it would be sufficient. If in the end the security that is furnished within the time prescribed is found, after testing to be insufficient and is rejected, the requirements of the order have not been satisfied. In that case the Court will be entitled to reject the application for accepting the security. A I R (Vol 34) 1947 Mad 70 : 1946 M W N 604 : 59 L W 500 : (1946) 2 M L J 217 : 231 Ind Cas 363.

——**Construction—Security bond executed in favour of District Judge in proceedings under the Guardians and Wards Act—Charge, if created over immovable properties mentioned in the list appended thereto — Antecedent orders of the Judge in regard to giving security — If can be examined to ascertain intention.**

A security bond was executed by two persons in favour of the District Judge in the matter of the appointment of a guardian under the Guardians and Wards Act. They bound themselves jointly and severally to the District Judge in a particular sum to be paid to him for which payment they, their heirs, executors and administrators bound themselves jointly and severally. Then followed a sentence "whereas in the above matter the said Judge has by order, dated 4th August, 1916 approved of the above Gopal Rao Paishwa as surety for the said Venka Rao and has also approved of the above written bond with the under-written conditions as a proper security to be entered into by the said parties and in testimony of such approbation has signed his name in the margin hereof. Now the conditions of the above written bond is such, etc., etc. The conditions mentioned in the bond related to furnishing of accounts and payment of the sums found due according to the directions of the Court. It was stated that if those conditions are satisfied the bond would be void and of no effect, otherwise it shall remain in force. At the end of the document a list of properties was attached under the heading

"particulars of property." On a question whether under such a bond, a charge was created over the properties mentioned in the bond and whether in construing it, the antecedent orders of the Judge could be examined to ascertain what was intended by the Judge by accepting such a bond.

Held : It could not be inferred from the two expressions "Judge has by order dated, 4th August, 1916" and "as a proper security" that the Judge had intended that a charge should be fastened on the immovable properties for the due fulfilment of the conditions specified in the bond. Those expressions are equally consistent with the view that what was created was only a personal liability. In the absence of any words in the body of the document itself either directly or indirectly fastening an obligation in the nature of a charge on the properties the mere insertion of a list of them is not of any legal effect.

It is an established principle that the intention of the author of a written instrument must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words that they actually used, to declare the meaning of what is written and not what was intended to have been written, to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention.

Even assuming that the antecedent orders of the Judge in regard to the same matter could be looked into, there was nothing in them to show that the Court wanted, or that the persons who executed the bond intended to offer, immovable property as security.

The bond whether construed on its own terms or whether examined in the light of the antecedent orders, does not create a charge on the properties mentioned in the list appended thereto. 60 LW 615 : 1947 M W N 642 : (1947) 2 M L J 344.

SECURITY FOR COSTS
See Civil P. C., O. 25; O. 41, Rr. 6 and 10 and O. 45, R. 7.

SECURITY FOR COSTS OF APPEAL
See Civil P. C., O. 41.

SECURITY FOR GOOD BEHAVIOUR
See Criminal P. C., Ss. 107 to 126.

SEDITION
See (1) Indian States (Protection against Disaffection) Act, S. 3.
(2) Penal Code, S. 124-A.
(3) Press (Emergency Powers) Act, S. 4.

SEDUCTION
See Tort.

SELF-ACQUIRED PROPERTY
See Hindu law—Joint family.

SELF-ACQUISITION
See Hindu law—Joint family.

SELF-DEFENCE
See (1) Evidence Act, S. 105.
(2) Penal Code, Ss. 96 to 105 and 299 to 304.

SENTENCE
See (1) Criminal P. C., Ss. 32 to 35, 123, 390 to 402, 423 and 426.
(2) Criminal trial.
(3) Penal Code, Ss. 53 to 75.

SEPARATE ACQUISITION
See Hindu law—(1) Joint family.
(2) Widow.

SEPARATION
See (1) Criminal P. C., S. 488.
(2) Divorce Act.
(3) Hindu law—(i) Joint family.
(ii) Maintenance.
(iii) Partition.
(4) Husband and Wife.
(5) Muhammadan Law—Divorce.

SERVANT
See (1) Factories Act.
(2) Master and servant.
(3) Penal Code Ss. 403 to 409.
(4) Tort — Vicarious Liability — Secretary of State.
(5) Workmen's Compensation Act.

SERVICE CONTRACT
See (1) Contract Act, S. 39.
(2) Master and servant.

SERVICE GRANT
See Grant.

SERVICE INAM.
See Grant.

SERVICE OF NOTICE
See (1) Civil P. C., S. 80.
(2) Railways Act, Ss. 140-142.
(3) T. P. Act, Ss. 83, 84 and 106.

SERVICE OF SUMMONS
See (1) Civil P. C., O. 5.
(2) Criminal P. C., S. 69.

SERVIENT AND DOMINANT TENEMENT
See (1) Easements.
(2) Easements Act.

SERVITUDE, PENAL
See Penal Code, S. 56.

SESSIONS CASE
See Criminal P. C., Ss. 268 to 307.

SESSIONS COURT
See Criminal P. C., Ss. 6, 7 and 9.

SESSIONS JUDGE
See Criminal P. C., Ss. 9 and 17.

SESSIONS TRIAL
See Criminal P. C., Ss. 266 to 335.

SET-OFF
See (1) Civil P. C., S. 49, O. 8, R. 6; O. 20, Rr. 6, 7; O. 21, R. 72 and O. 21, R. 91.
(2) Companies Act, S. 229.
(3) Provincial Insolvency Act, S. 46.

SETTING ASIDE ALIENATION
See (1) Hindu law—Alienation.
(2) Limitation Act, Art. 44.

SETTING ASIDE ALIENATION BY GUARDIAN
See Limitation Act, Art. 44.

SETTING ASIDE DECREE
See (1) Civil P. C , Ss. 96, 151; O. 9, R. 13, O. 32, R. 7 and O. 41, R. 33.
(2) Decree.

SETTING ASIDE EXECUTION SALE
See Civil P. C., O. 21, R. 91.

SETTING ASIDE INSTRUMENT
See (1) Limitation Act, Art. 91.
(2) Specific Relief Act, S. 39.

SETTLED ACCOUNT
See (1) Accounts.
(2) Limitation Act, Art. 64.

SETTLEMENT
See (1) Bengal Land Revenue Settlement Regulation, 1822.
(2) Bengal Permanent Settlement Regulation, 1793.
(3) Bengal Settlement Regulation, 1875.

(4) Bombay Khoti Settlement Act, 1880.
(5) Deed-Construction.
(6) Divorce Act, S. 39.
(7) Family arrangement.
(8) Grant.
(9) Hindu Law—Widow—Maintenance.
(10) Husband and wife.
(11) Madras Permanent Settlement Regulation, 1802.
(12) Oudh Settlement.
(13) Oudh Sub-settlement Act, 1866.

SETTLEMENT - MARRIAGE
See (1) Divorce Act, S. 39.
(2) Hindu law—Widow—Maintenance.
(3) Husband and wife.

SETTLEMENT RECORD
See (1) Evidence Act, S. 35.
(2) Landlord and Tenant.

SEXUAL OFFENCE
See (1) Evidence Act, S. 133.
(2) Penal Code, Ss. 375 to 377.

SHAH JOG HUNDI
See Negotiable Instruments Act, S. 5.

SHAMILAT
See (1) Co-sharer.
(2) Custom (General) and Custom (Punjab).
(3) Landlord and Tenant—Co-sharer.

HAM TRANSACTION
See (1) Benami.
(2) Presidency Towns Insolvency Act, S. 56.
(3) Provincial Insolvency Act, S. 54.
(4) T. P. Act, S. 53.

SHAN STATES
See Burma Laws Act, 1898, S. 12.

SHARER
See (1) Co-Sharer.
(2) Hindu law—Joint family.
(3) Landlord and Tenant—Co-sharer.
(4) Muhammadan law—Co-heirs.

SHARES—COMPANY
See (1) Companies Act.
(2) Company.
(3) Hindu law—Succession.
(4) Muhammadan law—Succession.

SHARIAT ACT (26 of 1937)
See Muslim Personal Law (Shariat) Application Act (26 of 1937).

SHEBAIT
See (1) Hindu law—Religious Endowment.
(2) Religious Endowment.

SHERIFF
See (1) Civil P. C., O. 16, R. 2.
(2) Respective High Court Rules.

SHIAS
See Muhammadan law.

SHIKMI TENURE
See Land Tenure.

SHIP, SHIPMENT, SHIPPER
See Shipping.

SHIPPING
See also (1) Admiralty.
(2) Carriage of Goods by Sea Act.
(3) Carriers—Shipping.
(4) Contract Act, S. 73.
(5) Insurance.
(6) Merchant Shipping Act.
(7) Regulations for Preventing Collisions at Sea.

1. Admiralty jurisdiction.
2. Bill of lading.
3. Carriers.
See also Carriers.
4. Collision.
See also (1) Regulations for Preventing Collisions at Sea.
(2) Tort—Negligence.
5. Landing charges.
5A. Marine insurance.
See Insurance.
6. Maritime lien.
7. Navigation.
8. Prize Law.
9. Tort.
See also Note 4.
10. Charter party.
11. Recovery of freight.

1. Admiralty jurisdiction.

—— Jurisdiction in rem — Collision — Damages — Liability of ship as wrong-doer.

It is true that the Admiralty has jurisdiction in rem and that the ship is often spoken of as the wrong-doer and that a ship may be liable in Admiralty where no damages could be recovered at law against the general owners, but where the owners of the ship are not residents abroad, dead or bankrupt, a suit does not lie against the ship but against the owner. AIR (Vol 26) 1939 Sind 349 : ILR (1940) Kar 53 : 189 Ind Cas 9.

——Calcutta High Court.

Admiralty jurisdiction of the Calcutta High Court rests on cl. 32 of the Letters Patent of 1865 which continues cl. 31 of the Letters Patent of 1862. By these clauses, the High Court has such civil and maritime jurisdiction as might be exercised by the Supreme Court as a Court of Admiralty or by any Judge of that Court as commissary of the vice-Admiralty Court. AIR (Vol 24) 1937 Cal 122 : 171 Ind Cas 513.

——Nature and extent of.

The jurisdiction of an Admiralty Court begins where the tide touches the shore, whether at low or high water mark and extends all over the world, to the coast of every country, and up every bay, arm of the sea, and river so far as great ships go and it is not necessary to show that the tide reaches the spot if it is accessible to ocean-going vessels. AIR (Vol 23) 1936 Sind 3 : 29 SLR 281 : 37 Cr L J 314 : 160 Ind Cas 375 (DB).

——Bombay High Court — Service on ship—Writ of summons — Warrant of arrest.

It is not essential under the Admiralty Rules of the Bombay High Court to issue a writ of summons in addition to issuing a warrant of arrest. AIR (Vol 10) 1923 Bom 51 : 24 Bom LR 1167 : 76 Ind Cas 433.

——Jurisdiction over seamen's claims — Mariner's wages—Master's liability.

The Court of Admiralty has jurisdiction in rem or in personam over claims by seamen for any wages earned by them under a special contract or otherwise and the master, ship and the owner are severally liable to a mariner for his wages and the mariner is entitled to choose whom he would proceed against. The master is entitled to recover the wages and messing charges as well as the wages and the messing charges of the chief engineer and other seamen or mariners. For the master is liable for the wages and the messing charges to the seamen unless there is a special contract relieving him from the liability. AIR (Vol 10) 1923 Cal 439 : 50 Cal 29 : 74 Ind Cas 287 (DB).

——Arrest of ship—Trespass — Damages—Maritime necessities — Action in rem.

An ordinary suit for mere trespass did not lie for the arrest of a ship. There is no trace of any such suit in the books. The arrest of the ship is a judicial act of the Court and an ordinary step in an action in rem, so, where it constitutes a legal grievance, it is

not an independent wrong, but an integral part of an action in rem in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation either in the admiralty proceedings or by separate action. But the arrest by the Marshal of Calcutta as an officer of the Court, and the subsequent detention by the Court do not constitute a detention due to the default of a party. The English decisions must be the guide in dealing with the maritime matters in India. AIR (Vol 2) 1915 Cal 681: 42 Cal 85 : 28 Ind Cas 463 (DB).

2. Bill of lading.

(a) General.
(b) Construction.
(c) Presumption about.

(a) General.

——Bill of lading — What is — Possession of bill of lading effect of — Effect of transfer — Bill of lading, as document of title—Liability of shipping company.

A bill of lading is a document of title signed by the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. The bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves, has, by mercantile usage, the same effect as an actual delivery in the circumstances. On a transfer, therefore, of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties to the transferee provided that the transferor was competent to dispose of the goods. These attributes attach only to a true bill of lading and not to a false bill of lading. to goods shipped and not to goods intended to be shipped, and an essential condition of the operation of a bill of lading as a document of title and as a symbol of the goods is that the goods are on board as the bills of lading certify. It is essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself.

M purchasing bags of foodstuff and putting them in lighter for transhipment to ship expected to arrive next day—Ship not arriving as expected—M in anticipation of her arrival obtaining from manager of shipping company bills of lading duly filled — M pledging bills of lading with Bank, obtaining certain amount and absconding — All bags confiscated by Police on complaint by unpaid vendor of M and ship sailing without consignment — Suit by Bank against Shipping Company, its manager, M and unpaid vendors' for recovery of amount :

Held, that the Shipping Company owed to the Bank as an indorsee of the bill of lading a plain duty not to issue a bill of lading for goods not on board. The case against the shipping Company could be dealt with simply on the principle of estoppel. The Company were bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition although they were not received on board at all. The Bank, in consequence, acted to their detriment in advancing money to the shipper M and the Shipping Company was liable to compensate the Bank for loss suffered by their action. Ordinarily, the measure of damages was the value of the bills of exchange drawn against the bills of lading. Neither the shipping documents nor boat notes were documents of title and even if the shipper M had defrauded the Shipping Company, the fraud did not affect the title of the Bank, they being indorsees for value without notice. No valid pledge in favour of the Bank was created when the bills of lading were pledged with the Bank in exchange for their advance. Apart from the pledge of the bill of lading, there was no bailment to the Bank and the Bank had no claims against the goods in possession of the unpaid vendors or against the unpaid vendors. The Bank was not concerned in whose possession the goods were then or in future. Even if the Bank had a claim against the unpaid vendors, this would not prevent them enforcing their undoubted claim against the shipping company. A I R (Vol 26) 1939 Sind 225 : I L R (1939) Kar 439 : 184 Ind Cas 226 (DB).

——Mate's receipt—Issue of bill of lading.

The production of the mate's receipt is a very necessary condition if the shipowner is to be asked to issue bills of lading to a person other than the person named in the mate's receipt. It is also a useful protection to him in case the shipper named in the receipt is acting for a principal. But there can be cases where on the fact the issuing of a receipt without the bill of lading being produced may not be a wrongful act amounting to conversion of the part on the part of the carrier.

Per Lort Williams, J.—The shipowner cannot deliver the bill of lading without production of the mate's receipt. AIR (Vol 18) 1931 Cal 269 : 52 C L J 365 (FB).

——Shipper accepting without protest bill-of-lading different from prior agreement — He is ordinarily bound by such bill-of-lading — Mere production of forwarding note will not suffice to prove, that contract made was different from that in bill-of-lading. A I R (Vol 16) 1929 Cal 260 : 117 Ind Cas 851 : 33 C W N 169 (DB).

——Liability of Port Trust.

Even if it be assumed that the Port Trust act as the agents of the Shipping Company they will equally be entitled to take advantage of any exemption in the Bills of Lading. A wharfinger is justified or excused by the same thing as would justify or excuse the master. The Port Trust are however not ordinary Wharfingers or the Agents of the Shipping Company. They have the goods under their statutory authority as agents of both parties and a Bill of Lading is no evidence against them. A I R (Vol 12) 1925 Sind 221 : 92 Ind Cas 206 : 18 S L R 106 (DB).

——Evidentiary value.

A Bill of lading is prima facie evidence that the condition of goods is according to the description shown therein. A I R (Vol 11) 1924 Rang 25 : 74 Ind Cas 916 : 1 R 146 (DB).

——Contract of affreightment.

A bill-of-lading is evidence and sometimes conclusive evidence of the contract of affreightment, but is not the contract of affreightment itelf. A I R (Vol 6) 1919 M 931 : 34 M L J 145 : 46 Ind Cas 500. **[Affirmed on appeal 42 Mad 455 : 51 Ind Cas 692 ; A I R (Vol 6) 1919 Mad 239.]**

——Date of Evidence of shipment.

The date on a bill-of-lading is very strong prima facie evidence of the date of shipment. A I R (Vol 5) 1918 L B 144 : 42 Ind Cas 382.

——Loss of—Shipping company's rights and duties.

The shipping company are bound to deliver the goods to the person who proves that he is the owner and the consignee of the goods notwithstanding the fact that he is unable to produce the bill-of-lading. The company cannot, after notice from the consignee not to do so, deliver the goods to wrong person though he may produce the bill-of-lading. But where the consignee alleges loss of the bill-of-lading, the company is entitled to be satisfied that loss is bona

fide. A I R (Vol 1) 1914 L B 146 : 7 Bur L T 92 : 24 Ind Cas 70.

(b) Construction.

——Statement that goods are shipped in good condition—Estoppel against ship-owner.

A ship-owner who issues a clean bill of lading is bound by the statement in it that the goods are shipped in good or in apparent good order and condition. If the statement turns out to be untrue, the ship-owner is estopped from alleging its falsity as against a purchaser who relies on the statement at its face value and acts upon it to his detriment. This is a rule which may be applied any day in the case of c. i. f. contracts. Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted upon it to his detriment. He cannot be said to rely on the statement if he knew that it was false; he must reasonably believe it to be true and, therefore, act upon it. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified. A I R (Vol 34) 1947 P C 40 : 228 Ind Cas 614 : 13 B R 299.

—— Issue between ship-owners and indorsees of bill of lading—How decided.

An issue between the ship-owners and the indorsees of a bill of lading has to be decided as between them on the basis of what appears on the face of the bill when it is presented at the port of delivery. Their rights and liabilities would not be affected by what happened at the port of shipment as between the shippers and the ship-owners, except in so far as appears from the bill of lading. A I R (Vol 34) 1947 P. C. 40 : 228 Ind Cas 614 : 13 B R 299.

——Clause with regard to jurisdiction.

Where a bill of lading contains a clause, which excludes the jurisdiction of the Courts in India to decide questions arising under the bill and gives the same to the foreign Tribunal of the country of export, the clause should be construed as a submission to arbitration of the disputes arising out of the bill of lading to the foreign Tribunals. The clause cannot afford a valid plea to the shipping company to urge that no suit can be instituted against them on account of loss or damage sustained by the holder in India. The only remedy therefore, open to the shipping company in the circumstances of this nature is to apply for stay of the suit under S. 19, Arbitration Act. AIR (Vol 23) 1936 Sind 85 : 30 S L R 25 : 163 Ind Cas 697 (DB).

——Clause regarding difference and obliteration of marks and weight of goods.

Where a shipping company provides by an express reservation a clause with regard to differences and obliteration of marks as contained in the bill of lading, the plaintiff cannot rely upon the description given in the bill of lading, and he must prove by independent evidence that the goods bearing the particular marks were actually shipped or put on board. It is the same as regards a reservation made with regard to the weight of the goods shipped. A I R (Vol 23) 1936 Sind 85 : 30 S L R 25 : 163 Ind Cas 697 (DB).

——Particulars of contents stated in margin — Statment that weight, contents, etc., are unknown, in body — Delivery of bags with plaintiff's marks but contents different.

Where a bill of lading contained in the margin the names of the particular grains said to be the contents of the bags delivered for carriage, but contained in the body a statement "weight contents and value when shipped, are unknown", and that delivery by the carrier of packages "externally in good condition as received shall be conclusive evidence of the delivery of the full weight and contents", and though the carrier had delivered the specific number of bags with the initials of the plaintiff on them, the plaintiff instituted a suit against the carrier on the ground that the bags did not contain grains at all but only onions :

Held, (1) that having regard to the well-recognised interpretation which such words occurring ordinarily in bills of lading have received, the description in the bills of lading in question in the margin that the bags contained grains of particular description was not conclusively binding on the defendant; (2) that though the defendant was bound to deliver the bags that were handed over to him, in the absence of evidence to the contrary, they must be taken to be the bags that were delivered to the defendants for carriage. A I R (Vol 20) 1933 Mad 7 : 63 M L J 736 : 37 L W 27 : 1932 M W N 1233 : 139 Ind Cas 623.

—— Issuing of bill of lading — Loose practice — Party permitting same whether can resile.

A person who has himself directed the ship to hold the goods for shipment on behalf of A cannot be allowed subsequently to treat as wrongful the carrying out of his own instructions in the absence of anything done by him to countermand the same in good time. AIR (Vol 18) 1931 Cal 269 : 52 C L J 365 (FB).

——Conflict of laws—Law of ship's flag prevails.

Where any question arises involving a conflict of laws, the law of the ship's flag prevails, unless it is clear from the express language of the bill of lading or otherwise that the parties intended some other law to prevail. AIR (Vol 18) 1931 Sind 124 : 25 S L R 222 : 133 Ind Cas 77.

——Unseaworthiness of ship — Bill-of-lading — Suit for damages of goods due to unseaworthiness of ship —Ship-owner cannot plead immunity for want of notice of damages by the sender in stipulated time.

Where the loss complained of by a charterer is due to unseaworthiness, then the ship-owners are not entitled to claim the benefit of any of the special clauses in the charterparty or the bill-of-lading, and any conditions as to notifying the damage or stipulating that notice of damage should be given within a particular time or of a similiar nature, cannot defeat the right of action unless there is in the bill-of-lading or charterparty an express clause as to unseaworthiness. Where goods are shipped on board a ship there is an implied condition of seaworthiness which forms the basis of the contract, and where there is a breach of that condition and loss arises on that breach the shipowners cannot rely upon the special conditions of the contract. But of course where the charterparty or the bill-of-lading contains express condition as to unseaworthiness, this express condition will be taken to override the implied condition. A I R (Vol 15) 1928 Bom 113 : 52 Bom 327 : 30 Bom L R 145 : 108 Ind Cas 477.

——Shortage in goods.

Goods short delivered—Exemption from liability—Burden is on ship-owners to prove that their case is covered by exemption provided in bill-of-lading.

The principle of tenancy-in-common in respect of unidentifiable goods among various consignees does not apply where there are goods otherwise missing or lost apart from the goods which are unidentifiable. A I R (Vol 15) 1928 Mad 239 : 1927 M W N 728 : 27 M L W 439 : 54 M L J 636 : 108 Ind Cas 196.

— Exportation and re-exportation — Bill-of-lading —Construction — Exportation is not limited to exportation to foreign country—Re-exported goods — Meaning of.

Bags of sugar were shipped in consignments from Java to Calcutta and from Calcutta were re-shipped or re-exported to Madras in the same bags in which

they had come from Java. On arrival at Madras certain bags in all the consignments were found torn and restitched and there was a considerable slackage in the value claimed in all the consignments. Plaintiff, owner of the goods, sued the shipping company that carried the goods from Calcutta to Madras for the value of the slackage in the consignments. Bill-of-lading covering the carriage of the goods provided that the shipping company was not responsible for the "condition or contents of re-shipped or re-exported goods."

Held, that the clause in the Bill-of-lading relating to re-shipment or re-exportation did not cover only the re-shipment or re-exportation in the course of the voyage covered by the Bill-of-lading but also extended to goods which had been previously re-shipped or re-exported and hence the shipping company was protected.

Exportation does not necessarily mean exportation to a foreign country. Re-exported goods are goods which are unloaded from a ship and lie at the port for some time and then the owner re-exports them to another port. AIR (Vol 14) 1927 Mad 671 : 50 Mad 804 : 38 M L T 386 : 1927 M W N 673 : 26 M L W 872 : 52 M L J 693 : 103 Ind Cas 323 (DB).

——Jettison of goods on deck—When owner entitled to contribution—Bill-of-lading — Exemption clause, if includes liability to contribution—"At merchants risk"—Liability of merchant to contribute if excluded.

It is a general rule that a jettison of goods on deck does not entitle their owner to contribution. This rule does not, however, apply on voyages where the carrying of goods on deck is permitted by the established custom of navigation; nor, where the other cargo-owners have consented that the goods jettisoned should be carried on the deck of the ship.

It is a practical canon, but not a rule of legal interpretation, that the office of a bill-of-lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and that it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers the liability to contribution in general average in case of proper jettison depends on the intention of the parties. There is nothing to prevent a ship-owner from making an exception in his own favour by which he is to be relieved from the ordinary laws of the sea, but if he wishes to do so, he ought to do so in clear words. The words, "At merchants risk" will not exempt a ship-owner from liability to contribution in a case of proper jettison. But the words would exempt the ship-owner from liability in the case of an improper jettison. A I R (Vol 12) 1925 Sind 76 : 21 S L R 29: 78 Ind Cas 972.

——Weight contents and value when shipped unknown—Suit for shortage—Onus is on plaintiff to prove shortage. AIR (Vol 10) 1923 Mad 523 : 17 M L W 363 : 72 Ind Cas 408.

— Responsibility for short delivery—Exclusion of.

Where in a bill-of-lading there is a special clause stamped with a rubber stamp in a different ink : "goods within mentioned have not been tallied and it is agreed that neither the shippers nor the receivers of cargo have any claim under the bill-of-lading for shortage", the shipper cannot maintain an action against the shipping company for damages for short delivery on the plea that the clause was not properly brought to his notice. AIR (Vol 8) 1921 Mad 691 : 30 M L T 18 : 62 Ind Cas 709 (DB).

——Bill-of-lading containing condition that cargo of other merchants must not be carried—Cargo supplied by charterer not sufficient ballast—Ship-owner must ship more ballast but must not ship cargo for another merchant, in lieu of ballast. AIR (Vol 8) 1921 Sind 121 : 16 S L R 235 : 79 Ind Cas 456.

——Conditions in — Validity — Carrier by sea.

It is open to a carrier by sea to limit his liability by an express contract to that effect. The Indian law also is the same. A condition excluding liability for damage done by the negligence of the servants of the carrier is valid. AIR (Vol 5) 1918 Sind 50: 11 SLR 106 : 45 Ind Cas 168.

——Port Trust.

The Karachi Port Trust in landing cargo from the ship in virtue of statutory powers and in delivering the cargo landed to different consignees, are intermediaries and act as the agent of the ship-owner in carrying out his instructions whenever there arises under the bill-of-lading a dispute as to the method of delivery of any portion of the cargo landed to a particular consignee. The equitable rule of proportion is applied in cases of mixture of unidentifiable cargo belonging to different owners caused by accident with respect to the sound and unsound portions of the whole mixture. An exception in the bill-of-lading protecting the ship-owner from liability for marks made by the shipper for identifying the cargo, throws the onus on the shipper to prove that a particular bag claimed forms part of his and not that of any other consignee; if contents of sugar bags are lost by bad stitching the ship-owner is excused under the bill-of-lading even though it states that it was received in a sound condition. AIR (Vol 4) 1917 Sind 58 : 11 S L R 29 : 42 Ind Cas 659.

— Maritime law — Inland navigation — Mate's receipt — Legal nature.

Mate's receipts given by inland water carrier are not bills of lading nor are they negotiable instruments. The holder of such receipt has no prima facie right over the relative goods and notice of lieu given by the holder is not binding on the carrier who is bound to deliver only to the person he has contracted with. (1911) 4 Bur L T 21 : 9 Ind Cas 465 (DB).

——'Not responsible for marks'—Effect of.

The object of inserting the words 'not responsible for marks,' is to prevent the bill from being evidence that goods marked in the bill were actually shipped. In such a case the burden of proving that goods bearing certain marks were shipped, rests with the party alleging it. A bill-of-lading endorsed in blank is a negotiable instrument, and the holder of the bill is, in general, the owner of goods, yet the holder cannot sue on the contract embodied in the bill unless he is a party to it or an assignee, though he can have his remedy in tort. (1910) 3 S L R 203 : 6 Ind Cas 848 (DB).

— Stipulation relieving ship-owner from liability as soon as goods are free from ship's tackle — Lease of goods after delivery to landing agent but before delivery to consignee—Landing agent's position of.

It is an old and wholesome rule that if a ship-owner wishes to relieve himself from liability to the shipper, in case his vessel should be found to have been unseaworthy, he must say so plainly. But that rule has no application to a case where a ship-owner wishes to free himself from all liability for goods consigned. In such cases, the parties are perfectly free to make any stipulation they please, unembarrassed by any implied condition or any original underlying obligation. A bill-of-lading provided: "In all cases and under all circumstances the liability of the ship-owner shall absolutely cease when the goods are free from the ship's tackle, and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee." The goods were delivered overside into lighters and taken to the wharf and kept by a landing agent who disposed of them without production of a bill-of-lading or a delivery order.

Held, that the clause afforded complete protection to the ship-owners. The landing agents at Penang

are intermediaries owing duties to both parties — agents of the ship-owners as long as the contract of affreightment remains unexhausted, agents for the consignee as soon as the bill-of-lading is produced with delivery order endorsed. (1909) 13 C W N 733 : 6 M L T 11 : 19 M L J 316 : 4 Ind Cas 475 (PC).

——Carrier's negligence—Contract between carrier and consigner — Terms opposed to public policy — Contract Act, Ss. 23, 151 — Common Carriers Act III of 1865.

Per Chief Justice and Wallis J. (Sankaran Nair J. contra). — Contracts exempting a carrier from liability for the negligence of his servants are not void in India as opposed to public policy. The defendant Company undertook to carry some bags of rice belonging to plaintiffs and deliver them at Tuticorin.

The goods were landed and stored on the foreshore at Tuticorin from the 24th to 30th of October. On account of heavy rains from the 27th October, the goods were damaged. The finding of the District Judge was that the plaintiffs were not guilty of negligence. Both Subrahmanya Aiyar and Miller JJ. were of opinion that defendants were guilty of negligence.

Held, per Chief Justice and Sankaran Nair J., on the facts found, that no precautions having been taken by the defendants to prevent the goods being damaged by rain, the defendants were negligent and were liable for the damage to the goods.

Per Wallis J.—The manner of discharging is in the absence of special terms, to be determined by reference to the regulations and practice of the port of discharge; that having regard to custom of the port and the other circumstances of the case, the defendants were not liable. The bill of lading contained, in addition to an exception clause as regards "accidents, loss or damage from any neglect or default whatsoever of the pilot, master or mariners or other servants of the Company," another clause which ran thus: "In all cases and under all circumstances, the liability of the Company shall absolutely cease when the goods are free of the ships' tackles, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

Per Chief Justice.—A shipowner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and the contract evidenced by the bill of lading in the present case though perhaps clear, was certainly not express so as to protect the defendants from liability for their negligence in landing the goods.

Per Wallis J.—The carriers have sufficiently protected themselves from liability for the negligence of their servants during the discharge of the cargo.

Per Sankaran Nair J. — A shipowner is a bailee within the terms of S. 151 of the Contract Act. A common carrier may exempt himself from the liability of an insurer by contract but cannot exempt himself from the liability of an ordinary carrier imposed by S. 151 of the Contract Act, and a contract in India so exempting him is opposed to public policy. The obligation imposed by S. 151 of the Contract Act applies to bailees as well as to their servants in the discharge of their duty. The later developments in the Common Law in England as to the capacity of a common carrier to exempt himself from liability for loss due to his own negligence has not been adopted in India, but has been declared inapplicable by Act III of 1865 to the cases falling within the Act. (1908) 18 M L J 497 : 32 M 95 (120, 126) (FB).

—— Maritime law — Bill of Lading—Construction — Exception clause.

A Bill of Lading contained, in addition to an exception clause as regards "accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servant of the Company," another clause which ran thus :— "In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackles, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." — Held per Subrahmanya Aiyar J. — That the carriers were not exonerated from liability for their negligence in landing the goods. Except when the words leave no option to the court to construe them as otherwise than making out an agreement that the party holding the goods in a legal character contracts not to be responsible for breach of any of the incidents attaching to it in law, the agreement should be taken to provide only for some definite matter in connection with the legal relation subsisting between the parties to the agreement.

Held, also, that the 2nd clause in the Bill of Lading puts an end to the Company's liability only as carriers when the goods leave the ship's tackle and constitutes their subsequent possession until delivery as that of bailees. The defendant company undertook to carry some bags of rice belonging to plaintiffs and deliver them at Tuticorin. The goods were landed and stored on the foreshore at Tuticorin from the 24th to 30th of October. On account of heavy rains from the 27th of October, the goods were damaged. The finding was that the plaintiffs were not guilty of any negligence.

Held per Subrahmanya Aiyar J.—That the defendant company, in landing the goods as they did without precautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances, have taken of like goods of his own, and that the damage was therefore the result of the Company's negligence and that the clauses in the Bill of Lading did not save them from liability.

Per Miller, J. — The exception clause being clear in terms was valid, and even if the condition as to landing be struck out, any negligence on the part of the carriers in the landing of the goods will be saved by the exception clause. That the exception clause, if not the clause relating to the condition as to landing, saved the defendants from the liability which would otherwise attach to them. Ambiguous expressions employed by a Company for the purpose of limiting their common law liability have to be construed against the Company. (1906) 16 M L J 573 : 30 M 79 (81, 88) (DB).

(c) Presumption about.

——Goods, presumption about.

Bill-of-lading—Good condition of goods delivered is presumed when so mentioned.

The onus of proving the contrary lies on the shipowners. 74 Ind Cas 916 : 1 Rang 146 : AIR (Vol 11) 1924 Rang 25 (DB).

3. Carriers.

See also Carriers.

——Substituted ship.

A ship-owner is only entitled to compel the acceptance of a substituted ship, after the voyage in the ship contracted for has begun. 87 Ind Cas 127 : 48 Mad 459 : 21 M L W 445 : 1925 M W N 303 : AIR (Vol 12) 1925 Mad 727 : 48 M L J 413.

——Non-delivery of goods.

Jettisoning due to storm, alleged in defence to suit for non-delivery—Allegation must be received with caution especially when unsupported by meteorological reports. 79 Ind Cas 456 : 16 S L R 235 : AIR (Vol 8) 1921 Sind 121.

4. Collision.

See also (1) Regulations for Preventing Collisions at Sea.
(2) Tort—Negligence.
(a) General.
(b) Negligence.
(c) Regulations.
See also Regulations for Preventing Collisions at Sea.

(a) General.

——Overcrowding.

Where there is nothing to show that as a result of overcrowding or overloading the vessel was drawing more water than she would have normally been doing, it cannot possibly be held that the vessel struck the submerged snag by reason of the overcrowding. AIR (Vol 28) 1941 Pat 250 : 22 P L T 31 : 7 B R 485 : 192 Ind Cas 659 (DB).

——Collision in broad daylight—Presumption.

The fact of a vessel under steam colliding in broad daylight with a ship at her moorings is prima facie evidence of fault, and a defendant cannot escape liability except by proving that a competent navigating officer could not have averted the collision by the exercise of ordinary care and skill. It must be proved by the defendant that there was no fault on his part but the collision was due to an inevitable accident. AIR (Vol 24) 1937 P C 205 : 169 Ind Cas 536.

——Under-writer—Rights.

Where, in the opinion of competent authorities on the report of the wreck it is found necessary to sell the cargo, the public sale per se vests the proceeds of the sale in the under-writer. (1912) 36 Bom 484 : 13 Bom L R 1211 : 12 Ind Cas 897.

(b) Negligence.

——Damages.

Where a party's negligence, even though it continued to the end, did not contribute to the collision which was entirely due to the negligence of the other party :

Held, that the other party was liable to the former in damages. AIR (Vol 30) 1943 P C 110 : 56 L W 421 : 208 Ind Cas 169.

——Submerged snag appearing in river bed after mansoons—Vessel colliding and sinking—Liability of master.

The existence of the snag in the navigable and proper channel being unknown and unexpected, colliding with it is not in itself an act of negligence. Such a collision is in the nature of an act of God or inevitable accident. AIR (Vol 28) 1941 Pat 250 : 7 B R 485 : 22 P L T 31 : 192 Ind Cas 659 (DB).

——Proof—Burden.

In action for collision, the burden in the first instance lies on the plaintiff and before he can succeed, he must prove loss or damage due to the wrongful acts of the defendants. He must prove affirmatively that his loss was caused by the negligence of the defendant or of some person for whose acts he is liable. When he makes out a prima facie case of negligence on the part of the defendant, the burden of proof is shifted and the defendant will be liable unless he proves that his negligence in no way contributed to the loss.

It may well be that both parties are guilty of a neglect of duty, and that, if either had used reasonable care and skill, the collision would have been avoided. In such a case, the maritime law, which is followed in the Admiralty, apportions the joint damage. So far as what constitutes negligence, it may perhaps best be expressed as doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done. In collision cases, the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation, either international or local, governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. One is not to expect extraordinary skill or extraordinary diligence, but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty AIR (Vol 26) 1939 Sind 349 : ILR (1940) Kar 53 : 189 Ind Cas 9.

——Contributory—Wrong lights—Nature of proof.

If a ship, by carrying wrong lights, or by navigating in an improper or unusual manner, misleads or embarrasses another, she cannot attribute as a fault to the latter any act which was the probable result of her own negligence. AIR (Vol 26) 1939 Sind 349 : ILR (1940) Kar 53 : 189 Ind Cas 9.

——Contributory negligence—Principle of.

Upon the whole, the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent while not free from blame might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. AIR (Vol 24) 1937 P C 168 : 168 Ind Cas 532.

— Contributory negligence.

When two vessels are guilty of negligent navigation and a collision results, both may be held responsible though the negligence is not synchronous. It has to be considered not merely whether one vessel has been subsequently negligent, but whether it has also been severably negligent. Where the acts of negligence, though successive, are close together in time and interact with each other, they fall to be considered not as severable but as co-operating factors in the final catastrophe. AIR (Vol 24) 1937 P C 168 : 168 Ind Cas 532.

——A collision was found to have been caused by the negligence of the master in proceeding at an excessive speed and by negligent helm action of the officer. The allegation of negligent helm action was not pleaded and the evidence did not support the same although witnesses could have been questioned on the point :

Held, that the plea as to negligent helm action could not stand. AIR (Vol 22) 1935 P C 212 : 159 Ind Cas 713.

——Collision of ships—Sinking of one due to wrong position of anchor in another — Considerations in determining liability enumerated.

A ship "P" while being towed struck a ship "S". The anchor of "P" which was not in its proper place pierced "S" and "S" sank with its cargo. Owners of "S" and its cargo sued the owner of "P".

Held, that the material questions as to the liability of the defendants for the damage done to "S" and the loss thereby caused to the owners of the ship and the cargo were (1) was the anchor dangerously exposed ? (2) was such exposure negligent ? (3) was the alleged negligence the cause of the damage and loss complained of ? and (4) was the negligence, if any, negligence of the servant of the owners of "P" in the course of his employment. AIR (Vol 17) 1930 P C 106.

——Navigation.

In a suit brought by the owners of a cargo lost while conveying it in a brig on account of a collusion that occurred between the defendant company's

steamer and the brig containing the cargo, it was proved that the brig had no lights and consequently placed the steamer in a position of extreme danger and, that in that emergency the serang of the latter gave an order to starboard "instead of to port the helm."

Held, that the brig having by her wrongful act suddenly put the defendant's ship in a difficulty the defendant company was not guilty of any negligence. (1904) 31 C 36 (43, 44) (DB).

(c) Regulations.

See also Regulations for Preventing Collisions at Sea.

——Crossing vessels—Test—Duty of— Giveway ship —"Course"—Meaning of— Regulations for Preventing Collusions at Sea (Canada), Arts. 19 and 21.

Articles 19 and 21 of the Regulations for Preventing Collusions at Sea (Canada) presuppose as their essential conditions that the vessels must be crossing vessels and crossing so as to involve risk of collision. As the purpose of these articles is to impose a duty on the giveway ship to keep clear, that ship must be in a position to appreciate what the situation is and to know what the other ship is doing and whether it is on a course at all or if so on what course. The question whether two vessels are crossing vessels within the article depends on the purpose of a ship's movement so far as that purpose can be inferred by the Master of the other ship from what he sees. The issue always depends on the reasonable inference to be drawn by the ship which has the other on her starboard side as to the later vessel's future course deducted from observation of her movement at the relevant moment, making due allowance for the nature of the locality where she is at that moment.

A vessel bound to keep her course and speed may be obliged to reduce her speed in order to avoid some danger of navigation and the question must be in each case "is the manoeuvre in which the vessel is engaged an ordinary and proper manoeuvre in the course of navigation which will require an alteration of course and speed: ought the other vessel to be aware of the manoeuvre which is being attempted to be carried out?" It is only when the stand-on vessel is aware or ought to be aware of that fact that the vessels are crossing vessels within Arts.19 and 21 because that awareness is a necessary condition. This implicitly at least involves that prima facie any alteration of direction is inconsistent with the idea of a "course" within the meaning of the Regulations. The test always is: was what was being done open and notorious to a seaman on the other ship in the ordinary course of navigation? The ordinary idea of a "course" is a sufficiently constant direction of a ship on the same line or heading. This will enable a navigator when he sees the other vessel to know if she is on a crossing course. He can often only become aware of that if he can keep the other vessel under observation for sufficient time to ascertain if she is or is not changing her heading. AIR (Vol 36) 1949 P C 200.

——Navigation in river Hughli—Local rules—Breach —Offence.

The question regarding 'the turning points or bends of river mentioned in R. 5 of the local rules governing navigation in Hughli have to be considered with reference to the channel and from the practical stand point of a navigator. The prohibition in R. 5 cannot be supposed to extend to all parts of the river where the channel is not completely straight but must be interpreted with regard, not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled :

Held, that the course of the river Hughli from above the Fairway marks to Fisherman's Point is not a turning point or bend.

Held, also on facts that the action of the defendant's ship in failing to slacken speed when the plaintiffs' ship came abreast of her at Bight Column was a plain breach of duty under R. 5 and the defendant's ship was alone to blame. A I R (Vol 25) 1938 PC 263 : 1938-2 M L J 992 : 4 BR 819 : 43 CWN 29 : 69 CLJ 101 : 32 SLR 954 : 176 Ind Cas 886.

——Regulations for preventing collusions at sea, Art. 16 — Position of vessel, how to be ascertained by another vessel—Importance of implicit obedience to Regulations.

In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation for preventing collisions at sea, she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. The data on which an inference is founded may be so conclusive as to raise the inference to the level of certainty. But where such inference is taken, the vessel so taking it takes the chance of her inference being right.

It is important that there should be implicit obedience to the Regulations on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, she must suffer the consequences. AIR (Vol 22) 1935 PC 25 : 155 Ind Cas 61.

——Regulations for preventing collisions at sea, Regulations Nos. 25, 29 — Use of signals— Both vessels following unwarranted course — Initial position of one more faulty—Liability.

Signals other than those specified and prescribed by the Regulations are given at the risk of the vessel which gives them. As to warning blasts and exchange of whistle notes, other than the authorized signals, the manifest danger against which the seaman has to guard is that if that be done which is not prescribed, it may be misunderstood or misrepresented.

Where two vessels held on too long on their unwarranted course, and one of them was navigating in breach of Regulation No. 25, while the initial position of the other was more faulty than that of the former, with the result that both vessels continued their erroneous action until neither could avoid collision :

Held, that both were rightly to blame. AIR (Vol 19) 1932 PC 65 : 137 Ind Cas 466.

——Effect of Regulations.

The effect of the various Regulations for preventing collisions at sea, which control navigation of vessels passing in a narrow channel and decide as between approaching vessels which is the "give way" ship, depend upon conclusions of fact as to the extent and bounds of the narrow channel to which the relevant Regulation is to be applied and as to the relative movements of the ships before the collision. A I R (Vol 18) 1931 PC 189 : 131 Ind Cas 771.

5. Landing Charges.

——Mercantile usage in Karachi.

Ordinarily it is the duty of the local agent of a shipowner or charter to collect all landing charges due to the landing contractor from the consignees and after taking out the rebate as per contract either on his own behalf or on behalf the charterer or the shipowner, hand over the collection to the landing contractor. A I R (Vol 20) 1933 Sind 235 : 150 Ind Cas 483.

5A. Marine insurance.

See Insurance.

6. Maritime lien.

——Delivery of goods free along side vessel — Mate's receipt to be exchanged for bill of lading — Goods shipped by brokers in the name of export company — Passing of the property on goods coming into possession of ship-owners — Seller's lien after parting with

property and possession is only equitable and not common law or possessory one — Ship-owners issuing bill of lading without mate's receipt to shippers and owners of cargo — Ship owners are not liable for damages for conversion—Claim for breach of contract against export company upheld. A I R (Vol 18) 1931 Cal 373 (SB), Reversed. AIR (Vol 25) 1938 P C 152 : 42 CWN 677 : 1936-1 M L J 834 : 1938 MWN 487 : 4 BR 549 : 67 CLJ 299 : 40 Bom LR 799 : 65 IA 263: 32 S L R 502 : I L R (1938) 2 Cal 381 : 174 Ind Cas 564.

——Unpaid vendor's lien — Mate's receipt — Value of — Hypothecation of goods after shipment by purchaser — Negotiation of bills of lading by mortgagee prior to notice to ship-owner of vendor's charge — Effect of.

An unpaid vendor of goods, shipped on board a steamship, who holds the Mate's receipt for the said goods with the benefit also of a charge clause in his contract of sale, has not only a right against the defaulting purchaser, but also a right in damages against the ship owner on the basis of an action for conversion or trespass, where the ship-owner refuses to redeliver the goods in recognition of the unpaid vendor's charge, always provided that the ship owner has notice of the said charge before delivery at the port of destination of the goods and, even if the ship-owner has issued bills of lading at the request of the purchasers in regard to the goods, which bills of lading have already been negotiated. Where goods are hypothecated after shipment by the purchaser to a person who negotiates the bills of lading together with other documents relating to shipment prior to notice to the ship-owner of the unpaid vendor's charge, it will not convey to the ship-owner any better title to the mortgagee than the purchaser himself had. A I R (Vol 24) 1937 Cal 319 : 173 Ind Cas 486.

——Negligence — Liability for maritime lien for injury caused.

In order to render a ship liable to maritime lien for injury caused, the ship itself must be the instrument which caused the damage. In England, the former right of the plaintiff to arrest a ship other than a ship alleged to be in fault is obsolete in the sense that no Court of Admiralty will enforce it. A I R (Vol 24) 1937 Cal 122 : 171 Ind Cas 513.

——Right of carrier to possession.

If goods in the possession of a carrier on behalf of another are wrongfully put on board a vessel and the vessel innocently accept them in the ordinary course of business the carrier would be entitled to demand the goods. A I R (Vol 18) 1931 Cal 269 : 52 C L J 365 (FB).

——High Court—24 Vic. Ch. 10, S. 6—Charter-party —Lien of ship owners for unpaid freight.

S. 6 of 24 Vic. Ch. 10 (which is extended to the Colonial Courts by 53 and 54 Vic. C. 27. S. 2, Sub-S. 2) relates to a suit brought by the owners of any goods or the assignee of any goods, or the assignee of any bill of lading. It is by no means confined to a suit brought upon a bill of lading where a contract is directly proved between the shipper and ship-owner. A charter party by which the owner gives over the possession and control of the ship to the charterer is not consistent with the lien for the freight on the goods carried in the ship. For the owner has not possession of the goods. He cannot therefore detain them for unpaid freight due. (1904) 6 Bom L R 466 (471, 472).

7. Navigation.

——Public navigable river, tests of—Construction of bridge higher up — Suit to restrain from constructing bridge.

A river is not "navigable" unless it is navigable throughout the year for ordinary boats used for commercial purposes.

In order to find out if a river is a public navigable river what the Court is primarily concerned with is the present condition of the channel, but to come to a decision on the question of navigability, an investigation into its past history is not without importance.

In a suit to restrain the defendant from constructing a bridge over a river alleged to be a public navigable river :

Held, that even though the channel may not be navigable near the site of the proposed bridge, yet if it was navigable at a spot further down and if the proposed bridge would interfere with the navigability of that portion, the plaintiffs could get the reliefs they wanted. AIR (Vol 20) 1933 Cal 615 : 37 C W N 442 : 146 Ind Cas 409.

8. Prize Law.

——Judicial notice of facts by Prize Court.

It is competent to a Judge in the Prize Court in a state of war to take judicial notice of matters of common notoriety. Where goods have been seized as conditional contraband, the Court may take judicial notice of various devices resorted to cover the conveyance of contraband goods to an enemy destination. Where a large consignment of food stuff consisting of several thousands of cases of tinned fish is being carried, the Court may take notice that it is calculated to increase the total war effort of the enemy, whether it is meant to be supplied to the armed forces or to feed the civil population behind the lines. The Court may also take notice of the fact that decrees in neutral countries forbidding export of contraband to the belligerent countries are often subject to evasion. The Court is also competent to take judicial notice of a particular place as the war base of supplies in the enemy country and the practice of the enemy country to receive contraband goods for its own use or disposal in a way calculated to help war effort. AIR (Vol 31) 1944 P C 50: 11 B R 81 : 215 Ind Cas 1.

——Seizure of contraband goods — Proof by captor and claimant—Presumption of innocence until guilt proved.

In case of seizure of conditional contraband, the captor, in order to justify seizure, has to show reasonable suspicion. The claimant, on the other hand, must establish affirmatively the precise character of his adventure and that the ostensible destination is the ultimate destination. The analogy of English Criminal Law that a man is presumed to be innocent unless he is proved guilty has no application in such cases for several reasons. In the first place it is not an offence for a neutral to carry contraband goods, though the goods are liable to be confiscated. Secondly, the Prize Courts have their own rules. The claimant is not a prisoner on his trial but a party who is appearing to establish his case for the release of the goods. Finally the claimant being in the know of the facts, is the person who can dissipate the suspicion. If he is to succeed in his claim, it is for him to satisfy the Court. AIR (Vol 31) 1944 P C 50 : 11 B R 81 : 215 Ind Cas 1.

——Contraband goods — Circumstances raising reasonable suspicion.

In cases of contraband goods, a bill of lading "to order" or shipping document omitting to name the consignee at the ventral port is a suspicious circumstance justifying seizure of the contraband goods. It is a further matter of adverse suspicion if there is no navicert for the goods. A I R (Vol 31) 1944 P C 50 : 11 B R 81 : 215 Ind Cas 1.

——Rules—Duties of claimant and captor.

The Prize Law has its own peculiar rules. Under these rules, it is not for the Crown as captor to

establish affirmatively that the goods seized are subject to be condemned. All that the captors have to show is that the case is one involving reasonable suspicion. If they do so and no claim is made or if a claim made fails the Court will in due course condemn the property as prize. On the other hand claimants are required to produce affirmative proof. They have to prove that they are entitled to the release of the goods as being their property and also that the facts are such that there is nothing which would render the property good and lawful prize. In other words they must show by affirmative evidence that the reasonable suspicions were unfounded. AIR (Vol 31) 1944 P C 50 : 11 B R 81 : 215 Ind Cas 1.

——Prize proceedings — Prize of War—Commercial domicile in hostile state—Vessel will be condemned.

Where every act of claimant at the time of the breaking of the war was consistent with the intention to retain his commercial domicile at Constantinople, and inconsistent with any intention to divest himself of it, and he did his best to continue the voyage of the ship to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Busra where there was no cargo engaged, or agent appointed, or trade expected.

Held, the claimant had not discharged the onus of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. A I R (Vol 9) 1922 P C 371 : 25 Bom L R 116 : 18 M L W 664 : 1923 M W N 846 : 46 Bom 857 : 84 Ind Cas 737 : 32 M L T 81 : 27 C W N 557 : 70 Ind Cas 156.

——A claim for damages in prize proceedings cannot be had as an alternative to a claim for the release of the vessel and consistently with her condemnation. A I R (Vol 9) 1922 P C 371 : 32 M L T 81 : 27 C W N 557 : 18 M L W 664 : 1923 M W N 846 : 46 Bom 857 : 25 Bom L R 116 : 70 Ind Cas 156 : 84 Ind Cas 737.

——German ship—Capture — Three miles from port —'Port'—Meaning—Hague Convention No. VI, 1907, Arts. 1, 2 and 3.

The word 'port' as used in the VI Hague Convention does not mean a port in the sense of a fiscal or customs port but means a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking and therefore a German ship lying within three miles of the harbour of Bombay cannot be seized as if it were in the port of Bombay and Arts. 1 and 2 of the VI Hague Convention did apply. AIR (Vol 7) 1920 Bom 301 : 21 Bom L R 1116 : 54 Ind Cas 444.

—— Prize — Vessels belonging to neutral—Hostile — Commercial domicile—Condemnation of vessel.

A vessel belonging to the claimant—a neutral—but whose commercial domicile is in an enemy country, entered the port of Bombay before the outbreak of war. She was seized as a prize.

Held, that the vessel must be condemned as lawful prize, because on the outbreak of war the claimant's commercial domicile was Turkish and he was engaged in trade in enemy territory and at the time of the capture he had no intention of removing that domicile to a neutral country and to prevent the vessel from reaching enemy territory. A I R (Vol 7) 1921 Bom 285 : 21 Bom L R 934 : 53 Ind Cas 372.

——Prize — Effect.

Where a ship is condemned as a prize, the crown can impose the freight as a lien on the goods which are released. A I R (Vol 5) 1918 Cal 830 : 45 Cal 28 : 21 C W N 670 : 26 C L J 62 : 40 Ind Cas 383 (DB).

—— Prize — Confiscation of cargo in enemy ship.

A German ship was captured at sea after the declaration of war and condemned. Claims were submitted on account of goods shipped before the war by the British subjects to British merchants and goods shipped by British subjects to German merchants.

Held, that in determining the question of liability to confiscation, regard must be had to the property in the goods and not to the risk except as it may assist the Court in deciding the question, "To whom the goods belonged at the time of capture". In the circumstances of the case, the bills of lading being still with the sellers, the property had not passed to the buyers, though goods might have been appropriated towards the contract and that they were liable to confiscation. A I R (Vol 2) 1915 Cal 793 : 42 Cal 334 : 30 Ind Cas 174.

9. Tort.

See also N. 4.

——Maritime law — Principle of general average contribution, application of — Tort — Wrongful retention—Limitation Act, Arts. 48, 49, 38.

The plaintiff, along with his boat, was hired to carry iron bars to a ship belonging to the defendant company. As the loading was not completed by the time permitted by the harbour rules, the plaintiff was detained under threat that he would lose his wages. During mooring owing to heavy squall the master of ship cast off the boat. The boat being loaded with iron bars sank. In a suit by the plaintiff for recovery of the value of the boat :

Held, that the doctrine of general average contribution did not apply. The doctrine does not apply to boats or articles that are not a part of the ship or its cargo or its freight. Moreover loading of a ship in a harbour by a person not interested in the ship or its cargo is no part of maritime adventure.

Held, further that the shipping company was liable in tort for the loss of boat on account of wrongful detention.

Held, also that the suit was governed by Arts. 48 and 49 and not by Art. 38, Limitation Act. A I R (Vol 32) 1945 Mad 60 : (1944) 2 M L J 340 : 57 L W 596 : 1944 M W N 700.

——By a charter party in suit it was provided as under :

The owner will let and the charterer will take, for the purpose of towing flats and barges, the steam launch Shri Krishna,—for a period of six months certain—provided the charterer shall not ply the vessel in salt water nor use it for any other purpose than towing flats and barges without the written consent of the owner :

Held, that in absence of any contradictory provisions to it, the charter party was construed as a demise for the vessel and the charterer was liable for the negligence of the master and crew. (1936) 63 Cal 53.

——General average — Claim for—Cause of action —Forum.

A claim for general average contribution is sustainable only when the vessel reaches a port safely. Each owner of a sacrificed interest must contribute to all the sacrifices in whatever order of time they may have occurred. The time of jettisoning is not to be taken as the time, when the value of the goods is to be ascertained but the time of reaching the port of discharge, furnishes the starting point. A claim for general average may be made at the place where the voyage has safely ended. A I R (Vol 6) 1919 M 883 : 35 M L J 189 : (1918) M W N 521 : 24 M L T 209 : 47 Ind Cas 708 (DB).

10. Charter party.

——Duty and liability of charterer — Charter party —Shipowner is to bring the ship and the charterer is to have the cargo ready.

Per Rankin, C. J.—The prima facie right of the ship-owner is to say that the provision of the cargo is

no part of his concern and that it is an absolute duty resting by the contract on the charterer. It may be qualified by an exception clause but such a clause (unless on unusual terms) will only take effect if the charterer has really been prevented from providing a cargo of the kind prescribed by one or more of the specified clauses. There may well be cases where apart from any exceptions stipulated in the charter party, and apart from any express reference, in the charter party, to the custom of the port, owner and charterer can be treated as contracting with reference to the regulations or natural conditions of a port. Where the cargo stipulated for is to be provided from a particular place, circumstances affecting supply from that source may, if known to both parties, be circumstances with reference to which the charterer's promise to have a cargo ready has to be construed. When the parties have agreed on the terms of the exception clause in view of the facts known to them and of the extent of the risk each is prepared to take, to impute to the owner's agent knowledge of the charterer's intention to limit himself to loading one ship at a time, knowledge of his proposed sources of supply and of his general practice in deciding between the claims of one customer as against another, to treat these matters as qualification of his undertaking to have a cargo of coal ready is to have little or nothing of the well recognized principle of commercial law.

"Ready" in the case of a cargo means "ready" in a reasonable sense.

Per C. C. Ghose, J. — The obligation of the parties must be decided by the terms of the charter party, but there are certain general principles governing cases of this nature. It is the shipowner's duty to bring the ship to the place named in the charter-party and until he has done this, the ship is not an arrived ship and the lay-days do not commence to run. It is the duty of the charterer to have the cargo ready so that it may be put on board as soon as the vessel is brought to the place named in the charter party. The result, therefore, is that the shipowner cannot claim damages for detention or demurrage until he has performed the obligation incumbent on him. If the shipowner has performed this obligation the charterer is liable if the cargo is not ready to be loaded in proper time unless he is protected by the exceptions in the charter-party.

If a ship is prevented from getting into a loading berth owing to an obstacle created by the charterer or owing to a default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place and that the charterer must pay for the subsequent delay The people who provide cargo as charterers are the people who are responsible for getting allotment of the berth in the dock. AIR (Vol 14) 1927 Cal 332 : 45 C L J 161 : 101 Ind Cas 854 (DB).

——Shipowner not getting loading berth owing to charterer's fault—Charterer must pay for delay.

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay or whether the lay-days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage, does not seem to have been determined. AIR (Vol 13) 1926 P C 121 : 54 Cal 84 : 53 I A 230 : 38 M L T (P C) 9: 1926 M W N 882 : 31 C W N 317: 26 M L W 1: 99 Ind Cas 581.

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——Charter party silent about route—Shortest route should be taken — Deviation—All resulting damages should be paid.

If the charter party says nothing more than that the cargo should be carried from one port to another, it is an implied condition that the ship must go according to the nearest route between the ports. Any usage permitting deviation may be proved.

Where there is an unjustified deviation the plaintiff is entitled to recover all damages caused by the deviation. On justified deviation if the ship encountered a storm and some goods were jettisoned, he is entitled to recover jettisoned cargo; he is entitled to recover damages and cost of the cargo; he is entitled to all the incidental expenses including the advanced freight if any AIR (Vol 12) 1925 Mad 770 : 21 M L W 249 : 86 Ind Cas 751 (DB).

——Mortgagee taking security with notice of charter party — Position of charterer—Non-specification of lay and cancelling dates.

The position of the charterer, where the mortgagee took his security with notice of the charter party, is stronger than when the mortgage was prior to the charter party. An agreement for the letting of a ship to a charterer implies that she shall not be employed for any other person or purpose during the currency of the charter party provided the charterer is ready to supply the cargo. Where twelve charter parties for twelve consecutive voyages were signed by the parties, the fact that the lay and cancelling dates have not been specified in the charter parties does not make the contract incomplete. AIR (Vol 1) 1914 Bom 312 : 16 Bom L R 178 : 24 Ind Cas 758 (DB).

——In respect of the charterer's liability in discharging a ship's cargo, a sharp distinction is drawn between those cases where a fixed period of time is provided and those cases were no such period is fixed. There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of the cargo when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it and which cause the ship to be detained in service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time, that is, a reasonable time under the circumstances. Hence a provision in a charter party that the cargo should be discharged as fast as vessel can deliver constitutes the vessel's capacity for delivering not as an absolute or unconditioned criterion but as a criterion subject to the customs and facilities of the port. (1905) 7 Bom L R 670 (674, 675).

—Time charter — Sub-charter — Bill of lading — Freight—Owner's lien for unpaid money by time charterers.

By a charter entered into by the owners of the S. S. "Bombay" and Issabhoy Thaver and Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. The conditions of the charter were among others the following :—(1) In default of the monthly payment of Rs. 18,000 the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them; (2) The captain, though appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents

might direct without prejudice to the charterers: (3) The charterers were to have the option of sub-letting the steamer : (4) The owners were to have a lien upon all cargoes for freight or charter money due under the charter. The ship was then sub-chartered to the plaintiff for a round voyage from Saigon to Reunion and back from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate of Re. 1-8-0 per bag of 168 lbs. calculated only on the cargo shipped from Saigon to Reunion. There was to be no freight payable by the sub-charterer to the time charterers for any other cargo. The steamer completed this voyage and arrived at Bombay having on board a quantity of sugar put on board by the sub-charterer at Mauritius and for which he had received bills of lading from the captain. The freight was prepaid by the sub-charterer to the owners in respect of the bill of lading freight. But something was due from the sub-charterer to the time charterers of money payable under the sub-charter. And the time-charterers owed a month's freight to the owners. For the payment of this latter sum, the owners claimed a lien on the sub-charterers' sugar on board S. S. "Bombay" :

Held (1) that under the circumstances the ship-owners must be taken to have contracted with the sub-charterer, that his sugar should be carried to Bombay in that ship on the terms of the bills of lading ;

(2) that the bills of lading were not mere receipts for goods given to a charterer already bound to the ship-owner by a charter party entered into between them and which the captain had no authority to depart from;

(3) that therefore unless the fact that the sub-charterer had notice of the time-charter makes a difference which on the facts here made none, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight;

(4) that the words "without prejudice to this charter" meant that the rights of the ship-owners against the time-charterer and vice versa were to be preserved. Notice by a shipper of a charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charter party shows that the captain exceeded his authority in signing the bill of lading and the shipper knew this he cannot enforce the terms of the bill of lading uncontrolled by the charter party. If the shipper knew that there was a charter party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents.

A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a court of justice can be expected to recognise it. (1904) 6 Bom L R 743 : 9 C W N 1: 1 A L J 551 : 28 B 573 (595, 596) : 31 I A 222 (P C).

11. Recovery of freight.

——Loss of ship before loading.

Venture commences at the moment of starting and not at the time of loading of a ship. Consequently, where a ship proceeded empty to a place where it is to be loaded but was lost before it reached that place S. 56 of the Contract Act has no application and the advance freight cannot be recovered. AIR (Vol 17) 1930 Sind 282 : 123 Ind Cas 232 (DB).

——Recovery of advance freight.

Whether a chartered ship is a common carrier or not, the general principle of the Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. AIR (Vol 13) 1926 Mad 175 : 49 MLJ 738 : 49 Mad 200 : 22 MLW 842 : 91 Ind Cas 780 (DB).

——Advance freight—what is not.

"Advance freight" must connote freight and the idea of freight does not arise until the voyage has actually begun, or at any rate, until the goods for which freight is payable have been loaded in the ship or accepted by bills-of-lading.

A contract of charter-party for two voyages was entered into between the plaintiff and defendants. The whole amount of the freight was payable on signing the contract but half of it was to be notionally distributed at the port of lading on each trip at the time of loading there.

The money was paid but no voyage was made according to the charter party as the barque stranded on the coast, while proceeding to the port of lading to load for her first voyage. The plaintiff sued to recover the money paid :

Held, that as no cargo was loaded and no bills of lading were signed as per the charter party, the payment cannot be viewed as advance freight. It was a pure advance made to the defendants, on account of what would be payable to them as freight by the plaintiff; but the conditions precedent, viz., the starting on the voyage, or at least of loading were absent to make it amount in law to advance freight, the wording of the clauses as to freight making it payable on signing bills of lading. (Case law discussed. AIR (Vol 12) 1925 Mad 727 : 48 MLJ 413 : 48 Mad 459 : 21 MLW 445 : 1925 MWN 303 : 87 Ind Cas 127 (DB).

——Freight paid in advance is irrecoverable under any circumstances — Voyage interrupted by Government requisitioning the ship—Liability of the owner.

Where freight in advance is paid to the shipowner, it is his absolutely and is irrecoverable under any circumstances by the shipper of the goods. Where the voyage is interrupted by the Government requisitioning the ship and the latter passing out of the hands of the owners, no refund can be claimed. This would be so even apart from any special terms of the bills of lading. Hence when such interruption takes place, the ship-owners are not obliged to forward the goods to the destination at their own cost, although the bill of lading may contain a provision to the effect that the ship-owners shall have the option to tranship the goods to any other ship of their own or any other line. AIR (Vol 8) 1921 Mad 67 : 40 MLJ 57: 44 Mad 145: 13 MLW 273: 1921 MWN 38: 62 Ind Cas 372 (DB).

SHIVAIJAMA TENURE

See Land Tenure.

SHOLAPUR MARTIAL LAW ORDINANCE (4 of 1930)

——S. 2.

——Ss. 2, 10, 11—Validity of Ordinance — Power of Civil Courts to enquire whether emergency existed —Martial Law — Power of civil authorities to hand over control to military — Existence of state of war, necessity of — Power of Courts to consider acts of military authorities — Decision of military officers, whether subject to revision by High Court — Duty of military to aid civil authorities.

In the case of an Ordinance promulgated by the Governor-General under S. 72, Government of India Act, 1915, the question whether an emergency exists or not is one of fact which the Courts can inquire into. But inasmuch as the Governor-General is the person who must, in the first instance, decide whether or not there is an emergency upon which he ought to act, and inasmuch as he may frequently have information which, in the public interest, he may be unwilling to disclose and which no Court can compel him to disclose, all that the Courts can do is to inquire whether there is evidence upon which the Governor-General may reasonably conclude that an

emergency exists. If that question is answered in the affirmative, there is an end of the matter.

Under S. 11, Sholapur Martial Law Ordinance, 1930, all sentences passed by any officer acting in the exercise of military control between May 12, and 3 45 P.M. on May 18, are to be deemed as valid as if they were sentences passed under the Ordinance in respect of an offence against a Regulation or a Martial Law order in force under the Ordinance. But the said section does not provide that the sentences of the military are to be treated for all purposes as if passed under the Ordinance. They are left as sentences of Military Courts not subject to appeal or revision.

Section 11, Sholapur Martial Law Ordinance, is not ultra vires.

Per Beaumont C. J. — The ordinary rule is clear that sentences passed by Military Tribunals in time of war are not justiciable.

Per Madgavkar J.—With regard to the introduction of Martial Law, it is settled law : Firstly, a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. Secondly, neither the military nor citizens can refuse or impose conditions on such aid. Thirdly, the necessity must be proved not merely of recourse to the military, but also of the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being, and the Courts have power to go into the question whether such necessity existed. Fourthly, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that jurisdiction of the Courts ceases. Fifthly, the powers exercised by the military commonly but incorrectly known as "Martial Law" in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal, and, therefore, need acts of indemnity, if they are not to be questioned.

An officer of the Government has no right, because of a certain number of evil-doers who break the peace, to declare war against every other person in a large area as a rebel, abolish at one stroke the ordinary laws and tribunals, and place the military in possession free to deal and to punish as they will and restore tranquillity so called through terror. It is only when practically the entire population of a certain area is so widely and so deeply disaffected and so armed that it is able to enforce its own law, and the King's Law and writ do not run, that an armed rebellion or insurrection as distinguished from riot can be said to exist and necessity to arise.

The military have no right to refuse the aid to civil authorities unless the ordinary laws and tribunals are abolished. It is the right of the civil authorities to demand, and the duty of the military to furnish all the armed aid that may be necessary in the suppression of disorders and breaches of peace and this duty is cast not only upon the military but also upon all loyal citizens and subjects of the Crown actively to aid in the suppression of disorders.

The justification for the acts of the military lies, not merely in their bona fides but in the existence of necessity, i.e., in the proof of such a state of war, insurrection or armed resistance as to justify the cessation of the ordinary law and its replacement by military force pure and simple. The question of necessity or whether the proved facts amount to necessity is a question of fact for the Courts. If necessity is proved as in the cases referred to above, then the acts of the military are not justiciable by the ordinary Courts. Unless it is proved, they are so justiciable and "the Courts have, at any rate in time of peace, jurisdiction in respect of acts which have been done by military authorities and others during a state of war."

Per Blackwell J. — It is clear law that the civil authorities are not entitled to abrogate their duties and to hand over control to the military except in cases of necessity. It is undoubtedly the duty of the Courts if the necessity is challenged, to inquire into the matter, and if the necessity is not established, then any persons who have committed acts not sanctioned by the ordinary law are liable to be attacked in the Courts at the instance of those who have suffered from their lawless acts. AIR (Vol 18) 1931 Bom 57 : 32 Bom LR 1613 : 32 Cr LJ 403 : 55 Bom 263 : 129 Ind Cas 596 (SB).

——S. 11.

——S. 11—Effect of.

The effect of S. 11 is to validate all sentences properly or improperly passed by the Military and the High Court is thereby precluded from entering into the question whether martial law was properly declared at Sholapur in May 1930. The sentences passed by the military are not subject to the usual rules as to appeal and revision. AIR (Vol 18) 1931 Bom 57 : 32 Bom LR 1613 : 1931 Cr C 65 (FB).

SHRINE

See (1) Hindu law—Religious Endowment.
(2) Religious Endowment.

SHROTRIEM

See (1) Grant.
(2) Madras Estates Land Act, S. 3.

SIGNATURE

See (1) Deed—Execution.
(2) Limitation Act, S. 19.
(3) T. P. Act, Ss. 3 and 123.

(SIKH) ANAND MARRIAGE ACT (7 of 1909).

——Conversion to Sikhism from Islam—Essentials.

Sikhism being a proselytising religion, a Muhammadan woman can become a Sikhni by a mere declaration of faith without going through any other ceremony. AIR (Vol 20) 1933 Lah 347 : 34 P L R 356 : 142 Ind Cas 13 (DB).

——Scope.

The Act is an enabling and not a disabling Act and it does not follow that because that Act does not apply the marriage is not a valid one. AIR (Vol 13) 1926 Lah 31 : 26 P L R 744 : 90 Ind Cas 1056.

SIKHS.

See (1) Hindu Law — Applicability.
(2) Punjab Sikh Gurdwaras Act, S. 2.
(3) (Sikh) Anand Marriage Act (1909).

SIKH GURUDWARAS ACT.

See Punjab Sikh Gurdwaras Act.

SILICOSIS.

See (1) Australian Workmen's Compensation (Silicosis) Act (1920).
(2) Workmen's Compensation Act.

SIMULTANEOUS EXECUTION.

See Civil P. C., S. 38, and O. 21, R. 21.

SIND AGRICULTURISTS' RELIEF ACT (8 of 1940).

——Preamble.

——Preamble—Object.

The Sind Agriculturists' Relief Act provides not a general relief for all agricultural indebtedness but seeks only to relieve agriculturists in certain circumstances from the burden or part of the burden of debt already incurred when the Act was passed. AIR (Vol 30) 1943 Sind 186 : I L R (1943) Kar 402 : 209 Ind Cas 187 (DB).

——S. 13.

——S. 13—Decree satisfied — Debt cannot be scaled down.

A condition precedent to the effective scaling down of a decretal debts is the amendment of the decree under S. 13 of the Act and hence where the decree has been satisfied, no amendment in the decree can be made and the decretal debt cannot be scaled

down. AIR (Vol 31) 1944 Sind 162 : I L R (1944) Kar 46 : 215 Ind Cas 192 (DB).

— S. 13—Order under, when revisable.

An order passed under the Sind Agriculturists' Relief Act is not appealable, but where a Court acting under the Act declines to grant the applicant the relief he seeks on the ground that it has no jurisdiction under the Act to do so, its order is subject to revisional jurisdiction of the High Court under S. 115, Civil P. C. AIR (Vol 31) 1944 Sind 162: I L R (1944) Kar 46 : 215 Ind Cas 192 (DB).

— S. 13—Appeal.

An appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment : A right of appeal is not to be implied, particularly in the case of a statute like Sind Agriculturists' Relief Act which is purely temporary in nature, and is clearly intended to give speedy and easy relief to agriculturists. AIR (Vol 30) 1943 Sind 186: ILR (1943) Kar 402: 209 Ind Cas 187 (DB).

—S. 13—Appeal.

There is no provision in the Sind Agriculturists' Relief Act for any appeal and no appeal lies under the Act against an order made under S. 13 nor is such an order a decree within the meaning of S. 2 (2), Civil P C., or appealable as such because an application under S. 13 of the Act is not a plaint in a suit nor is it comparable to a plaint in a suit. The order does not, as such, fall within the provisions of S. 152, Civil P. C., and no right of appeal can be conferred by analogy. Hence no appeal lies against an order amending a decree passed under S. 13, Sind Agriculturists' Relief Act. AIR (Vol 30) 1943 Sind 186 : ILR (1943) Kar 402 : 209 Ind Cas 187 (DB).

SIND CHIEF COURT RULES.

—R. 168.

— R. 168 — Scope — Measure of damages between plaintiff and applicant and applicant and third party.

The mere fact that the measure of damages may be the same between the plaintiff and the applicant as between the applicant and the third party, does not mean that the case falls within the scope of R. 168, so as to have a right to indemnity against the third party. A I R (Vol 34) 1947 Sind 168 : I L R (1946) Kar 409.

— R. 168 — Applicability—Small cause suit transferred for trial to Chief Court — Third party procedure.

The third party procedure under R. 168 of the Sind Chief Court Rules is applicable to a suit originally instituted in the Small Cause Court and transferred for trial to the Chief Court. AIR (Vol 34) 1947 Sind 168 : I L R (1946) Kar 409.

—Chap. VII, R 10.

— Chap. VII, R. 10—Rule nisi, meaning of ex parte ad interim order, if should accompany notice.

A rule nisi is defined as "a rule obtained on motion ex parte to show cause against the particular relief sought." It does not, therefore, mean that a notice issued by the Court is not a rule nisi unless it is accompanied by an ex parte ad interim order which is to operate pending the hearing of the application. The apparent effect of a rule nisi is that a party against whom it is issued is entitled to open when the rule comes up for hearing, and the rule is made absolute unless good cause is shown against it. AIR (Vol 21) 1934 Sind 180 : 28 S L R 161 : 153 Ind Cas 286.

—Appendix II, Item 5.

—Appendix II, Item 5—Sale by consent — Levy of poundage.

Sale by Commissioner or Receiver appointed by consent of parties is not sale by Court. Hence no poundage can be levied on the proceeds of such sale. AIR (Vol 29) 1942 Sind 112 : I L R (1942) Kar 196 : 202 Ind Cas 631.

—Appendix VI, Cl. (g).

—App. VI, Cl. (g)—Pleader's fees—Test case.

Where the defts made plff's suit a test case for deciding important questions bearing upon their right of disposal of waste lands and hence the trial was made intricate and prolonged, the pleader's fee ought to be assessed under, cl. (g) of Appendix VI of the rules of the Court, and the low value put by plff. on his injunction is only one of the circumstances to be taken into consideration. AIR (Vol 2) 1915 Sind 7 : 9 S L R 10 : 30 Ind Cas 19 (DB).

SIND CIVIL COURT CIRCULARS.

—Form IV.

— Form IV — Vakalatnama — Power of counsel to compromise.

A vakalatnama in Form IV prescribed by Sind Civil Court Circulars does not give power to an Advocate or a Pleader, to compromise the case on behalf of his client. AIR (Vol 28) 1941 Sind 28 : I L R (1940) Kar 467 : 193 Ind Cas 45.

SIND CONSUMPTION OF INTOXICANTS RESTRICTION ACT (4 of 1940).

— S. 3.

—S. 3—Offence, nature of.

The offence under S. 3 relates to the consumption of an intoxicating drug in a public place and not merely to having the care and management of a public place in which someone else consumed some intoxicant. AIR (Vol 30) 1946 Sind 171 : I L R (1943) Kar 283 : 45 Cr L J 144 : 209 Ind Cas 391 (DB).

—S. 4.

— Ss. 4 2 (1) (b)—"Public place" what is.

The definition of a 'public place' in S. 2 (1) (b) although very wide, is not particularly precise, it includes 'Daira,' 'Otara,' 'Makan,' 'Marhi,' and it means a place used for public, religious or charitable purposes. Construing this definition on the principle of ejusdem generis, it is clear that eating and drinking houses declared to be public places must be eating and drinking houses of a public nature, kept for the use of the public and do not include a private house. Whether the particular rooms in the house in question come within the definition of a 'public place' as defined in S. 2 (1) (b) is a question of fact. If, in fact, a room not licensed by the municipality as a hotel is used for eating and drinking by members of the public and is not used for private purposes, whether for private eating or private drinking, or some other private purposes, then it does, just as much as the other rooms licensed by the municipality come, within the definition of public place in S. 2 (1) (b). AIR (Vol 30) 1943 Sind 171 : I L R (1943) Kar 283 : 45 Cr L J 144 : 209 Ind Cas 391 (DB).

—S. 6.

—Ss. 6, 7, 8—Transfer of grantee's interest.

Where the interest in an occupancy is restricted in its enjoyment to the grantee personally, there can be no transfer of it either by a private arrangement or otherwise between the grantee and other persons whose names do not appear in the Government records AIR (Vol 24) 1937 Sind 279 : 32 S L R 73: 172 Ind Cas 403 (DB).

SIND COURTS ACT (BOM. ACT 12 of 1886).

—S. 9.

— S. 9—Reference on difference of opinion.

Per Will, A. J. C. — S. 9 (c) does not restrict the 3rd Judge to giving his opinion on the points or points of difference only, but makes it obligatory on him to give his opinion on the appeal or confirmation as the case may be. AIR (Vol 17) 1930 Sind 225 : 1930 Cr C 865 (DB).

—S. 9—Bench differing on one point only—Whole appeal and not only a part is referred to third Judge —Decision of third Judge controls whole appeal.

AIR (Vol 13) 1926 Sind 105 : 20 S L R 362 : 96 Ind Cas 234.

——S. 9 — Where the Bench hearing the appeal is composed of two Judges and the Judges composing the Bench differ in opinion as to the decision, then a discretion rests in the Judicial Commissioner, if he thinks fit to refer the case either (1) to a third Judge or (2) to a Full Bench of three Judges, but he is not bound to take one of these alternatives. AIR (Vol 13) 1926 Sind 90 : 93 Ind Cas 448 (DB).

——S. 15 A.

——S. 15-A — Tout—Proceedings to declare nature of — Inquiry by Judicial Commissioner.

Proceedings to declare a man a tout are not judicial proceedings but proceedings of a departmental nature which relate to the working of the Courts, and S. 15-A gives to Judicial Commissioner's Courts the general control over inquiries made into the question of whether a man is or is not a tout. AIR (Vol 24) 1937 Sind 4 : 38 Cr L J 316 : 30 S L R 340 : 166 Ind Cas 643 (DB).

——S. 15-A—Interpretation.

"General control" in S. 15-A of the Act does not refer to administrative control only but refers to both administrative and judicial powers of supervision over Courts subordinate to the appellate jurisdiction of the High Court. AIR (Vol 17) 1930 Sind 265 (FB)

——S. 16

——S. 16 — Pleader charged with participation in meetings and processions organised by an unlawful association—Expression of regret—Warning—Costs.

A District Judge reported to the Judicial Commissioner's Court for action under S. 16, Sind Courts Act, against a Pleader for having taken part in political meetings and processions organised by a Congress Committee which had been declared unlawful by the Government. It appeared that he had been warned previously for congratulating all Indian leaders who had been convicted and sentenced under the provisions of the Salt Act and the I. P. C. On the present occasion, the Pleader declared that he had not and that he never had any intention of associating himself with the Congress or its activities or to participate in any disloyal movement or in any association declared by the Government to be unlawful :

Held, that in view of the declaration made by the Pleader, he might be let off with a warning, but that he should pay the costs of the Crown. AIR (Vol 20) 1933 Sind 310: 27 S L R 177 : 146 Ind Cas 754 (DB).

——S. 16—Inquiry, nature of—Disciplinary action against Pleader — Drawing from Court client's money—Pleader's inability to repay money when called upon —Misbehaviour.

The inquiry contemplated by S. 16 is of a quasi criminal character and strong proof is necessary for action. But the proposition to be proved is not that the inculpated Pleader has brought himself within one of the sections of the I. P. C. Disciplinary action against a Pleader is not by way of punishment. It rests upon the principle that the Court deems him unworthy of its confidence and unfit for his place. The proposition to be proved is that he has been guilty of some such misbehaviour as would justify the Court in removing or suspending him from practice.

Where a notice to a Pleader was issued to show cause why action should not be taken against him under S. 16, it was admitted (1) that the Pleader drew out moneys belonging to his client ; (2) that he paid the cheque to his own credit in his own bank; (3) that he did not enter those moneys in his client's account ; (4) that he was not able to refund those moneys when called upon, and that he had not refunded them in full even at the time of hearing of the case :

Held, that the Pleader was guilty of such misbehaviour as to justify the Court in taking action under S. 16. AIR (Vol 20) 1933 Sind 65 : 143 Ind Cas 631 (DB).

——S. 16—Professional misconduct.

Legal practitioner retaining his client's considerable amount on an excuse which was merely a pretence—When pressed by the client, the practitioner giving cheque on a Bank, in which he had no sufficient funds.

Practitioner held guilty of serious misbehaviour, for which the only adequate punishment was the cancellation of his sanad. AIR (Vol 20) 1933 Sind 45 : 142 Ind Cas 593 (DB).

——S. 16—Misconduct—Passing resolutions sympathising with Satyagraha movement — Suspension—Duties of Pleader.

Active participation in the passing of resolutions sympathizing with the spirit of a movement which preaches open defiance of law and authority and congratulating persons sentenced for breach of laws is misbehaviour on the part of a Pleader which renders him liable to suspension :

Participating in passing such resolutions is not mere expression of opinion.

A legal practitioner has the right to entertain political opinions, but that should be in conformity with the position he has obtained by virtue of the license granted to him. AIR (Vol 18) 1931 Sind 33 : 25 S L R 131 : 131 Ind Cas 187 (DB).

——S. 16—Accusations of criminal nature — When Court can take disciplinary action, without a conviction by the criminal Court.

Per Rupchand, A. J. C. — Where the accusations against a pleader are of a criminal nature, it is not in every case that criminal conviction is a sine qua non to the exercise of the disciplinary jurisdiction of the High Court. A broad distinction has to be drawn between the acts done by the pleader in his professional capacity or in the presence of the Court, and acts not done in such capacity and not in the presence of the Court. It is only in the later case when the acts charged are indictable and are fairly denied that the Court will not proceed against the pleader in the exercise of its disciplinary jurisdiction until he has been convicted and will not compel him to answer on oath to a charge for which he may be indicted. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445: 12 AI CrR 274: AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Failure to keep accounts.

If a pleader or barrister fails to keep fee-book or ledger showing sums deposited by client for expenses and sum expended on his behalf, High Court is justified in taking serious notice of his conduct under its disciplinary jurisdiction. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Is professional misbehaviour because that will be considered disgraceful and dishonourable by pleaders of repute and competency.

Per Rupchand, A. J. C.—Professional conduct of a pleader must be judged by the rules and standard of his profession and if a pleader has done something which would be reasonably regarded as disgraceful and dishonourable by pleaders of good reputation and competency he is guilty of professional misconduct. Further a pleader becomes more disgraceful and calls for a more severe punishment, when he is guilty not only of an unwritten rule of professional conduct, but where such rule has been enacted and laid down by the Rules of Association to which he has the honour to belong and where one of the conditions on which he has obtained his license to practice as a pleader is that he shall undertake to submit to such written rules of conduct.

Applying this test the failure by a pleader to keep a fee-book or a ledger containing the account of client's money for a number of years which is a breach of Rr. 35 and 36 of the Rules of the Karachi Bar Association is an act of professional misbehaviour because that would be considered disgraceful and dishonourable by pleaders of good repute and competency. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Misbehaviour, scope of—"Misbehaviour" is not limited to professional misconduct, but includes general misconduct also.

"Misbehaviour" in S. 16 is not limited to professional misconduct, but can be extended to general misconduct as well.

Per Rupchand, A. J. C. — The Judicial Commissioner's Court of Sind has unlimited jurisdiction to deal with every kind of misbehaviour, professional or otherwise of a pleader though such jurisdiction will undoubtedly be exercised for the very object with which it has been conferred, namely, the preservation of the purity of the Courts and the proper and honest administration of the law : 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Nature of proceedings.

Per Rupchand, A. J. C.—Proceedings under S. 16 though judicial are neither criminal nor civil, but special proceedings resulting from Court's inherent power over its officers—Form of procedure in such proceedings is not of controlling importance so long as fair notice and chance of being heard are present. 115 Ind Cas 318 : 23 SLR 245 : 30 Cr L J 445 : 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Omission to plead privilege.

Per Rupchand, A. J. C.—In disciplinary proceedings against pleader he, being inadvertently put on oath, answering questions without protest—He cannot afterwards urge that answers given by him if found false, should not be used against him in determining whether his conduct was worthy of his profession. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Perjury.

Per Rupchand, A. J. C.—Pleader in order to avoid punishment in disciplinary proceedings voluntarily committing perjury — There is no reason why he should not be prosecuted for perjury. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 A I Cr 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Power to define misbehaviour.

Per De Souza A. J. C.—Court has power to define by judicial decision or otherwise what constitutes misbehaviour on pleader's part—Rules framed by Bar Association with Court's approval are such, to which pleaders must conform, but it does not follow that breach of any of them should call for disciplinary action. 115 Ind Cas 318: 23 SLR 245: 30 Cr L J 445: 12 A I Cr R 274 : AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Proof of misconduct.

Per De Souza, A. J. C.—Disciplinary proceedings against a pleader being of a quasi criminal character, the misconduct must be made out by the admission of the party concerned or else there must be other strong proof of the misconduct imputed. 115 Ind Cas 318 : 23 S L R 245 : 30 Cr L J 445 : 12 AI Cr R 274: AIR (Vol 16) 1929 Sind 121 (FB).

——S. 16—Pleader—Misbehaviour—Misconduct not connected with profession.

The jurisdiction of the Judicial Commissioner under S. 16 of the Sind Courts Act extends not only to professional misbehavior but to general misconduct. While the jurisdiction is unlimited, the Court is reluctant to take cognisance of misconduct not connected with the office of pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office. 11 S L R 81 : 19 Cr L J 322 : 44 Ind Cas 338 : AIR (Vol 5) 1918 Sind 54 (FB).

——S. 16—Pleader — Misbehaviour — Filing second complaint.

A pleader should take pains to master his instructions and the law relating to them so as to eliminate all inaccuracies. He should bring to notice of Court, prior unsuccessful proceedings by same party in the same or another court. As an officer of the court it is his duty not deceitfully to circumvent but honestly and loyally to uphold the practice of the court and to co-operate in the orderly and pure administration of justice by the Court. AIR (Vol 4) 1917 Sind 1 : 11 S L R 12 : 18 Cr L J 819 : 41 Ind Cas 643 (FB).

——S. 16 — Pleader — Vakalatnama executed by pleader but purported to be by party — Professional misconduct.

It is professional misconduct of a serious kind for a pleader to present in Court a vakalatnama purporting to have been executed by his clients while really it was done by himself; such an act is an attempted deception practised on the Court. (1911) 4 S L R 242 : 12 Cr L J 390 : 11 Ind Cas 254 (FB).

——S. 16—Rules under—Pleader's license—Scope.

Under the rules under S. 16 Pleaders' licenses relate both to civil and criminal courts. A pleader licensed to practise in the Civil and Criminal Courts of one district cannot as of right practice in the Courts of another district. (1911) 4 S L R 207 : 12 Cr L J 118 : 9 Ind Cas 717 (DB).

——S. 93.

——S. 93—Reference on difference of opinion.

On a difference of opinion between two Judges differing in a revisional application the matter cannot be referred to a third Judge. S. 93 only confers that power in appeals and not in revision applications. The matter in such cases should be referred to a Full Bench under R. 4. AIR (Vol 11) 1924 Sind 75 : 17 S L R 133 : 83 Ind Cas 353 (FB).

SIND COURTS ACT (BOM. ACT 7 of 1926)

——S. 7.

——S. 7 (3)—Construction and scope — Suit against Government Railway Administration—Damages for loss caused to goods in transit—Jurisdiction of Small Cause Court. See I L R (1947) Kar 198.

——S. 9.

——Ss. 9 and 14 — Single Judge of Chief Court of Sind—Right of appeal, against decision of.

A Judge of the Chief Court of Sind sitting singly is not subordinate to the Chief Court and the right of appeal from his decision is not governed by S. 9, but by S. 14 of the Sind Courts Act. AIR (Vol 35) 1948 Sind 89 : I L R (1947) Kar 164.

——S. 37.

——S. 37—Suit against Governor-General in Council for recovery of expenses incurred in clearing and forwarding goods imported by Director General, Stores Department — Jurisdiction of Court of Small Causes, Karachi.

A suit filed against the Governor-General of India in Council for the recovery of certain sum alleged to be certain expenses incurred by the plaintiffs in clearing and forwarding two crates containing transformers imported by the Director-General, Indian Stores Department, for the North-Western Railway (State Railway) is also excluded from the jurisdiction of the Small Cause Court by the above two provisions. AIR (Vol 28) 1941 Sind 138 : I L R (1941) Kar 238 : 195 Ind Cas 556.

——S. 37 (1) — Suits against Governor-General of India in Council for recovery of certain sum alleged to have been over-charged by State Railway—Jurisdiction of Small Cause Court, Karachi.

A suit filed against the Governor-General of India in Council for the recovery of certain amount alleged to have been overcharged by the State Railway authorities on a consignment consigned to the plaintiff is a suit of the description falling under cl. (1) of S. 32, Bombay Civil Courts Act of 1869, and S. 37, Sind Courts Act of 1926 and is therefore excepted from the jurisdiction of the Small Cause Court. Such a suit is also clearly excluded from the jurisdiction of the Karachi Small Cause Court by S. 14, Karachi Small Cause Courts Act, 1929, as amended. AIR (Vol 28) 1941 Sind 138 : I L R (1941) Kar 238 : 195 Ind Cas 556.

——S. 37 (1)—Scope.

There is no indication in the wording of cl. (1) of S. 32, Bombay Civil Courts Act and S. 37, Sind Courts Act, that any inquiry should be made into the real substance of the plaintiff's claim. AIR (Vol 28) 1941 Sind 138 : I L R (1941) Kar 238 : 195 Ind Cas 556.

SIND COURTS CRIMINAL CIRCULARS

——Chap. I, R. 4.

——R. 4—Mistake and irregularity of Police Officer —Forming part of judgment—Expunging of passage.

If any mistakes or irregularities on the part of Police Officer are brought to a Magistrate's notice during the course of an inquiry he should preferably reserve the discussion of such mistakes and irregularities for separate official correspondence. Where the passage complained of consists of a comment on the conduct of a Police Officer who had no opportunity to explain the circumstances referred to and the passage comes at the very end of the judgment, and is clearly separable from it, it can be expunged under S. 561-A, Criminal P. C., as the deletion of the passage will not have the effect of mutilating the judgment. AIR (Vol 21) 1934 Sind 68 : 35 Cr L J 1138 : 150 Ind Cas 610 (DB).

——Chap. V, R. 22.

——Chap. V, R. 22 — Magistrate's duty to proceed die in diem — Checking unnecessary examination.

It is the duty of a Magistrate to insist on the trial proceeding from day to day as required by rule. The Court can check prolific examination and cross-examination of witnesses, in the exercise of its inherent power. AIR (Vol 4) 1917 Sind 46 : 11 S L R 27 : 18 Cr L J 834 : 41 Ind Cas 658.

——Chap. V, R. 22 — Lengthy examination of witnesses and adjournments.

In criminal cases lengthy examination of witnesses and adjournments to suit the convenience of counsel ought not to be allowed as they would amount to denial of justice. AIR (Vol 4) 1917 Sind 73 : 10 S L R 148 : 18 Cr L J 54 : 37 Ind Cas 38.

SIND ENCUMBERED ESTATES ACT (20 of 1896)

See Sind Incumbered Estates Act (20 of 1896).

SIND FOODGRAINS (MOVEMENT CONTROL) ORDER (1943)

——Cl. 2.

——Cl. 2 (c)—"Foodgrains," meaning of.

There is nothing in the Order restraining the meaning of the word "foodgrain" to a substance used for human consumption, and there is no justification for importing any such restriction into the meaning of the word. Crushed gram is produced from gram by process of crushing, and therefore, it is clearly a product of grain, and falls within the definition of "food-grains." AIR (Vol 31) 1944 Sind 188 : I L R 1944 Kar 293 : 46 Cr L J 110 : 216 Ind Cas 50 (DB).

SIND FRONTIER REGULATION (3 of 1882)

——Scope.

The Regulation does not apply to villages in the Karachi Taluka outside the Kohistan Mahal. The Regulation being highly penal, the districts to which it applies are definite ascertainable areas. (1911) 5 S L R 54 : 12 Cr L J 558 : 12 Ind Cas 646 (DB).

——S. 3.

——S. 3—Magistrate proceeding under, if a Court.

An order under S. 3 is an executive order and a Magistrate proceeding under this section is not a Court and so the High Court cannot interfere in revision. (1911) 5 S L R 54 : 12 Cr L J 558 : 12 Ind Cas 646 (DB).

——S. 5.

——S. 5—Property partly outside area — Reference to Jirgah, legality of — Omission to state reasons for reference, effect—Procedure of Jirgah — Discretion of Magistrate.

If there is a dispute which is likely to cause a breach of the peace within the area to which the Regulation applies, the District Magistrate has authority to refer the dispute to the Jirgah for settlement, and it is immaterial that portion of the subject-matter of the dispute is not within the particular area to which the Regulation has been applied.

An omission on the part of the District Magistrate to state the grounds on which he is satisfied that there is a dispute does not deprive him of jurisdiction to appoint a Jirgah.

There are no rules laid down for the procedure of the Jirgah, but there must be a substantial compliance with the ordinary provisions of law relating to civil procedure; the parties must have notice of the proceedings, and they must have opportunity, if they so desire to place their evidence before it. But if these condition are substantially complied with the particular form is perhaps not of any moment.

It is discretionary on the part of the Magistrate to proceed under S. 5 (3) (c), and if he is of opinion that a decree in accordance with the finding of the Jirgah is advisable, it is open to him to take that course even if an award has been made. AIR (Vol 18) 1931 Sind 137 : 25 S L R 245 : 134 Ind Cas 381 (DB).

——Ss. 5, 6, 7—Reference to Council of Elders— Bar of Civil Court's jurisdiction.

As soon as the District Magistrate has made a valid reference to the Council of Elders the Civil Court loses its jurisdiction till either a declaration that further proceedings under S. 5 are not required or the parties are referred to the Civil Court. If a decree is passed under S. 6 of the Regulation, that decree is a bar to the trial of the same issues in a Civil Court and even if some persons to whom reference is made have failed to sign it, the decree is not a nullity. (1909) 3 SLR 100 : 3 Ind Cas 902 (DB).

——S. 7.

——Ss. 7 and 5 (3)—Suit filed after reference but before decree under S. 5 (3).

A suit filed after the District Magistrate had made a reference to the Council of Elders and not taken for final hearing until after he had passed a decree under S. 5 (3) is barred by S. 7. (1909) 3 SLR 100 : 3 Ind Cas 902 (DB).

——S. 8.

——Ss. 8, 12, 13—Scope.

Any offence of any kind cannot be withdrawn from a Court of Session and referred to a Council of Elders. Section 8 of the Regulations is a governing section so far as Ss. 12 and 13 are concerned. A I R (Vol 28) 1941 Sind 97 : 42 Cr L J 645 : I L R (1942) Kar 246 : 195 Ind Cas 14 (DB).

——Ss. 8, 12, 13 — Construction — Power of Public Prosecutor to withdraw case — Section 13, if repugnant to general provisions of Regulation.

Section 13 of the Regulation is not repugnant to its general purview. There is also nothing in S. 12 or any other section which cuts down the meaning of the very wide words intentionally used by the Legislature in S. 13. Sections 12 and 13 must be read along with and in the light of S. 8 which is the general section empowering the Commissioner in Sind and

the District Magistrate to refer cases to a Council of Elders. Section 8 puts no limitation of time within which such powers may be exercised; this power may be exercised before a case is challaned in Court, or it may be exercised before the case is sent up to the Sessions Court; or it may be exercised after the trial of such a case has commenced in that Court. All the three sections are easily reconcilable in the manner referred to above. That being so, there is no reason why the very wide words of S. 13 should not receive their full and proper meaning.

A Public Prosecutor can, therefore, withdraw a case from the Sessions Court, even after its trial has begun but before an order of conviction or acquittal has been passed in order to refer it to the Council of Elders under S. 13. A I R (Vol 25) 1938 Sind 9 : 39 Cr L J 294 : 32 SLR 129 : 173 Ind Cas 325 (DB).

——S. 8 (2)—District Magistrate, whether Court.

Even though a District Magistrate acting under S. 2, Sind Frontier Regulation, does not act upon evidence which he himself has heard, he is still a Court within the meaning of S. 476, Criminal P. C. AIR (Vol 29) 1942 Sind 75 : 43 Cr L J 705 : ILR (1942) Kar 66 : 200 Ind Cas 630 (DB).

——S. 8 (2)—Council of Elders—District Magistrate

A Council of Elders under the Regulation is a Court within S. 75 of the Penal Code, and a conviction by the District Magistrate on the recommendation of the Council is previous conviction. A District Magistrate convicting an accused on a finding by a Council of Elders under S. 8 (2) of the Regulation is a Council in British India as his functions are judicial and not ministerial. A I R (Vol 4) 1917 Sind 17 : 11 SLR 46 : 18 Cr L J 909 : 42 Ind Cas 141 (DB).

——S. 12.

See Sind Frontier Regulation, S. 8.

——S. 13.

See also Sind Frontier Regulation, S. 8.

—— S. 13—Revision in High Court.

Sessions Judge passing order under S. 13 (2) staying proceeding so that case may be referred to Council of Elders—Case found not referable as the offence committed was not one under S. 8 of Regulation :

Held, that the order could be set aside in revision under S. 439, Criminal P. C. AIR (Vol 28) 1941 Sind 97 : 42 Cr L J 645 : ILR (1942) Kas 246 : 195 Ind Cas 14 (DB).

——S. 17.

——S. 17 — Appeal or revision — Order of detention —Jurisdiction of High Court to interfere in revision or appeal.

Under S. 19 of the Sind Frontier Regulation, no appeal lies from a decree or sentence passed under the Regulation; there is only revising power vested in the Commissioner in the matter of sentences and decrees. The High Court, i.e., the Judicial Commissioner's Court has no power of revision or review against a sentence or order under the Regulation. A I R (Vol 35) 1948 Sind 1 : 48 Cr L J 372 : 229 Ind Cas 298 (DB).

——S. 20.

—— S. 20—Forfeiture of bond — Essential condition —Procedure.

The procedure applicable to forfeiture of bonds taken under S. 20, Sind Frontier Regulations is that prescribed by S. 514, Criminal P. C. Hence the forfeiture of such a bond must involve proof of the commission of an offence punishable under Ch. XVI, I. P. C., with imprisonment for one year or upwards. A I R (Vol 31) 1944 Sind 121 : 45 Cr L J 696 : I L R (1943) Kar 517 : 213 Ind Cas 185 (DB).

——S. 20—Forfeiture of bond.

Where a person has been convicted under S. 392, I. P. C., and has resorted to force constituting offence under Ss. 342 and 323, the Court would be justified in ordering forfeiture of the bond under S. 20, Sind Frontier Regulation of 1892. AIR (Vol 31) 1944 Sind 121 : I L R (1943) Kar 517 : 45 Cr LJ 696 : 213 Ind Cas 185 (DB).

—— Ss. 20 to 26—Construction.

Sections 20 to 26, Sind Frontier Regulations should be read with S. 397, Criminal P. C. Section 397 (2), therefore, applies to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations. AIR (Vol 28) 1941 Sind 29 : 42 Cr L J 342: ILR (1941) Kar 161 : 192 Ind Cas 865 (DB).

——Ss. 20 and 24 – Revision.

An Order of District Magistrate under S. 20 (1) and S. 24 (1) ordering security for good behaviour cannot be revised by the Court of Judicial Commissioner of Sind. A I R (Vol 7) 1920 Sind 51 : 13 S L R 215 : 21 Cr L J 513 : 56 Ind Cas 769 (DB).

——Ss. 20. 21 and 23—Forfeiture.

Section 23 fully explains what involves a forfeiture of the bond taken under Ss. 20 and 21 and the District Magistrate cannot determine beyond the limits of the section what acts or omissions constitute a breach of the bond. A I R (Vol 1) 1914 Sind 67 : 7 SLR 194 : 15 Cr L J 544 : 24 Ind Cas 952 (DB).

SIND HOUSE RENT CONTROL ORDER, 1942.

——R. 10.

——R. 10 — Order directing execution of order for recovery of possession passed before amendment of Rent Control Order—Application of amendment.

An order directing execution of the order for recovery of possession in favour of landlord under S. 20, Karachi Small Cause Courts Act, passed before the amendment of the Sind House Rent Control Order, cannot be said to be order for recovery of possession within S. 20, Karachi Small Cause Courts Act, and R. 10, Sind Rent Control Order when it is made after the amendment. Hence the amendment of 27th September 1943 can have no application to that order and a certificate of Rent Controller need not be given before the passing of that order. A I R (Vol 31) 1944 Sind 215 : ILR (1944) Kar 160 (DB).

SIND INCUMBERED ESTATES ACT (CENTRAL ACT) 20 of 1896).

——Scheme of Act.

The scheme of the Sind Encumbered Estates Act does not contemplate that the Court should oust the jurisdiction of the manager on matters which the Legislature has declared to be within his sole competence. A I R (Vol 26) 1939 Sind 36 : 179 Ind Cas 956 (DB).

——Application for protection at late stage.

There is nothing in the Act to enable the Court to hold that the Legislature ever intended to put it in the power of a debtor to oust the jurisdiction of the Court, by applying for protection at such a late stage of the proceedings, after the property had been auctioned, and thereby to create a chaos to the serious prejudice of both the auction-purchaser and the judgment-creditor. A I R (Vol 14) 1927 Sind 225 : 103 Ind Cas 440 (DB).

——S. 5.

——S. 5—Liability contemplated.

The liability contemplated by the Act is a liability which may be valued by the manager and its payment provided for in the liquidation scheme. A I R (Vol 14) 1927 Sind 225 : 103 Ind Cas 440 (DB).

——S. 5—A suit for specific performance of a contract for sale of immovable property is not in respect of a liability under the Act, and there is nothing in the Act to clothe the manager with the right to decide for himself whether he should convey the property or compel the purchaser to accept damages in lieu thereof. A I R (Vol 14) 1927 Sind 225 : 103 Ind Cas 440 (DB).

——S. 7.

——S. 7—Suit to set aside manager's order.

Manager under the Sind Encumbered Estates Act S. (7) (2) (c) is an officer of Government within the meaning of Art. 14. A suit to set aside any act or order of the manager in his official capacity should be brought within one year from the date of his order as provided for by Art. 14. A I R (Vol 17) 1930 Sind 150.

——S. 8.

——Ss. 8. 10, 12 — Unjustified claim to property — Manager's power—Enquiry as to property and decision thereon — Property shown in Record of Rights as belonging to zamindar also included in Notification under S. 12—Third person disputing zamindar's title to property—Presumption— Property, if can be regarded as property in management under S. 10.

Assertion of an unjustified claim to property made by third person is not sufficient to oust the manager's power of management under S 10. Under S. 8, the order of management extends, inter alia, to all the immovable property, including any interest in joint immovable property of which the debtor is possessed or entitled, and quite clearly such order necessarily implies some inquiry as to what the property is and some decision upon that inquiry. Immovable property does not describe or name itself or itself proclaim the identity of its owners, and where a certain share in the lands is shown as the property of the zamindar in the Record of Rights published by the Manager under S. 12 in the Sind Official Gazette, the manager can rely upon the presumption raised by S. 135-J, Land Revenue Code, and the share can be held to be property of which he is in management under S. 10 in spite of a third person disputing the title of the zamindar to that share. AIR (Vol 26) 1939 Sind 155 : 40 Cr L J 710 : 182 Ind Cas 963 (DB).

——S. 8—Stay of proceedings, when granted.

Where the claim of the plaintiff is not that the "debtor" (i.e, the Jagirdar whose estate is under order of management), is subject to any liability to the plaintiff, but the claim is that the zemindari rights in question did not form part of the property which the Manager was authorised to manage under Ss. 7 and 8.

Held, that the plaintiff's case is inconsistent with the imposition of any liability on the debtor; for the plaintiff claims rights in respect of certain property which property the plaintiff says did not belong to the debtor, hence to such a suit S. 8 does not apply and it cannot be stayed. AIR (Vol 13) 1926 Sind 279: 96 Ind Cas 1049 : 20 S L R 183 (DB).

——Ss. 8 and 9—Adjudicated insolvent — Protection —Suit by mortgagee.

Section 9 of Act XX of 1896 is not limited to proceedings pending or decrees asked for against the debtor but extends to all proceedings then pending in respect of the debts and liabilities mentioned in S. 8 which inter alia refers to all debts and liabilities to which the debtor is subject. A suit pending against the mortgagor who has obtained protection must be stayed notwithstanding the mortgagor had been adjudged insolvent before the protection order, and the mortgagee plaintiff offered to limit his claim to the mortgaged property. AIR (Vol 2) 1915 Sind 22 : 9 S L R 48: 30 Ind Cas 25 (DB).

——S. 9.

——S. 9—Bail-bond.

A bail-bond is recognized by the Legislature as falling within the category of contracts, vide Contract Act, S. 74. A person whose estate is under the management of the Manager, Encumbered Estates cannot enter into any contract involving him in any pecuniary liability and this applies to bail-bonds entered into by him. AIR (Vol 8) 1921 Sind 128 : 83 Ind Cas 897 : 26 Cr L J 193 : 16 S L R 195 (DB).

——S. 9 — Meaning of "All debts and liabilities to which he is subject".

The words "all debts and liabilities to which he is subject" include also the contingent liabilities arising out of a covenant which has a living force at the time of the order of management. (1909) 3 S L R 95: 3 Ind Cas 900 (DB).

— S. 9 (2) — Scope Suit to compel Manager to recognise transfer or assignment — Ousting of Manager's jurisdiction.

Claims are debts against the estate, and it is only with such debts or claims that the Manager is concerned. A debt is not less a debt because its amount is determined by the Manager. There is nothing indeed in the Act to prevent the Manager, if he wishes, paying a third party, at the request of the creditor, the amount determined under S. 15. Nor does it say that he should not recognize the lawful transferee or assignee of a debt, but a suit against him as Manager to compel him to do so must fail within the prohibition contained in S. 9 (2), the suit being in reality one in respect of a debt or liability. AIR (Vol 26) 1939 Sind 36 : 179 Ind Cas 956 (DB).

——S. 10.

See also, Sind Incumbered Estates Act, S. 8.

——S. 10—Scope.

The general principle embodied in S. 4 of Repealing Act of 1938 and in S. 6 A, General Clauses Act, 1897, is that textual alterations remained fixed in the parent Act, after the Amending Act has come into force, though the Amending Act be subsequently repealed. Section 10, Sind Incumbered Estates Act, therefore, even now relates to "all rents, profits and other sums in respect of property under management" as amended by the Repealing Act II of 1906 though that Act itself was afterwards repealed by the Repealing Act of 1938. A I R (Vol 26) 1939 Sind 155 : 40 Cr L J 710 : 182 Ind Cas 963 (DB).

——S. 10—Habeas corpus.

Order of arrest passed under S. 10, Sind Incumbered Estates Act — Judicial Commissioner's Court cannot interfere under S. 491, Criminal P. C. A I R (Vol 26) 1939 Sind 155 : 40 Cr L J 710 : 182 Ind Cas 963 (DB).

—— S. 10—Manager's power of arrest—Proper order.

The Manager of Incumbered Estates has power under S. 10 to arrest, during the management of the property. It is, however, incumbent upon the Manager, when he purports to exercise the powers of arrest conferred by the Act, to mention in his order the section of the Act under which he passes his order and the survey numbers in respect of which he proposes to recover, by his power of arrest, sums due. AIR (Vol 26) 1939 Sind 155 : 40 Cr L J 710 : 182 Ind Cas 963 (DB).

——S. 12.

——S. 12—Effect of publication in Official Gazette.

Where a certain share in the lands is shown as the property of the zamindar in the record of rights published by the Manager in the Sind Official Gazette, the manager can rely upon the presumption raised by S. 135-J, Land Revenue Code. A I R (Vol 26) 1939 Sind 155 : 40 Cr L J 710 : 182 Ind Cas 963 (DB).

——S. 15.

——Ss. 15, 17, 31, 32—Award by manager—Finality of—Liquidation scheme—An appeal.

An award by the manager under Ss. 15, 16 is final, and can only be varied by the Commissioner on appeal under S. 32. The liquidation scheme cannot vary the award. The jurisdiction of the Manager under Ss. 15 and 16 is a special jurisdiction and does not arise unless the terms of the statutes are complied with. The Manager, under the Act cannot award future interest subsequent to the order of management under rule 4, as such interest is solely in the discretion of the Commissioner under R. 12.

A I R (Vol 4) 1917 Sind 13 : 11 S L R 49 : 42 Ind Cas 6 (DB).

——S. 17.

——Ss. 17 (1) and 12—Liquidation scheme—Scope of —Inclusion of property by manager as belonging to estate owner—Aggrieved party's right of suit.

The liquidation scheme prepared and submitted in pursuance of S. 17 (1), Sind Incumbered Estates Act, pertains to the determination of debts and liabilities of the estate owner and the manner in which it is proposed to pay or discharge them. It makes no reference whatever to rights over immoveable property and S. 12 deals with procedure in the matter of the notification of claims and not rights to immoveable property against the estate-owner. If, therefore, the manager of the incumbered estates, includes a certain property as belonging to the estate-owner, the aggrieved party is not bound to challenge the inclusion within six months from the date of the publication of the order of management in the Sind Government Gazette but can establish the nature or extent of his right to the immoveable property by a suit. AIR (Vol 35) 1948 Sind 14 : ILR (1947) Kar 168 (DB).

——S. 28.

——Ss. 28, 29—Application of—Restrictions to heirs of person getting protection.

Both Ss. 28 and 29 impose a restriction upon the thakur, jagirdar or zemindar to whom the estate is restored. These sections contain no provision that the thakur jagirdar or zemindar on whom a restriction is imposed should be the very person who had obtained protection under the Act and not his heir or heirs as the case may be.

Where the management of the estate of a zemindar who had obtained protection under the Sind Incumbered Estates Act continued for two years after his death, and the estate was subsequently restored to his heirs :

Held, that the disability of alienating the restored property beyond his lifetime which would have attached to the zemindar had he been alive at the date of restoration, equally applied to his heirs. AIR (Vol 23) 1936 Sind 57 : 30 S L R 37: 163 Ind Cas 173 (DB).

——S. 28—Prohibition against alienation—Repeal of Act in 1906, effect of—Private alienation—Collusive sale—Setting aside—Limitation.

The prohibition against alienation took effect already in 1881 when the estate was placed in the hands of the manager of the incumbered estate under the Sind Incumbered Estates Act of 1881, that is, long before the repeal of the Act in 1906 and so the limited estate created by the surrender in 1881 could not be converted into a full estate on account of the repealing Act of 1906 by reason of section 6, Sub-section A of the General Clauses Act of 1897. S. 28 of the Sind Act of 1881 applies only to voluntary alienation of parties. An alienation collusively made as if through Court is nevertheless a voluntary alienation. For a suit to set aside an alienation by the heirs of a person to whom the Act applies, limitation runs from death of the alienor. (1913) 7 S L R 55 : 21 Ind Cas 514 (DB).

——S. 29.

——S. 29—Mortgage decree against zemindar—Execution — Judgment-debtor dying during pendency —Legal representative's objection that decree is no longer executable against mortgaged property—Procedure.

A mortgage decree was obtained against a zemindar or jagirdar within the meaning of S. 29 whose estate came within the provisions of S. 29. During the pendency of the execution of the decree, the judgment-debtor died :

Held, that his legal representative could raise an objection that owing to the death of the judgment-debtor and the provisions of S. 29, the decree was no longer executable against the mortgaged land. Such an objection as it was not raised by the judgment-debtor himself but by his legal representative, was competent. The matter could be decided in the execution proceedings and the legal representative could not be forced to a separate suit. A I R (Vol 26) 1939 Sind 142: ILR (1939) Kar 398: 181 Ind Cas 953 (DB).

——S. 29—Scope.

The person who is granted protection and to whom lands not paying the minimum assessment are restored comes within the purview of S. 29 and such a person cannot alienate the restored property beyond his lifetime and thus undo the very object for which he was granted protection. AIR (Vol 23) 1936 Sind 57 : 30 SLR 37 : 163 Ind Cas 173 (DB).

——S. 29—Applicability.

The restriction contained in S. 29 extends only to the legitimate share of the alienor in the land restored to him and to his co-heirs jointly, and not to the share of his co-heirs which is subsequently transferred to him at a partition between him and his co-heir. AIR (Vol 23) 1936 Sind 57 : 30 SLR 37 : 163 Ind Cas 173 (DB).

——S. 29—Power of restored zemindar to partition—"Alienation," whether includes "partition."

Section 29 does not prevent a restored zemindar from making a partition of property of which he is a tenant-in-common, either privately or through the Court so as to bind his heirs.

The two expressions "alienation" and "partition" are different and have different meanings attached to them. Alienation in its ordinary sense does not include within its ambit a partition or division of property. AIR (Vol 18) 1931 Sind 118 : 25 SLR 430 : 132 Ind Cas 471 (DB).

——S. 29—Sanction for sale—Gift, validity of.

Where sanction of the Commissioner is obtained under the Sind Incumbered Estates Act for effecting a sale and the disqualified proprietor makes a gift, the gift is invalid beyond the life-time of the donor. AIR (Vol 18) 1931 Sind 17 : 25 SLR 72 : 129 Ind Cas 900 (DB).

——S. 29—Alienation beyond lifetime invalid — No title in alienee, after death.

The share of a person, who is under the protection of the manager, cannot be alienated beyond the term of his natural life under S. 29. (1911) 10 Ind Cas 550 (DB) (Sind).

——S. 32.

——Ss. 32, 19—Cancellation of—Effect—Liquidation scheme sanctioned by Commissioner — Relinquishment of management—Effect.

There is nothing in the Act which prohibits it or is inconsistent with the scheme being cancelled. Section 32 when read with S. 21, General Clauses Act, gives power to the Commissioner to cancel the liquidation scheme which he has sanctioned and when such a scheme has been cancelled, the position of the estate reverts to the position occupied under S. 19 before the liquidation scheme was sanctioned. On relinquishment of management by Commissioner after the cancellation of the liquidated scheme, proceedings, processes, executions and attachments which were stayed or suspended under S. 9 of the Act and the debts and liabilities barred by S. 14 shall revive. AIR (Vol 27) 1940 Sind 225 : 192 Ind Cas 454 (DB).

——S. 38.

——S. 38—Suit against manager.

Suits against manager acting officially though not barred, no express provision exists reserving right of suit to party aggrieved except under S. 39. AIR (Vol 17) 1930 Sind 150.

SIND JUDICIAL COMMISSIONER'S COURT RULES

——Power to file re-interrogatories, for examination of witnesses.

Re-interrogatories can be filed for examination of witnesses outside the jurisdiction of the Court.

The necessity of amending the Rules of the Sind Judicial Commissioner's Court which are defective on this point, so as to bring them in line with the Rules of the Bombay High Court pointed out. AIR (Vol 18) 1931 Sind 105 : 132 Ind Cas 470.

——Alluvion and diluvion of land.

Lands washed away and afterwards reformed on an old site which can be clearly recognized remain the property of the original owner.

This is the general law applicable throughout India including Sind. The law laid down in Special Circular No. 23 of the Commissioner in Sind is not different. AIR (Vol 16) 1929 Sind 61.

——'Owner,' meaning.

The owner referred to in para. 3 is the permanent occupant, who owns permanent proprietary rights in the land for purposes of cultivation. AIR (Vol 16) 1929 Sind 61.

——Affidavit before Bench Magistrate.

An affidavit sworn before a Bench Magistrate in Sind is one sworn before a proper person under S. 539 according to the rules of the Sind Judicial Commissioner's Court. AIR (Vol 14) 1927 Sind 128 : 28 Cr LJ 168 : 7 A I Cr R 336 : 99 Ind Cas 600 (DB).

——Pleader's fees.

Where the plaintiff himself undervalued his suit to avoid payment of higher Court fees the plaintiff could not be allowed special fees for a pleader because the case was an intricate one. (1910) 4 SLR 37 : 7 Ind Cas 601 (FB).

——R. 2.

——R. 2 (4) — Power of Single Judge to quash commitment.

Under R. 2, cl. (4) of the Sind Judicial Commissioner's Court Rules, power is vested in a Single Judge of the Court to deal with every application for quashing a commitment under S. 215, Criminal P. C. AIR (Vol 19) 1932 Sind 157 : 26 SLR 407 : 34 Cr LJ 14 : 140 Ind Cas 485.

——R. 4.

——R. 4—Difference of opinion among judges.

On a difference of opinion between two Judges differing in a revisional application the matter cannot be referred to a third Judge. Section 93 only confers that power in appeals and not in revision applications. The matter in such cases should be referred to a Full Bench under R. 4. AIR (Vol 11) 1924 Sind 75 : 17 SLR 133 : 83 Ind Cas 353 (FB).

——R. 4 — When a revision application has been heard by a Bench of two judges, and judgments delivered, but no final order passed in application because of difference of opinion, the Judicial Commissioner has the power to refer the matter to a Full Bench under R. 4. AIR (Vol 11) 1924 Sind 75 : 17 SLR 133 : 83 Ind Cas 353 (FB).

——R. 23.

——Rr. 23, 24 and 27—Costs—Remand Order—Costs in the cause — Power of lower Court.

When a case is remanded for fresh decision and costs of appeal are directed to be costs in the cause, the lower Court when passing its decree has no power to alter the order of the Appellate Court as to costs and to allow costs not shown in the order of the Appellate Court. The expression "successful party" in R. 23 of the Rules of Court means the party who, as a result of the Court's judgment, is entitled to formulate a claim for costs against another party; it does not include a party obtaining success in proceedings before another Court. (1912) 5 SLR 254 : 15 Ind Cas 228 (DB).

——R. 28.

——R. 28—Exemption against Agriculturists — Plea of agriculturist—May be raised in execution—Decree to be transferred to collector.

Rule 28 of the Rules of the Judicial Commissioner of Sind permits a judgment-debtor to raise the plea of his being an agriculturist in execution proceedings though no such plea was raised by him at any earlier stage of the proceedings. But the purpose of such a plea if it is to be successfully raised can only be to have the decree transferred to the Collector for execution. In that case, it is the duty of the Court of execution to enquire into the status of the judgment-debtor and if he is found to be an agriculturist, to transfer the decree for the sale of the property specifically mortgaged, to the Collector for execution. AIR (Vol 12) 1925 Sind 49 : 18 SLR 19 : 78 Ind Cas 583 (FB).

SIND MAINTENANCE OF PUBLIC SAFETY ACT (15 of 1948)

——Scope — If ultra vires.

The Sind Maintenance of Public Safety Act, 1948, is not ultra vires; the pith and substance of the Act falls within the entries "public order" and "preventive detention" in the Provincial exclusive List in the Seventh Schedule to the Government of India Act, 1935. AIR (Vol 37) 1950 Sind 18 : 51 Cr L J 715 (DB).

——S. 2

——S. 2 (1) (a)—Order alleged to be made mala fide —Burden of proof.

The burden of proof is upon a detenu who asserts that an order was passed mala fide by the Provincial Government, to prove the same. AIR (Vol 37) 1950 Sind 18 : 51 Cr L J 715 (DB).

——S. 2 (1) (a)—Scope—Ground of detention—"Accused member of gang of dacoits and association of dangerous criminals" — Sufficiency — Legality of detention.

Where the ground of detention furnished to a detenu is that "he is a member of a gang of dacoits and an association of dangerous criminals," it cannot be held that the detention is illegal on account of non-compliance with S. 2 (1) (a) of the Sind Maintenance of Public Safety Act. AIR (Vol 37) 1950 Sind 18 : 51 Cr L J 715 (DB).

——S. 4.

——S. 4—Scope—Mandatory character — Failure to give opportunity to make representation—Effect on legality of detention.

The provisions of S. 4 of the Sind Maintenance of Public Safety Act are mandatory and their object is to enable the detenu to make a representation and thus to give him an opportunity of securing his freedom by adducing fresh facts by explaining or disproving the facts previously held against him. Though the original order when made might be legal and proper, yet the detention becomes illegal as a result of this omission to give this opportunity to the detenu. The detention having become illegal, it cannot be re-validated by a belated opportunity being given. AIR (Vol 37) 1950 Sind 7:51 Cr L J 860 (DB).

SIND RENT CONTROL (NON-RESIDENTIAL PREMISES) ORDER (1943)

——S. 2.

——Ss. 2 (1) (c), 3 (b) and 11 (1) and (2) — Applicability and scope — Premises let and used for hotel—Rent below Rs. 200 p. m. — Order for possession — Jurisdiction to make — Cerificate of Rent Controller —Necessity.

The words "a room in an hotel or boarding house" in S. 3 (b) of the Sind Rent Control (Non-Residential Premises) Order, 1943, refer not only to a room in an hotel but also to a room in a boarding house, and are intended to take away the protection from guests occupying a room in an hotel or boarding house. Where, however, a person leases a buil-

ding for the purpose of carrying on the business of an hotel or a boarding house and the rent reserved does not exceed Rs. 200 p. m the premises are governed by S. 2 (c) of the Order. Unless the landlord or lessor in such a case is armed with a certificate of the Rent Controller as provided by S. 11 (2) of the order no order for possession can be made in view of the bar of S. 11 (1). Section 3 (b) does not apply to such a case. AIR (Vol 34) 1947 Sind 27:1LR (1946) Kar 136 : 228 Ind Cas 635 (DB).

——S. 3.

——S. 3 (b) - Room in boarding house.

When Cl (b) of S. 3 refers to "a room in an hotel or boarding house," it refers not only to a room in an hotel but also to a room in a boarding house. These words are intended to take away the protection from guests occupying a room in an hotel or boarding house. Where, however, a person leases a building for the purpose of carrying on the business of an hotel or a boarding house and the rent reserved does not exceed Rs. 200 p. m. the premises are governed by cl. (c) of S 2 of the Order. Unless, therefore the landlords in such a case, are armed with a certificate of the Rent Controller, no order for possession can be made in view of S. 11 by the Court. AIR (Vol 34) 1947 Sind 27 : I L R (1946) Kar 136 : 228 Ind Cas 635 (DB).

——S. 11.

——S. 11 –Applicability—Retrospective operation.—Pending proceedings.

The application of S. 11 of the Sind Rent Control Order is not confined to proceedings instituted after the order came into force. The order applies also to pending proceedings AIR (Vol 34) 1947 Sind 98:1LR (1946) Kar 260 : 231 Ind Cas 56 (DB).

——S. 11—"Tenant"—Ex-tenant holding over after notice to quit.

Section 11 of the Sind Rent Control Order applies not only to tenants but also to ex-tenants. The definition of the word "tenant" includes an ex-tenant whose tenancy has been determined by a notice to quit but who holds over. AIR (Vol 34) 1947 Sind 98 : I L R (1946) Kar 260 : 231 Ind Cas 56 (DB).

— S. 11 — Finality of Rent Controller's Order — Scope of.

The finality of the Rent Controller's order applies to a case where he grants a certificate and not to a case where he refuses to grant one on the ground that the premises in question are not covered by the Sind Rent Control Order. The tenant is not aggrieved by the Rent Controller's order refusing to grant a certificate and therefore he cannot appeal against it. Where the Rent Controller has refused to grant a certificate the rights of the parties are governed by S. 11 (1) provided the premises in question are within the perview of the Sind Rent Control Order and the Court cannot make an order for possession by virtue of the bar of S. 11 (1). AIR (Vol 34) 1947 Sind 27 : I L R (1946) Kar 136 : 228 Ind Cas 635 (DB).

——S. 11 (1) — Scope — Order refusing certificate on ground that control order does not apply—Finality against lessee.

Where the Rent Controller refuses to give a certificate to the lessor under S. 11 (1) of the Sind Rent Control (Non-Residential Premises) Order, 1943, it is not conclusive as against the lessee so as to preclude him from resisting an application for eviction. The finality of the order of the Rent Controller applies to a case where he grants a certificate and not when he refuses to grant one on the ground that the premises in question are not covered by the Control Order. The tenant cannot appeal against it. Where the Rent Controller refuses to grant a certificate, the parties are governed by S. 11 (1), provided the premises in question are within the purview of the Rent Control Order. AIR (Vol 34) 1947 Sind 27 : I L R (1946) Kar 136 : 228 Ind Cas 635 (DB).

SIND RENT CONTROL (RESIDENTIAL PREMISES) ORDER (1942)

——Cl. 10

——Cl. 10 — Construction and scope — Decree for delivery of immovable property – Execution—Order —If falls under Cl. (10)—Emergency legislation—Interpretation—Rule.

On a proper and reasonable construction of the words of Cl. (10) of the Sind Rent Control Order, 1942, it must be held that it covers and hits at a case where, following a decree for delivery of immovable property, an order in execution for the recovery of that property is made. The words of Control Orders passed in the stress and urgency of war should not be construed with that strictness and precision which applies to statutes passed after long consideration, discussion and debate. The words must be construed reasonably; their grammatical meaning must be given to them and the purpose of the particular order must be kept in mind. ILR (1946) Kar 329 : AIR (Vol 34) 1947 Sind 146 (DB).

——Cl. 10—Certificate for possession for erection of building for landlord's own use is within scope of Order.

Reading the word "use" in sub-cl. (2) with sub-cl. (3) of Cl. 10, it cannot be said that the certificate of the Rent Controller granting possession of the premises to the landlord for the erection of a building for his own use in place of a house then standing is outside the scope of the Order or the powers conferred by the Order upon him. AIR (Vol 33) 1946 Sind 128 : ILR (1946) Kar 40: 226 Ind Cas 147. (DB).

——Cl. 10 (2) (b) (as amended) — Powers of controller — Certificate for possession for erection of building for landlord's own use—If ultra vires.

Clause 10 (2) (b) (1) of the Sind (Residential Premises) Control Order, 1942, as amended has to be read with sub-cl. (3); under Cl. 10 (b) therefore possession may be given of a house where the landlord requires it in order to erect a building in place of the house then standing. It cannot be said that the certificate of the controller granting possession of his premises to the landlord for the erection of a building for his own use is outside the scope of the order or the powers conferred by the order upon the controller. ILR (1946) Kar 40 : 226 Ind Cas 147 : AIR (Vol 33) 1946 Sind 128 (DB).

——Cl. 12.

——Cls. 12, 13 and 14 (as amended in 1946) — Scope —If retrospective — Pending proceedings—If affected—Order by Collector in appeal presented before amendment, but made after amendment—Finality—Revision by Provincial Government—Competency.

Cls. 12, 13 and 14, inserted in the Sind Rent Control Order, 1942, in substitution of the original Cl. 12, by the amending order of 1946, are not retrospective in operation, so as to apply to and affect proceedings instituted before, and pending at the time of the amendment. When an appeal is presented to the Collector from an order of the Controller granting a certificate to the landlord, and the amendment giving a right to file a revision application to the Provincial Government against the Collector's Order is introduced pending the appeal the order of the Collector in appeal though made after the amendment, is still final and is not subject to revision by the Provincial Government under Cl. 13 introduced by the amendment. Recourse having been had to the Rent Controller under the original order, the subsequent amendment providing for revision could not in any way render inconclusive the order of the Collector, which, being final under the Order as it stood at the time of the institution of the proceedings, remained unaffected by the subsequent amend-

ment. ILR (1947) Kar 103 : AIR (Vol 35) 1948 Sind 86 (DB).

——Cl. 12—Single order against two tenants of two premises of the same landlord—Separate ejectment certificate issued against each tenant—Cancellation of the order as against one tenant on an appeal by him—Order, if cancelled also as against the other.

Where a single order is passed against two tenants of two premises by the Rent Controller under the Sind Residential Premises Control Order but separate ejectment certificates are issued in respect of each of the premises and the order is cancelled on appeal by one of the tenants it cannot be said that the ejectment certificate as against the other tenant who had not appealed had ceased to be in existence so far as his premises are concerned. AIR (Vol 35) 1948 Sind 88 (DB).

SIND SAGAR DOAB COLONIZATION ACT (1 of 1902).

——Reclamation of land during continuance of Act —Acquisition of Adna Malkiyat rights.

Held, that the reclamation of land during the continuance of the Sind Sagar Doab Colonization Act, could not result in the acquisition of any "adna malkiyat" rights at any time as none of the conditions according to which such rights could accrue were in operation when the land was reclaimed. AIR (Vol 23) 1936 Lah 958 : 17 Lah 502 : 38 P L R 1036 : 166 Ind Cas 118 (DB).

——S. 5

——S. 5, Proviso—Effect of—Surrender under agreement between Government and landowners not taking place — Agreements and wajib-ul-arz., if rendered inoperative.

The plaintiffs and the defendants were both Ala Maliks in the village in question. The plaintiffs broke up the land in suit between the years 1902 and 1928, and their principal contention was that by breaking up this land and by paying or offering to pay "jhuri" to the Ala Maliks under the terms of the wajib-ul arz of the year 1878, they became Adna Maliks in the lands in suit. The case of the defendant was that the conditions embodied in the wajib ul-arz of 1878, to the effect that an Ala Malik, by breaking any part of the shamilat land could, by offering "jhuri" to the other Ala Malik, which the latter had no right to refuse, acquire Adna Malkiat rights, was abrogated by the provisions of the wajib-ul-arz compiled in the year 1902 in persuance of the provisions of the Sind Sagar Doab Colonization Act :

Held, that the agreements between the Government and the land-owners became operative from the dates on which they were executed and the provisions of the wajib-ul arz also came into force in the year 1902. Under the proviso to S. 5 the surrender under the agreements had to take effect from the date of the beginning of the excavation of the canal, and the mere fact that the surrender under the agreements did not take place, did not make the agreements and the wajib-ul-arz inoperative. In any case, the wajib-ul-arz became binding on the parties to the present litigation from the year 1902, and as the breaking of the land in the present case took place after the year 1902, the provisions of the wajib-ul-arz of 1902 and 1924 would govern the present case. AIR (Vol 23) 1936 Lah 962 : 161 Ind Cas 942 (DB).

SIND SHOPS AND ESTABLISHMENTS ACT (18 of 1940)

——S 2

——S. 2—Biri makers working independently for biri shopkeepers are not governed by sub-s. (13) of S 2.

Biri-makers employed by a biri shop-keeper, working independently in their own houses and preparing biris for the shop-keeper are not persons employed within meaning of sub-s. (13) of S. 2 and under no circumstances they can come within the purview of the Act. AIR (Vol 32) 1945 Sind 113 : I L R (1945) Kar 94 : 47 Cr L J 127 : 221 Ind Cas 251 DB).

——S. 2—Distinction between servant and independent contractor—Biri-makers under direct control of shopkeepers are servants under sub s. (13) of S 2.

It is very difficult to determine whether an employee is a servant or an independent contractor and it is a mixed question of law and fact which a Judge has to determine in the light of the facts placed before him. The distinction between a servant and an independent contractor is one which is continually occupying the attention of the Court and arises from the fact that a person may buy the benefit from another without having the right to control those services or to issue orders to the person rendering them. An independent contractor has been defined as "one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the control of the person for whom he does it and may use his own discretion in the things not specified beforehand." The line between an independent contractor and a servant is often a very fine one, it is a mixed question of fact and law and the Judge has to find and select the facts which govern the true relations between the parties as to the control of work and then to say whether the person employed is a servant or a contractor.

When the biri shop-keeper retains the power to direct the manner in which the work is to be executed and whether small or large biris are to be made or with what kind of tobacco and where the work is to be done is all under the direction of the shop-keeper, the shop-keeper must be assumed to exercise such direct control over his biri-makers as to constitute them his servants. AIR (Vol 32) 1945 Sind 113: I L R (1945) Kar 94 : 47 Cr L J 127 : 221 Ind Cas 251 (DB).

——S 2 (13)—Scope and object of Act—Biri makers remunerated on piece work basis are persons employed under S. 2 sub s. (13)

The Act is wide in its terms and is fundamentally designed to ensure that men shall not be employed in shops for more than a fixed number of hours a day. The Act cannot be evaded merely because certain employees happen to be paid for the amount of work they accomplish rather than on a daily or weekly or monthly basis. Hence biri-makers remunerated on piece work basis are persons employed within meaning of sub-s. (13) of S. 2. AIR (Vol 32) 1945 Sind 113; ILR (1945) Kar 94: 47 Cr L J 127: 221 Ind Cas 251 (DB).

——S. 2. (13)—Words "principally or wholly employed"—Meaning of.

The words "principally or wholly employed" in sub-s. (13) of S. 2 mean exactly what they state. They are words meant to exclude something in the nature of casual employment. They relate to employee. The employment should be his whole or principal employment. AIR (Vol 32) 1945 Sind 113: ILR (1945) Kar 94: 47 Cr L J 127: 221 Ind Cas 251 (DB).

——S. 2, (13)—Scope.

The words in "connection with the business of the shop" in sub-s. (13) of S. 2 are wide. Biri makers employed in the shop to prepare biris for sale must be deemed to have been employed in connection with the business of the shop and there is no reason why these biri makers sitting in the shop in connection with the stock in-trade should not have the benefit of the Act. AIR (Vol 32) 1945 Sind 113: ILR (1945) Kar 94: 47 Cr L J 127: 221 Ind Cas 251 (DB).

——S. 4.

——S. 4—Employment of a biri-maker wholly and principally in the biri-shop is not inherently intermittent.

Whether a biri-maker employed by a biri-shop-keeper falls under the category of persons whose

work is inherently intermittent is a matter of fact where a biri-maker is employed wholly or principally in the biri shop, that is to say for the greater part of the day and under direct supervision of the shopkeeper, it is difficult to say that his employment is inherently intermittent. AIR (Vol 32) 1945 Sind 113: ILR (1945) Kar 94: 47 Cr L J 127: 221 Ind Cas 251 (DB).

SIND SUPPRESSION OF HUR OUTRAGES ACT (1 of 1942)

——S. 2.

——Ss 2 (b) and 17—Jurisdiction of Special Tribunal—Presumption.

A condition precedent to the jurisdiction of the Special Tribunal appointed under the Sind Suppression of Hur Outrages Act is, generally speaking, that the accused person shall be a Hur. The person to be tried must, with certain exceptions come within the definition given in S. 2 (b). If he does not, then the Special Tribunal has no jurisdiction to try and sentence him.

Whether a particular person is or is not a Hur is a question of fact, but his status as a "Hur" for the purpose of the Act depends upon certain official acts, registration as a member of the Criminal Tribe of Hur or Lurs, or a declaration by special or general order of the Provincial Government, published in the Official Gazette, and the Court would ordinarily be prepared to rely upon the presumption under the provisions of S. 114, Evidence Act, and Illustration (e). Since the jurisdiction of the Tribunal depends on the special status of a particular individual, the matter should be placed beyond the sphere of reasonable doubt and it is desirable in such a case not to rely upon presumptions, and the Special Tribunal at the outset of the proceedings should put upon the record evidence which shows quite clearly that the accused is a Hur and which also removes any reasonable doubt as to the identity of the accused. AIR (Vol 31) 1944 Sind 111: ILR (1943) Kar 95: 45 Cr L J 46: 212 Ind Cas 142 (DB).

——S. 2 (b) (i)—Scope.

Section 2 (b) (i) relates to the registration of a member of the Criminal Tribe and not to the registration of the tribe itself. AIR (Vol 31) 1944 Sind 111: ILR (1943) Kar 95: 45 Cri L J 546: 212 Ind Cas 142 (DB).

SINGAPORE BANKRUPTCY ORDINANCE

——S. 51.

——S. 51 (1)—Burden of proof.

In determining the question whether a transfer is to be deemed fraudulent and void as against the Official Assignee in bankruptcy, the onus is on the assignee he has to show that the case is within the statute. AIR (Vol 15) 1928 P C 77: 54 MLJ 337: 30 Bom L R 290: 47 CLJ 339: 27 MLW 744: 107 Ind Cas 233.

——S. 51 (1)—English law.

The law of bankruptcy in England is settled as regards the effect of the English statute and the same principles are applicable to the Bankruptcy Ordinance in Singapore. AIR (Vol 15) 1928 P C 77: 54 MLJ 337: 30 Bom L R 290: 47 CLJ 339: 27 MLW 744: 107 Ind Cas 233.

——S. 51 (1)—Transfer not void.

Provincial Insolvency Act, S. 54 (1)— Dominant motive of transferor being to do what he is bound or compelled to do—Transfer is not void as against Official Assignee. AIR (Vol 15) 1928 P C 77: 54 MLJ 337: 30 Bom L R 290: 47 CLJ 339: 27 MLW 744: 107 Ind Cas 233.

SINGAPORE IMPROVEMENT ORDINANCE (1927)

——S. 57.

——S. 57 — Powers of Improvement Trust, held are limited by Improvement Ordinance (Singapore), 1927, S. 57.

Among the matters which generally render a house unfit for human habitation, is a structure which is unsafe, a verminous condition of the materials, a pestiferous atmosphere, a state of things dangerous to health, or such a rotten or decayed condition of the building that re-building will be cheaper than extensive repair.

When a house is stated to be unfit for human habitation, it is the whole house that is being so described. It cannot be suggested that a room with adequate windows must be ill-ventilated unless it has also a through current of air. Nor can it be suggested that a house with some rooms which are poorly lighted must be unfit for human habitation.

The powers of the Improvement Trust are strictly limited by the terms of S. 57. Within those powers, they can determine questions gravely affecting the property and rights of the inhabitants, but if they step in any degree beyond the limits imposed, any person aggrieved is at liberty to invoke the assistance of the law. AIR (Vol 24) 1937 P C 265: 46 L W 232: 170 Ind Cas 425.

SINGHS

See (1) Hindu Law—Applicability.
(2) Punjab Sikh Gurdwaras Act, S. 2.

SIR CURRIMBHOY EBRAHIM BARONETCY ACT (4 of 1913).

See (1) Currimbhoy Ebrahim (Baronetcy) Act.
(2) Income-tax Act, S. 9.

SIR LAND

See (1) Landlord and tenant.
(2) Local Tenancy Acts.

SISTER AND HALF-SISTER

See Hindu Law of Inheritance (Amendment) Act (II of 1929), S. 2.

SLANDER

See (1) Penal Code, Ss. 499 and 500.
(2) Tort—Defamation.

SLANDER OF TITLE

See (1) Tort—Trade mark.
(2) Trade Mark.

SLAVERY

See Penal Code, S. 370.

SMALL CAUSE COURT

See (1) Civil P. C., Ss. 7, 8 and O. 20, R. 4.
(2) Presidency Towns Small Cause Courts Act.
(3) Provincial Small Cause Courts Act.

SMRITIES

See Hindu Law—Texts.

SOCIETIES

See (1) Associations.
(2) Benefit Society.
(3) Clubs.
(4) Partnership Act.
(5) Societies Registration Act.

SOCIETIES REGISTRATION ACT (21 of 1860).

——Position and status of registered society—Suit by or against.

A society registered under the Societies Registration Act is, and enjoys the status of, a legal entity apart from the members constituting the same, and is capable of suing or being sued. AIR (Vol 33) 1946 Bom 516 : 1947 Comp C 21 : 48 Bom L R 341 : 229 Ind Cas 84.

——Status of Society—Suits by or against.

A society formed under the Societies Registration Act is a corporation and it has a separate existence apart from its member and can sue and be sued in its corporate capacity. AIR (Vol 27) 1940 Mad 949 : (1940) 2 MLJ 554: 52 L W 549 (1): 1940 MWN 1015: 191 Ind Cas 816.

——Preamble and S. 20 — Charitable purpose, what is—Character, when changed.

Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable

but religious would not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. AIR (Vol 27) 1940 Mad 167: 50 L W 734: 1940 MWN 31: ILR (1940) Mad 691: (1940) 2 MLJ 436: 189 Ind Cas 860 (DB).

——Where the object of an institution is to help the cause of education from the income and interest arising out of the trust fund, the institution has to be registered under the Societies Registration Act, 1860, in order to enable it to acquire a judicial status. In the absence of non-registration under the aforesaid Act all the trustees in charge of the fund have alone a legal status. AIR (Vol 21) 1934 Nag 207: 1 NLR 15: 151 Ind Cas 893.

——Managing Committee's right to refuse subscriptions.

No suit lies by a member of the public against the managing committee of a society or institution which is managed by public subscriptions to enforce the right to subscribe and to be admitted to the privilege of membership. AIR (Vol 3) 1916 Oudh 94: 19 O C 15: 34 Ind Cas 263.

——S. 1.

——S. 1—Charitable purposes—Scope of.

Per Mukerji, J.—The expression charitable purposes in the Act should be understood in the wider sense. If relief of wants occasioned by lack of pecuniary means is charity, adoption of preventive measures, to ward off pecuniary wants is also charity. AIR (Vol 17) 1930 Cal 397: 51 CLJ 272 (DB) .

——S. 6.

——S. 6—Requirements of—Compliance with.

The requirements of S. 6 of the Societies Registration Act would be complied with if on the resignation of the secretary of a society, the managing committee authorises the additional secretary to do the acts on behalf of the society.

It would be covered by the last portion of S. 6 of the Act. AIR (Vol 37) 1950 All 447 (DB).

——S. 6 — Society registered under Societies Registration Act—Principles governing relations of members of incorporated companies are applicable in case of such society—Such principles and exceptions stated — Acts of majority falling within exceptions — Members in minority can sue society without previous sanction or consent.

In all corporations and companies incorporated under the Indian Companies Act, the normal position is that the internal affairs of the corporations or companies are managed by a vote of the majority; and members join the corporations or the companies with full knowledge that the majority of the members are entitled to exercise the powers and control the operations generally. The Court will not interfere with the internal management of the companies acting within their powers and in fact has no jurisdiction to do so, and further in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company the action should prima facie be brought by the company itself.

This supremacy of the majority is, however, subject to the following exceptions, viz. (1) where the act complained of is ultra vires the company; (2) where the act complained of is a fraud on the minority; and (3) where there is absolute necessity to waive the rule in order that there may be no denial of justice.

These principles which govern the relations of the members of joint stock companies incorporated under the Indian Companies Act are also applicable in the case of a society registered under the Societies Registration Act and would govern the relations between the members of the society inter se.

Where, therefore, the acts complained of fall within the exceptions, the members of a registered society who are in the minority would be entitled to institute a suit on behalf of themselves and all other members of the society making the society and the president and members of the managing committee of the society party defendants to the suit and it would not be necessary to obtain the previous sanction and consent of the society for the institution thereof, simply because the control of the affairs of the society is in the hands of the majority whose acts are complained of and it would be futile to attempt to obtain the sanction and consent of the society for the institution of the suit, it being an absolute certainty that no such sanction or consent would ever be available to the plaintiffs. A I R (Vol 33) 1946 Bom 516 : 48 Bom L R 341 : 229 Ind Cas 84.

——Ss. 6, 7 and 8 — Society registered under Act — Society is legal entity capable of suing and being sued in its own name.

Once a Society is registered with the Registrar of Joint Stock companies by the filling of the memorandum and certified copy of the rules and regulations thereof with the Registrar and the Registrar has certified under his hand that the society is registered under the Act, the society enjoys the status of a legal entity apart from its members constituting the same and is capable of suing or being sued. In spite of the provisions contained in Ss. 6, 7 and 8, it is competent to the society, to sue or be sued in the name of the society, to be sued in its registered name. These provisions are not inconsistent with the user of the registered name of the Society in connection with legal proceedings. The use of the name is not compulsory but it is at least permissive : Observations of Lord Lindley in (1901) A C 426, foll.

Where, therefore, a suit is brought by some members of the society on behalf of themselves and all the members of the society against the president of the society as representing the society the suit cannot be objected to on the ground that the society is the plaintiff as well as the defendant. A I R (Vol 33) 1946 Bom 516 : 48 Bom L R 341 : 229 Ind Cas 84.

——S. 6 — Society registered, status of — Suit by member of society on behalf of himself and other members against members of Managing Committee of Society — Maintainability.

The position of a society registered under the Societies Registration Act is more like that of a club or a joint stock company. In order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. But where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company, the Courts allow the share-holders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and in such an action the plaintiff cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the share-holders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

A society was founded and registered under the Societies Registration Act mainly to promote the education of the boys and girls of Southern India and with that object in view it thought of erecting a building to house the school. Not having sufficient

funds on hand, schemes were suggested to borrow money on issue of debentures. The scheme, however, failed. On 26th July 1936, a general meeting of the society was called at which a managing committee was elected. The next general meeting of the society was called on 4th December 1938. At that meeting eight persons were elected to the managing committee. They co-opted one member in April 1939. The managing committee, on a consideration of the situation, resolved to borrow money from certain other parties and entered into an agreement with them for that purpose. A general meeting of the members held on 15th October 1939, validated the election of the managing committee which had been functioning till then and their acts. The plaintiff who was a member of the society then filed a suit on behalf of himself and the other members of the society except the defendants, who were the nine members whose appointment to the managing committee was confirmed by the general meeting held on 15th October 1939, for a declaration that the loans raised by the defendants were unauthorised and prayed that a managing committee be constituted under the direction of the Court :

Held, that as the position of the members of the society was similar to that of the share-holders of the company and as the acts of the defendants which were challenged were in respect of the society, it was necessary that the society should be a party to this litigation. It was not competent to the plaintiff either alone or representing himself and the other members of the society other than the defendants to bring a suit. As the acts of the defendants which were challenged were only in respect of the alleged wrong done to the society as a body and not in respect of infringement of the individual right of the plaintiff, in the absence of the society as a party to the litigation, the suit as framed was not maintainable and the Court had no jurisdiction to try the suit in the absence of the society. A I R (Vol 28) 1941 Bom 312 : 43 Bom L R 562 : I L R (1941) Bom 497 : 197 Ind Cas 308.

——S. 9.

——S. 9 — Mode of imposing penalty — Penalty imposed by society, must be in accordance with the rules made according to law.

The penalty imposed by society must be imposed in the manner prescribed by the Act, and not otherwise in order that it may be recoverable in Court; in other words, it must be for breach of bye-law duly made in accordance with the rules and regulations of the society or if the rules do not provide for making bye-laws then in accordance with a bye law made at a general meeting by the concurrent votes of three-fifths of the present members. No special legal force attaches to rules framed by society merely because of the fact that the rules were framed before registration and were lodged after registration with the Registrar under S. 18. A I R (Vol 12) 1925 Oudh 107 : 80 Ind Cas 556.

——S. 13.

——S. 13 — Adjustment of affairs of society — Procedure.

According to the provisions of S. 13 of the Societies Registration Act the adjustment of the affairs of the societies registered under the Act is to be referred to the Principal Court of original civil jurisdiction. Hence a reference to arbitration and an award and decree thereon is of no use and is without jurisdiction. 1946 A M L J 27.

——S. 15.

——S. 15 — Registered society — Principles applicable — Acts of majority — Binding force—Remedy of minority — Interference by Court.

The principles governing the relations of members of joint stock companies would apply to the case of a society registered under the Societies Registration Act; the opinion and acts of the majority would be binding on the whole society especially when the rules of the society are to that effect. The minority feeling aggrieved can sue the society even without obtaining the sanction and consent of the society. The power conferred on the majority must, however, be exercised bona fide and the Court interferes only to prevent unfairness or oppression. The supremacy of the majority is subject to three exceptions : (1) Where the acts complained of are ultra vires the society; (2) where the acts complained are a fraud on the minority; and (3) where there is absolute necessity to waive the rule in order that there may be no denial of justice. A I R (Vol 33) 1946 Bom 516 : 48 Bom L R 341 : 1947 Comp C 21 : 229 Ind Cas 84.

——S. 15 — Requisition by members not entitled to vote to convene meeting — Validity.

A requisition by the members of the society to convene a meeting, which is otherwise valid is not rendered bad only because it is signed by persons not entitled to vote. A I R (Vol 28) 1941 Bom 312 : 43 Bom L R 562 : I L R (1941) Bom 497 : 197 Ind Cas 308.

——S. 15 — Election — Validity.

Quaere. — Whether election of persons, whose subscription was in arrears for over three months is valid. A I R (Vol 28) 1941 Bom 312 : 43 Bom L R 562 : I L R (1941) Bom 497 : 197 Ind Cas 308.

——S. 15 — Meeting of society — Quorum — Determination of.

In order to determine the quorum for a meeting of a society, it is necessary to find out who were the members eligible to attend the meeting. It ts improper to take into consideration the names of the persons who were on the role but who had not paid their subscription or were in arrears for over three months. A I R (Vol 28) 1941 Bom 312 : 43 Bom L R 562 : I L R (1941) Bom 497 : 197 Ind Cas 308.

——S. 15 — Religious Association — Powers of the majority — Resolution for preferential treatment of the Guru of one particular mutt opposed to the basic principle of equality of treatment — Invalidity — See A I R (Vol 18) 1931 Mad 12 : 53 Mad 737 : 59 M L J 770 (D B).

——S. 19.

——Ss. 19, 3—Presumption of due registration.

The presumption of due registration arises, not on the certificate of registration granted by the Registrar under S. 3, but on the copies of the Rules and Regulations and Memorandum, certified under S. 19 which constitutes them prima facie evidence of the matters therein contained. A I R (Vol 25) 1938 P C 73 : 1938 ALJ 194 : 47 L W 239 : 1938 OWN 245 : 4 B R 317 : 40 PLR 247 : ILR (1938) Lah 63 : 1938-1 MLJ 359 : 66 CLJ 524 : 1938 A W R 74 : 1938 M W N 621 : 40 Bom LR 724 : 32 SLR 350 : 65 IA 106: 42 CWN 930: 172 Ind Cas 993.

——S. 20.

——S. 20—Charitable purpose—Society for improvement of Islamic education and help to poor mussaffars — One purpose to manage affairs of mosque — Character, if changed.

The improvement of Islamic education and rendering pecuniary help to the poor musaffars, etc., are charitable purposes and where a society is formed for such purposes, the fact that one of the objects of the society is also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members of the society, cannot render the society a society formed for religious purposes. A I R (Vol 27) 1940 Mad 167 : 50 L W 734 : 1940 M W N 31 : I L R (1940) Mad 671 : 1940-2 MLJ 436 : 189 Ind Cas 860 (DB).

——S. 20—Scope of.

When once registration of a society has been effected, the provisions of the Societies Registration Act will apply, and such bye laws as are inconsistent with them become inoperative. A I R (Vol 26) 1939 All 557 : 1939 A L J 757 : 1939 A W R 436 : 184 Ind Cas 293 (DB).

——S. 20 — Charitable society existing for the management of a public mosque.

A religious purpose may be a charitable purpose, and a society for religious purposes will ordinarily be a society for charitable purposes. Charitable purposes are not restricted to the giving of alms or other charitable reliefs, but the words have a much wider legal meaning :

Held, that a religious society which had for its object the control and management of, and the protection of the property appertaining to, a certain public mosque was a society which might legally be registered under the provision of the Societies Registration Act, 1860. (1906) 3 ALJ 124 : 1906 AWN 59 : 28 A 384 (386, 387) (DB).

SOHAQ GRANT

See (1) Grant.
(2) Hindu Law—Impartible Estate.
(3) Impartible Estate.

SOLDIERS (LITIGATION) ACTS (1918) AND (1923)

See Indian Soldiers (Litigation) Acts (1918) and (1925).

SOLDIER'S ORDINANCE (2 of 1915)

——S. 2.

——Ss. 2 and 9—"Serving under war conditions"—Meaning of—Court—Duty of, when in doubt.

"Serving under war conditions" does not necessarily mean serving abroad. When the Court is in doubt as to whether a party can be said to be serving under war conditions or not, it ought to refer the matter to the prescribed authority and act on the certificate given by such authority. AIR (Vol 7) 1920 Lah 427 : 56 Ind Cas 947.

SOLICITOR

See (1) Legal Practitioner.
(2) Soldiers Act (English) (1860).

SOLICITORS ACT (ENGLISH), 1860 (23 and 24 Vict. C. 127).

——Advocate—Lien for money due — Property recovered by his exertion :

Held, that the Advocate was not entitled to lien for costs like that which is sanctioned by the English Solicitors' Act, 1860, in favour of a solicitor upon property recovered by his exertion for client. A I R (Vol 19) 1932 Mad 256 : 55 M 455 : 1932 M W N 8 : 62 MLJ 185 : 35 LW 166 : 137 Ind Cas 571 (DB).

SOLITARY CONFINEMENT

See Penal Code, Ss. 73 and 74.

SONTHAL PARGANAS ACT (37 of 1855)

——S. 2.

See also Sonthal Parganas Justice Regulation (5 of 1885), S. 2.

——S. 2, Proviso — Objection regarding jurisdiction —Stage for.

If a defendant wishes to raise the question of jurisdiction, he should raise it at the earliest moment and the Court of appeal can refuse to enter into the matter of jurisdiction. A I R (Vol 21) 1934 Pat 184 : 15 PLT 139 : 13 Pat 329 : 147 Ind Cas 1222 (SB).

——S. 2—Suit, what is.

Bengal Regulation (5 of 1893), S. 15— Suit includes proceedings under Probate and Administration Act. AIR (Vol 16) 1929 Pat 574 (DB).

——S. 2 — Jurisdiction — Mortgage of land partly situate in Sonthal Parganas and partly elsewhere.

A suit to enforce a mortgage of lands situate partly in Sonthal parganas and partly elsewhere is maintainable only in Sonthal Perganas Courts. The duty of the Court exercising the jurisdiction would be to enforce the rules as to usuary contained in S. 6 of the Sonthal Parganas Settlement Regulation III of 1872. A I R (Vol 1) 1914 P C 140 : 42 Cal 116 : 41 I A 197 : 18 C W N 994 : 16 M L T 105 : (1914) M W N 565: 1 LW 619 : 20 CLJ 231 : 27 MLJ 459: 16 Bom LR 824: 25 Ind Cas 451.

——S. 2, Proviso—Sonthal Perghanas Justice Regulation 5 of 1893, S. 27 Suit worth more than Rs. 1000 —Sub-Judge, order of — Revision — High Court's Act S. 15.

Under the Sonthal Perghanas Act Civil Justice is administered by certain officers subject to the directions of the Lieutenant-Governor but under proviso to S. 2, all civil suits over Rs. 1000 in value shall be determined according to the general law as it the Act had not been passed. The High Court can under its general powers under clause 15 of the High Court's Act interfere with the orders of the Subordinate Judge in Sonthal Parganas in suits of the value of over Rs. 1000. The word 'suits' include also proceedings in execution. A I R (Vol 1) 1914 Cal 607 : 41 Cal 876 : 18 CWN 662 : 22 Ind Cas 848 (DB).

——S. 2—Courts of Deputy Collector, Sub-divisional officers and Deputy Commissioners — High Court's power to interfere—High Court's Act, S. 15.

The Courts of Subordinate Deputy Collectors, Sub-Divisional Officer and Deputy Commissioners, are not subject to the appellate jurisdiction of the High Court so that High Court cannot interfere with proceedings of these Courts under S. 15 of the High Court Act, 1851. AIR (Vol 1) 1914 Cal 452 : 41 Cal 915 : 18 CWN 575 : 19 CLJ 294 : 23 Ind Cas 883 (DB).

SONTHAL PARGANAS CIVIL RULES

——R. 36.

——R. 36—Bona fide sale by Judgment-debtor.

Bona fide sale by judgment debtor for paying off decree-holder — Judgment-debtor cannot question validity of sale as against purchaser. 60 Ind Cas 849: 2 P L T 345:6 P L J 85 : 1921 P H C C 66 : AIR (Vol 8) 1921 Pat 1 (FB).

SONTHAL PARGANAS JUSTICE REGULATION (5 of 1885)

——S. 2.

——S. 2 — Sonthal Parganas — Suit more than Rs. 1,000 in value— Whether can be tried at a place different from headquarters— Practice prevailing in Sonthal Paraganas condemmed as irregular.

A suit more than Rs. 1,000 in value by S. 2 of Regn. XXXVII of 1855 is triable according to the general laws, and not by the special Regulations for administration of justice in the Sonthal parganas. The practice in Sonthal Parganas by which Sub-Divisional Officers invested with the powers of the Subordinate Judge often hold Court away from their headquarters is most irregular and is likely to lead to a failure of justice. Cases over the limit of Rs. 1,000 should be governed by the ordinary law and practice applicable to the other parts of the province. AIR (Vol 22) 1935 Pat 39 : 14 Pat 342 : 16 PLT 528 : 1 B R 184 : 153 Ind Cas 303 (DB).

——S. 11.

——S. 11—Scope.

A suit more than Rs. 1,000 in value, by S. 2 of Regn. XXXVII of 1855 is triable according to the general laws and not by special Regulations for administrations of justice in the Sonthal Parganas. AIR (Vol 22) 1935 Pat 39 : 14 Pat 342 : 16 PLT 528: 1 B R 184 : 153 Ind Cas 303 (DB).

SONTHAL PARGANAS JUSTICE REGULATION (5 of 1893)

——Jurisdiction of Patna High Court.

The Letters Patent must be read subject to the special legislation in the form of Regulation 5 of 1893 which declares that the Courts other than the Sessions Court are not subordinate to the Patna High Court as their High Court. 108 Ind Cas 419 :

7 Pat 337 : 9 P L T 468 : 29 Cr L J 427 : AIR (Vol 15) 1928 Pat 241 (DB).

——Sonthal Perghanas — Courts exercising jurisdiction—Powers of.

Where property situate in the Sonthal Perghanas is mortgaged along with others, a suit on the mortgage is maintainable only before the settlement officer and not in Court outside the Sonthal perghanas. The duty of the court in trying such a suit is to give effect to rules against usury in S. 6 of the Bengal Regulation III of 1872. 42 Cal 116 : 41 I A 197 : 18 C W N 994 : 25 Ind Cas 451: 16 M L T 105: (1914) M W N 565 : 1 L W 619 : 20 C L J 231 : 27 M L J 459 : 16 Bom L R 824 : AIR (Vol 1) 1914 P C 140.

——S. 3.

——Ss. 3 (1), 36 and 37 — Act is not retrospective — Cause of action accruing under S. 10 of Act I of 1895.

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895. S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the Act bars the jurisdiction of the civil court only where the question relates to the making execution, discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside of a sale held in execution of such certificate. A I R (Vol 10) 1923 Cal 13 : 36 C L J 208 : 72 Ind Cas 698 (DB).

——S. 4.

——S. 4 (1)—Jurisdiction of Patna High Court.

Patna High Court has no jurisdiction to transfer cases of inquiries and trials before the Deputy Magistrate in the Sonthal Parganas — Commissioner of Bhaglpur is the High Court. It is only in cases where Government appeals against an acquital that the Patna High Court can have jurisdiction. The criminal Courts in the Sonthal Parganas, other than the Sessions Courts, are not within the jurisdiction of the Patna High Court. A I R (Vol 15) 1928 Pat 241 : 9 P L T 468: 29 Cr L J 427: 7 Pat 337: 108 Ind Cas 419 (DB).

——S. 4 (1) (ii) (a) — Under Cl. 1 (ii) (a) of S. 4 the High Court of Patna has only jurisdiction to deal with appeals under S. 417 against an order of acquittal. It has no power to deal with an application under S. 439 for setting aside acquittal for which the proper forum is the Commissioner of Bhagalpur. A I R (Vol 13) 1926 Pat 449: 6 Pat 83 : 8 P L T 271: 1926 P H C C 267 : 7 A I Cr R 231 : 28 Cr L J 80 : 99 Ind Cas 112 (DB).

——S. 5.

——S. 5—Entry in the Record of Rights can be challenged on ground of fraud. AIR (Vol 8) 1921 Pat 359: 1920 Pat H C C 363 : 2 Pat L T 40 : 60 Ind Cas 640 (DB).

——Ss. 5 and 6 — Jurisdiction of — Civil Court — Sonthal parghanas.

Where a portion of the mortgaged property was situate in the Sonthal parghanas, a suit to enforce the mortgage is maintainable only before the settlement or other Officer appointed under Regn. V of 1893 and the Court exercising jurisdiction is bound by the rules as to usury in S. 6. A I R (Vol 1) 1914 P C 140 : 42 Cal 116 : 41 I A 197 : 18 C W N 694 : 16 M L T 105: (1914) M W N 565 : 1 L W 619 : 20 C L J 231 : 27 M L J 459 : 16 Bom L R 824 : 25 Ind Cas 451.

——S. 10

——S. 10—Applicability of Civil P. C.

The provision in S. 10, Sonthal Parganas Justice Regulation that "trial" of suits is to be "regulated" by the Code includes all the essential matters governing the hearing of a cause, including the preliminary matter of the competence of the Court to entertain it. The Code, therefore, supplies, not only what may be called procedural rules, but also the rules governing jurisdiction. A I R (Vol 23) 1936 P C 189 : 2 B R 605 : 44 L W 88 : 17 P L T 461 : 40 C W N 1061 : 38 Bom L R 768 : 71 M L J 60 : 15 Pat 567 : 63 C L J 476 : 63 I A 311 : 163 Ind Cas 49.

——S. 10—"Only for trial of suits"—Meaning of.

The expression "only for trial of suits", referred to in S. 10, Sonthal Parganas Justice Regulation includes not only the actual hearing of the suit but also its institution. Consequently, Civil P. C., applies to the institution of suits as well. AIR (Vol 21) 1934 Pat 292 : 15 P L T 237 : 13 Pat 486 : 1 B R 289 : 154 Ind Cas 18 (DB).

——S. 11.

——Ss. 11 and 25 — Record of Rights—Entry that party is patnidar, effect of.

Where certain parties are recorded, in a Record of Rights prepared under Regulation III of 1872 as Patnidars of all the lands in a village that implies that they are not darmokararidars of any of the lands in the said village and the said entry in the Settlement registers, has under Section 2 of the Regulation the force of a decree. It is not open to the landlord to avoid the effect of this decree either by a Civil Court under S. 25-A or by an objection under S. 25-A or by an objection under S. 25 (1). A I R (Vol 1) 1914 Cal 682 : 22 Ind Cas 789: 19 C L J 29:18 CWN 271 (DB).

——S. 15.

——S. 15—'Suit', what is.

The word "suit" used in S. 15, Regulation 5 of 1893 and S 2, Act 37 of 1855 includes proceedings under Probate and Administration Act. AIR (Vol 16) 1929 Pat 574 : 9 Pat 507 : 121 Ind Cas 473 (DB).

——S. 27.

——S. 27—Rules under R. 36 — 'Proceedings' meaning of — Execution, whether can be continuation of transfer proceedings.

'Proceeding' in R. 36 need not be execution proceedings. A proceeding to have a decree transferred may be said to be a proceeding and therefore the execution of the decree may be in continuation of such a proceeding, and as such, may be an exception to R. 36 as being a pending proceeding. AIR (Vol 23) 1936 Pat 104 : 17 P L T 57 : 2 B R 286 : 15 Pat 356 : 160 Ind Cas 1096 (DB).

——S. 27—Rules under, R. 35—Whether ultra vires.

Section 27, Sonthal Parganas Justice Regulation of 1893, specifically prescribes that the rules framed thereunder must be consistent with that Regulation and with all other enactments for the time being in force in the Sonthal Parganas. One year's limitation for execution of decrees prescribed by R. 35 is obviously inconsistent with Art. 182, Lim. Act, which relates to the execution of decrees and therefore, R. 35, to that extent, is ultra vires and has got no binding effect upon the Court. A I R (Vol 23) 1936 Pat 104 : 17 P L T 57 : 2 B R 286 : 15 Pat 356 : 160 Ind Cas 1096 (DB).

SONTHAL PARGANAS JUSTICE (AMENDMENT) REGULATION (BIHAR REG. 8 of 1940)

——Scope — Reference to Sessions Judge — Competency—Cr. P. Code, S. 123—If affected.

There is nothing in the Sonthal Parganas Justice (Amendment) Regulation, 1940, which affects S. 123, Cr. P. Code, though under that regulation appeals from convictions by First Class Magistrates are required to be preferred to the District Magistrate, and not to the Sessions Judge, a reference to the Sessions Judge is competent and cannot be held to be without jurisdiction. A I R (Vol 35) 1948 Pat 84 : 13 B R 381: 48 Cr L J 409 : 229 Ind Cas 474.

SONTHAL PARGANAS JUSTICE (AMENDMENT) REGULATION (BIHAR REG. 1 of 1947)

——Jurisdiction of Sessions Judge—Trial commenced before the Regulation — Conviction — Appeal to

Court of Session after Regulation — Plea in revision to High Court that Sessions Judge had no jurjsdiction—If open.

Where a person who had been convicted filed an appeal to the Court of Session, and the latter Court had jurisdiction to entertain and decide the appeal under Regulation I of 1947, which was then in force, he cannot afterwards contend in revision to the High Court against the order of the Sessions Judge that the latter had no jurisdiction and that he had a vested right to appeal to the District Magistrate, because on the date on which he was placed on trial, the right to hear the appeal was in the District Magistrate. The petitioner having himself filed the appeal in the Court of Session, choosing that Court as his forum, and that Court having jurisdiction on the date of the appeal to hear it, it would not be open to the petitioner to afterwards question the jurisdiction of the Sessions Judge. AIR (Vol 35) 1948 Pat. 355 : 49 Cr L J 557.

——Scope - If ultra vires—Government of India Act (1935), S. 92 (2) — Powers of Governor to make Regulations to amend existing law.

S. 92 (2) of the Government of India Act (1935) empowers the Governor of a Province to make regulations and by such regulations to repeal or amend any Act of Federal Legislature or any existing Indian Law which was for the time being applicable to the area in question. The Sonthal Parganas Justice Regulation, 1893, is "an existing Indian law" within the meaning of S. 92 (1); hence Regulation I of 1947, made by the Governor, which amended the previous Regulation of 1893, is not in any way invalid or ultra vires. It is not correct to hold that the Governor can only proceed under S. 92 (1) and apply the Provisions of the Cr. P. Code to an excluded area by a notification. A I R (Vol 35) 1948 Pat 355 : 49 Cr. L J 557 (DB).

——S. 2.

——S. 2 (b)—Scope and effect of—Pending appeals—If affected — Jurisdiction of Additional District Magistrate to hear appeals filed before amendment.

The Sonthal Parganas Justice Regulation of 1947 merely purported to amend the Sonthal Parganas Justice Regulation of 1898, in regard to appeals from first class Magistrates. In effect the provision that appeals from convictions by first class Magistrates, other than the District or Additional District Magistrate, would lie to the Court of Session, repealed the former provision that such appeals lay to the District Magistrate, and on that point the Amendment Regulation of 1947 has to be regarded as a repealing enactment. It does not, however, affect pending appeals. and therefore appeals pending before the Additional District Magistrate at the time of its enactment can still be heard by him and his jurisdiction to hear and determine them is not taken away by the Amendment Regulation of 1947. A I R (Vol 35) 1948 Pat 234 : 49 Cr L J 318 (DB).

SONTHAL PARGANAS RURAL POLICE REGULATION (Beng. Reg. 4 of 1910).

——S 8.

——S. 8—Ghatwali tenure — Bengal Ghatwali Land Regulation (Birbhum) (29 of 1814) — Bengal Ghatwali Lands Act (5 of 1859) — Ghatwali tenures in Birbhum are not alienable.

The inalienability of a Ghatwali tenure is a settled principle of the general law, and with regard to those in Birbhum, Bengal Regn. 29 of 1814 and Act No. 5 of 1859, which the Regulation of 1910 does not purport to affect, have specifically affirmed it.

The regulation of 1910 far from being on its face a regulation altering the general law as recognized by the above regulation of 1814 and Act of 1859 only brings in ghatwals as zamindars incidentally, and for the sake of uniformity.

Where the muchlika taken from a Ghatwal provided "I will not allow any thief, badmash or absconder to live within the jurisdiction of my taluk, neither will I plot or conspire against Government nor help others in doing the same. I will not discharge, without the order of Government, such persons under me who have been engaged in doing police duties; if it be found necessary to discharge any such person, I will first send an information thereof, or report his faults to the authorities and abide by such orders as will be passed by them."

Held, that the Ghatwal held under conditions which are more extensive than that of merely supporting within his zemindari the police, in respect of whom he has to pay the amount determined by the Deputy Commissioner, and which are also substantial enough to leave his inability to alienate unaffected, as if the Regulation of 1910 and its predecessors had not passed and that the Regulation of 1910 contains nothing which can be construed as or operates to the same effect as a release or discharge of the Government's right to have the inalienability of the tenure enforced unless and until it effectually puts an end to it :

Held, further that the maximum cessente ratione legis, cessat et ipsa lex or any corresponding rule would have no application to the case. AIR 1925 Pat 346, Reversed. AIR (Vol 15) 1928 P C 177: 55 M L J 7 : 32 C W N 880 : 9 P L T 549 : 28 M L W 798 : 7 Pat 744 : 55 I A 249 : 48 C L J 64 : 109 Ind Cas 730.

——S. 8 — Personal services of Ghatwal commuted to money payment—Ghatwali becomes alienable.

The condition of inalienability attaching to a Ghatwali tenure ceases after the personal services, to be rendered in the past by the Ghatwalis, are commuted to a payment of money for the support of rural police.

There is no reason why an estate in which long leases can only be granted under certain conditions imposed by statute should not itself be freely alienable. AIR (Vol 12) 1925 Pat 346 : 6 P L T 106 : 1925 P H C C 22 : 4 Pat 272 : 86 Ind Cas 163.

[Reversed in A I R 1928 P C 177.]

——S. 8 (2)—Scope.

Section 8 (2) does not necessarily incorporate the provisions of S. 5 of the Birbhum Ghatwali Regulation of 1814. A I R (Vol 25) 1938 Pat 245 : 4 B R 633 : 19 P L T 519:17 Pat 398:175 Ind Cas 854 (DB).

SONTHAL PARGANAS RENT REGULATION (2 of 1886)

——S. 3.

——S. 3—Suit for enhancement of rent—Jurisdiction.

There is no law in the Sonthal Perghanas under which a suit for enchancement of rent is maintainable in a Civil Court. AIR (Vol 1) 1914 Cal 791 : 24 Ind Cas 1 (DB).

SONTHAL PARGANAS SETTLEMENT MANUAL

——Regulation III of 1872, S. 25—Mortgage of lands —Suit to recover mortgaged lands on the ground that they are non-transferrable. Held that the transferor cannot advance the plea of invalidity of mortgage. (1931) 12 PLT 351 (DB).

SONTHAL PARGANAS SETTLEMENT REGULATION (3 of 1872)

——Applicability.

All Courts exercising jurisdiction in Sonthal Parganas are bound by the provisions of Sonthal Parganas Regulation III of 1872. AIR (Vol 26) 1939 Pat 467 : 18 Pat 279 : 5 BR 986 : 183 Ind Cas 770 (DB).

——A tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated. AIR (Vol 25) 1938 Pat 597 : 19 PLT 658: 17 Pat 530: 5 BR 193 : 179 Ind Cas 92 (DB).

—— Interest allowable.

The interest to be decreed should not exceed the principal and that in taking account credit must be given for earlier payments on account of interest. AIR (Vol 17) 1930 Pat 442 (DB).

——Jurisdiction.

It cannot be positively maintained that a Court outside the Sonthal Parghannas, cannot try a suit regarding property both outside and inside, even though plaintiff gives up his claim relating to property inside the Parganas. AIR (Vol 10) 1923 P C 21 : 44 MLJ 476: 2 Pat 230: 4 PLT 217: 50 I A 58 : 37 CLJ 369 : 25 Bom LR 560 : 1923 MWN 377 : 32 MLT 121 : 27 CWN 901 : 18 MLW 597 : 71 Ind Cas 769.

—— Bar of suit.

When an enactment says that no suit shall lie in any Civil Court it means that no suit shall lie on any ground whatsoever including the ground of fraud. AIR (Vol 8) 1921 Pat 193 : 2 PLT 528 : 6 P L J 373 : 1921 PHCC 209 : 62 Ind Cas 962 (FB).

——Mal raiyati land in Chota Nagpur — Partition of trees and land — Whether binding on Ghatwal.

As between two mal raiyats with whom a settlement has been made under Regulation 3 of 1872, there may be a partition of the waste and jungle lands. But such partition is not binding upon the superior landlord the ghatwal. It will only subsist during the currency of the settlement.

So far as the trees to which the superior landlord is exclusively entitled, they cannot be the subject of partition, but as to the trees which belong to the mal raiyats there may be a partition. (1901) 5 Cal WN 185 (189).

——S. 5.

——S. 5—"Suit" if includes execution—Proceedings.

The term 'suit' in S. 5, in the Bengal Regulation III of 1872, does not include a proceeding in execution and such a proceeding can be commenced in a Civil Court even when the settlement proceedings might be going on. AIR (Vol 25) 1938 Pat 162 : 4 BR 446 : 174 Ind Cas 463.

——S 5—Bar under S. 5, scope of—Property situated partly in Sonthal Parganas and partly in Bhagalpur District — Concurrent jurisdiction — Suit before Settlement Officer of Sonthal Parganas — Transfer to District Judge — Again transfer to District Judge of Bhagalpur who in turn transfers it to Subordinate Judge — Jurisdiction.

The Courts of the Sonthal Parganas and those of Bhagalpur have concurrent jurisdiction in respect of properties partly situated in one district and partly in the other.

The bar imposed by S. 5 is to the institution of suits and trial of suits already instituted. There is no bar to the Civil Court trying a suit which has been properly instituted before the officer referred to in S. 5 of the Regulation namely, the Settlement Officer, provided that Settlement Officer transfers the case to the Civil Court.

When, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. AIR (Vol 22) 1935 Pat 439 : 14 Pat 356 : 1 BR 739 : 16 PLT 536: 157 Ind Cas 316 (DB).

——S. 5 — Scope of prohibition — What is barred is hearing of pending suit, and not interlocutory orders of preliminary nature.

The prohibition in S. 5 is against the Court proceeding with the hearing of a suit which is pending before it. And by hearing of a suit is meant the proceedings which are particularised in O. 18, Civil P. C. which is headed "hearing of suits and examination of witnesses, the record of evidence and so on." Those are the proceedings which are barred. It does not appear that interlocutory orders of a preliminary nature are barred. AIR (Vol 16) 1929 Pat 555 : 117 Ind Cas 197 : 10 PLT 535 (DB).

——S 5—Dispute about right of management.

Where there is no dispute in regard to plaintiff's interest in the estate but there is dispute as to the right of management of the estate the suit is not one for land and is not excluded from the cognizance of a civil Court. AIR (Vol 14) 1927 Pat 251 : 6 Pat 347 : 103 Ind Cas 459 (DB).

——S. 5—'Land'—"Land" includes soil and sub-soil but not minerals or mines.

The term land in the regulation includes the soil and the sub-soil but does not include mines or minerals, and therefore when the dispute between the parties is confined to a mineral lying upon or under the surface, it does not relate to land within the meaning of the Regulation and the jurisdiction of Civil Courts is not excluded. AIR (Vol 14) 1927 Pat 201 : 8 PLT 248 : 101 Ind Cas 712.

——S. 5—Execution proceedings — "Suit" does not include execution proceedings.

There is a clear distinction between a proceeding in the suit itself and a proceeding which is a continuation of the suit, and, therefore, proceedings in execution are not comprehended within the term "suit" as used in the regulation. AIR 1926 Pat 33, Diss. from. AIR (Vol 14) 1927 Pat 38 : 8 PLR 292 : 5 Pat 714 : 98 Ind Cas 791 (DB).

——S. 5—Execution is merely a continuation of the suit and proceedings in execution are proceedings in the suit. Therefore an application in a pending execution proceeding is a suit within the meaning of S. 5. Where such an application is made the executing Court should not dismiss the application but should transfer it for disposal to an officer, if any, appointed under S. 5 (2) of the Regulation. 90 Ind Cas 262 : 7 P L T 153 : AIR (Vol 13) 1926 Pat 33 (DB).

——S. 5—Applicability.

Where there was no evidence of any notification placing certain lands under settlement nor was there a notification concluding the settlement. Held, S. 5, did not apply in such a case. 66 Ind Cas 945 : 1 Pat 506 : 3 P L T 709 : AIR (Vol 9) 1922 Pat 450 (DB).

——S. 5—Institution of suit in Civil Court—Bar.

S. 5 of the Sonthal Perghanas Regulation 1872 as it stood in 1907 was a bar to the institution of any suit in the ordinary Civil Courts in regard to any land or any interest in or arising out of land in the Sonthal Perghanas so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and concluded. 5 Pat L J 164 : AIR (Vol 7) 1920 Pat 291 (DB).

——S. 5-A:

——S. 5-A—Applicability of Civil P. C.

The Civil P. C. including S. 17 is undoubtedly in force in the Bhagalpur District, and consequently, its operation extents also to the Courts established in the Sonthal Parganas under the Bengal, Agra and Assam Civil Courts Act. AIR (Vol 23) 1936 P C 189 : 2 B R 605 : 17 P L T 461 : 40 C W N 1061: 71 M L J 60 : 44 L W 88 : 63 C L J 476 : 38 Bom L R 768 : 15 Pat 567 : 63 I A 311 : 163 Ind Cas 49.

——S. 5-A—Construction.

The expression "Civil Court established under the Bengal, Agra and Assam Civil Courts Act, 1887" as used in sub-s. (1), S. 5-A of Sonthal Parganas Settlement Regulation must include a Court established under the Civil Courts Act outside the Sonthal Parganas. AIR (Vol 23) 1936 P C 189 : 2 B R 605 : 17 P L T 461 ; 40 C W N 1061 : 44 L W 88 : 71 M L J

60 : 63 C L J 476 : 38 Bom L R 768 : 15 Pat 567 : 63 I A 311 : 163 I C 49

——S. 5A—Settlement Officer, powers of transfer.

The language of the statute empowers the Settlement Officer to transfer the case to a competent Civil Court established under the Civil Courts Act and the Court of the Subordinate Judge at Gaya is certainly such a Court. It is true that that Court is not subordinate to the Settlement Officer and may not be bound to obey his order. But this is a mere matter of comity between the two Courts and cannot affect the jurisdiction of the Subordinate Judge.

A suit instituted in a Settlement Officer's Court can be transferred to a Civil Court if that Court would have had the competency to try it but for the passing of S. 5. AIR (Vol 23) 1936 P C 189 : 2 B R 605 : 17 P L T 461 : 40 C W N 1061 : 44 L W 88 : 71 M L J 60 : 63 C L J 476 : 38 Bom L R 768 : 15 Pat 567 : 63 I A 311 : 163 Ind Cas 49,

——S. 5-A—Where lands are situated both in the Sonthal Parganas and in the Gaya District the plaintiff, by reason of S. 17, Civil P. C., can elect to bring his action in the Gaya Court or in the Court of the Subordinate Judge of the Sonthal Parganas. The Gaya Court has jurisdiction (but for S. 5 of the Regulation of 1872) within the meaning of S. 5A of the Regulation of 1872. A I R (Vol 21) 1934 Pat 292 : 15 P L T 237 : 13 Pat 486 : 154 Ind Cas 18 (DB).

——S. 6.

——S. 6—Scope of — Suit on mortgage falling to be decided under S. 6 — Interest pendente lite and interest subsequent to decree.

Section 6 only lays down that the interest decreed on the loan or debt is not to exceed the principal. When once a decree has been passed, the loan or debt as the subject of enforcement no longer exists; it is in effect, merged in the decree, and the allowance of interest on the decree is not the allowance of additional interest on the loan or debt. Where a suit on mortgage falls to be determined in accordance with S. 6 as regards pendente lite interest, the matter lies within the domain of contract and S. 6 of the Regulation is applicable and more than double cannot be allowed in respect of all claims up to the time of grace fixed by the Court. But after that the matter comes to the domain of judgment and S. 6 has no application and the Court has power under S. 34 of the Civil P. C., to allow interest on the decretal amount at 6 per cent. per annum. AIR (Vol 23) 1936 P C 63 : 1936 A W R 204: 40 C W N 328: 2 B R 244: 17 P L T 89 : 1936 A L J 108 : 43 L W 268 : 1936 O W N 283 : 70 M L J 355 : 1936 M W N 308 : 38 Bom L R 349: 15 Pat 210: 63 C L J 154: 63 I A 114 : 160 Ind Cas 285.

—— S. 6— Provisions, if can be evaded.

The mandatory provisions of S. 6, Sonthal Parganas Settlement Regulation cannot be evaded and the Courts are not empowered to pass a decree even on compromise which allows interest in its contravention. A I R (Vol 22) 1935 Pat 439 : 14 Pat 356 : 1 B R 739 : 16 P L T 536 : 157 Ind Cas 316 (DB)

——S. 6 — "Intermediate adjustment" whether includes renewal of loan by execution of bond—Interest permissible.

The expression "intermediate adjustment" in S. 6, Sonthal Pargans Regulation includes the renewal of the loan by the execution of a bond.

There is nothing in S. 6 of Sonthal Parganas Regulation which would entitle the Judge to reduce the interest from the bond rate to a lesser sum. What comes within the mischief of the section is, first of all, compound interest; and, secondly, the total amount of interest going in excess of the sum of the loan itself, that is to say, the principal sum. Therefore, the mortgagee is entitled to bond rate up to days of grace granted by the decree.

Interest after the decree or after the days of grace would not be governed by the Sonthal Parganas Regulation, but S. 34, Civil P. C., applies and interest at six per cent can be allowed. AIR (Vol 22) 1935 Pat 98 : 14 Pat 400 : 16 P L T 379 : 1 B R 590 : 156 Ind Cas 290 (DB).

——S. 6—Agreement about law applicable — Cannot give jurisdiction which it otherwise has not.

If one part of the mortgage property is situated in Bhagalpur and another part in Sontal Parganas, and the terms of the mortgage deed show that the intention of the parties was that the case should be governed by lex loci contractus, that is by the general law, the agreement itself would not operate to give jurisdiction to a Court which otherwise has no jurisdiction to apply general law, two properties being governed by different laws nor can the Court allow the mortgagee to elect as to the property with regard to which he is to pursue his remedy. AIR (Vol 17) 1930 Pat 442 (DB).

——S. 6— Compound interest — Agreement to pay compound interest is not unlawful in Sonthal Pargana.

There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Parganas to pay compound interest on the amount borrowed is unlawful within the meaning of S. 23, Contract Act. All that the law provides is that compound interest will not be decreed by any Court. AIR (Vol 17) 1930 Pat 442 (DB).

——S. 6—Consideration of mortgage partly new.

Where original liability is increased by a mortgage independently altogether of the fresh consideration by adding to the original principal, interest which has then accrued due, the transaction amounts to intermediate adjustment within the meaning of Col. (6), S. 6. AIR (Vol 17) 1930 Pat 442 (DB).

——S. 6—Scope.

Section 37 of Act 12 of 1887 is not repugnant to Reg. 3 of 1872 in order that it might prevail over the former in the matter of interest. AIR (Vol 17) 1930 Pat 442 (DB).

——S. 6—Division of estate.

Where after the institution of the suit the estate in dispute is divided up in the sense that as to a part settlement has been completed and as to remainder settlement is in progress the fact that the estate has been described as indivisible in the Record-of-Rights does not preclude the jurisdiction of the Subordinate Judge with regard to the part with respect to which settlement was completed and the plaint can be amended accordingly so as to include that part only. AIR (Vol 16) 1929 Pat 555: 10 PLT 535: 117 Ind Cas 197 (DB).

——S. 6—Scope of restrictions.

It is only Court having jurisdiction in the Sontal Parganas that has to limit the amount of interest for which it will pass a decree, but if the Court is not exercising jurisdiction in the Sontal Parganas, there is no limit to the interest that can be described. AIR (Vol 17) 1930 Pat 442 (DB).

——S. 6—Scope and effect.

The Sontal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a Court under S. 34, C. P. Code to award interest on the decretal amount until realization. AIR (Vol 13) 1926 Pat 359: 5 Pat 433: 1926 PHCC 282: 96 Ind Cas 627 (DB).

——S. 6—Interest allowable.

Section 6, Regulation 3 of 1872, as amended by Regulation 5 of 1908, does not authorise any Court to decree as interest a larger sum of money than would together with prior payments, if any, equal the original loan or debt. AIR (Vol 12) 1925 P C 280: 50 MLJ 1: 24 ALJ 33: 1926 MWN 49: 5 Pat 135: 7

PLT 97: 28 Bom L R 1126: 30 CWN 482: 52 I A 416: 42 CLJ 592: 91 Ind Cas 1033.

——S. 6—Contracts of novation.

The question is undecided, whether by S. 6, so large an inroad on the law of contract, has been made in the Sonthal Parganas, as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest. AIR (Vol 13) 1926 Pat 359: 5 Pat 433: 1926 PHCC 282: 96 Ind Cas 627 (DB).

——S. 6—Interest upon decretal amount — Is bad in so far as includes interest on the principal debt.

Interest should not be awarded upon the decretal amount in so far as it includes interest on the principal debt itself, as to do so, would contravene the provisions of the Regulation, relating to compound interest. This principle applies equally where the amount decreed as interest already equals the sum advanced. All Courts, wherever they may be situated, having jurisdiction within the Sonthal Parganas, must, when exercising jurisdiction in cases arising within the Sonthal Parganas, follow the rules relating to usury set out in the section. The intention of the section is that the liability for interest decreed can be in no case in excess of the amount actually advanced, (1918) Pat. (Sup. C. W. N.) 305 Doubted but followed. Interest already paid must be credited in arriving at the amount which may be decreed. AIR (Vol 9) 1922 Pat 450: 1 Pat 506: 3 PLT 709: 66 Ind Cas 945 (DB).

——S. 6—Decree passed outside against person residing within parganas — Interest—Rule of Damdupat.

Section 6 of the Regulation is not applicable to a money decree made by a Court outside the Sonthal Parganas against a person resident within the Sonthal Parganas. The Court making the decree is not bound in such a case to regard the rule of Damdupat.

Cl. (b) of S. 6 does not prohibit a Court in Sonthal Parganas to which a decree is sent for execution from realising the full interest decreed even though it offends against the rule of Damdupat. AIR (Vol 6) 1919 Pat 324: 4 Pat L J 49: 49 Ind Cas 374 (DB).

——S. 6—Interest—Compound—Decree.

Section 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to the interest upon the principal advanced and the costs of the suit. Under that section the total interest decreed on any debt or loan should not in any case exceed the principal. The decree must set forth an amount due on the latest date of payment. AIR (Vol 5) 1918 Pat 240: (1918) Pat HCC 305: 47 Ind Cas 179 (DB).

——S. 6—Contract evading provisions of, if enforceable.

A contract between a borrower and a lender for the repayment of the interest of the principal sum borrowed, though in effect a subtle device for the purpose of evading S. 6 of Regn. III of 1872, is not invalid. The Court must enforce the contract in accordance with the provisions of the Regulation regulating the rate at which interest is to be allowed. AIR (Vol 4) 1917 Cal 221: 40 Ind Cas 415 (DB).

—— S. 6—Debt—Mortgage—Usufructuary.

A usufructuary mortgage is a debt or liability within the meaning of S. 6 of the Regulation. AIR (Vol 4) 1917 Pat 529: 2 PLW 20: 41 Ind Cas 677 (DB).

——S. 6—Damdupat—Rule of, if applicable—Quaere.

Whether a mortgagee can claim further interest on his loan after the total interest received by him equals the amount of the principal. (1909) 36 Cal 840: 36 I A 85: 10 CLJ 1: 6 ALJ 617: 6 MLT 1: 11 Bom L R 765: 13 CWN 1102: 19 MLJ 419: 2 Ind Cas 935 (PC).

—— Ss. 6 (b), 27 — Distinction between S. 6 (b) and S. 27 - Execution—Compromise decree — Appeal by judgment-debtor on ground that decree contravened provisions of S. 6—Appeal dismissed not on merits but on admission by judgment debtor — Jud ment-debtor, if can object in execution to validity of decree on ground that it contravened S. 6.

The language of S. 27 is totally different from the language of S. 6. Section 6 (b) is a provision which imposes on a Court which is about to pass a decree a duty to observe the rule contained in the clause. Section 27, on the other hand, is a general rule which debars any Court recognizing a transfer of a raiyat's right in his holding.

After the Passing of a compromise decree the judgment-debtor appealed from the decree on the ground that the decree contravened the provisions of S. 6. The High Court remanded the case on this issue and the finding on remand was challenged by both the parties. The appeal however, was dismissed, not upon the merits but upon an admission by the judgment-debtor that the decree was correct. The decree-holder then took out execution and the judgment-debtor objected that the decree was not executable being void as it contravened the provisions of S. 6.

Held, that the question ought to have been agitated in the trial Court or in appeal and as the appeal was dismissed on the admission of the judgment-debtor that the decree was correct, it was neither open to the judgment-debtor to object to the validity of the decree in execution nor was it open to the executing Court to entertain the objection. AIR (Vol 25) 1938 Pat 594: 4 B R 804: 177 Ind Cas 253 (DB).

——S. 9.

——Ss. 9, 11, 25 — Settlement Officer's decision — Effect.

S. 11 of the Regulation only means that the Settlement Officer's decision shall have the force of a decree of Court only as between the parties in existence at the time of the order and S. 9 only contemplates the ascertainment and record of existing interests and rights. Therefore a suit by the plaintiff who was only a possible reversioner to a Hindu widow at the time of the order for a declaration of title and for possession, on the ground that the widow of the defendant colluded and the latter got himself recorded as proprietor, is not barred under S. 25 of the Regulation. (1913) 17 C L J 587 : 20 Ind Cas 417 (DB).

——S. 10.

——Ss. 10 & 11—R. 27 framed under S. 10 — Applicability.

Rule 27 framed under S. 10 of the Act was made to meet the peculiar customs of the Sonthal and does not apply to all persons settled and resident in the Sonthal Perghanas. Rule 27 applies only to suits before Settlement Officers. AIR (Vol 1) 1914 Cal 732 : 18 C W N 333 : 18 Ind Cas 115 (DB).

——S. 11.

——Ss. 11, 25, 25-A—Scope and effect—Decision or order of Settlement Court — Competency of suit in Civil Court—Suits for declaration of mutwalli rights competent—Limitation.

Where there has been a decision or order of the Settlement Court, it will have the force of a decree of Court and no suit is competent in Civil Court to contest such decision or order unless it is in respect of the rights of zamindars or other proprietors inter se, in which case a suit in a Civil Court is competent subject to limitation laid down in S. 25-A which is an enabling section and is an exception to S. 11.

Certain items of property recorded in the Record of Rights in the names of S and Z as having proprietary and patni rights — Application made by Z to be re-

corded as sole mutwalli rejected by Settlement Officer and Commissioner without decision of his claim — Subsequently suit by sons of Z that they were mutwallis of the said items and that entries in the Record of Rights were wrong:

Held, that the suit was competent and was not barred by Ss. 25-A, 25 or S. 11.

Held further that the limitation for the suit started from the order of the Commissioner and a suit brought within 3 years from such order was within time under S. 25-A. AIR (Vol 31) 1944 Pat 234 : 23 Pat 203 (DB).

——Ss. 11, 14 — Decree—Entry in record of rights, whether has force of decree.

Section 14 does not imply that an entry made by the Settlement Officer in a record of rights is made after due inqury and must be taken to be his decision having the force of a decree within the meaning of S. 11. Such an implication would not be inconsistent with the provisions of S. 25 (1) which says that 'such record shall be conclusive proof of the rights and customs therein recorded' but it also distinctly opposed the provisions of S. 25 (2) of the Regulation which gives the Settlement Officer power to correct any material error in the record at any time before the completion of the Settlement is notified in the Gazette. AIR (Vol 31) 1944 Pat 234: 23 Pat 203 (DB).

——S. 11—Effect — Decision under S. 11 is a decree and can only be avoided under S. 25-A, if question involves rights of proprietors, as between themselves.

Section 11 bars every suit regarding any matter decided by any settlement Court; except such suits under S. 25-A, as are brought to contest the finding or record of the settlement officer where only the rights of Zamindars or other proprietors as between themselves are concerned, provided they are brought within three years from the date of the publication of the record-of-rights. Section 11 provides that every decision and order of the settlement officer regarding the interests and rights of the parties shall have the force of a decree. AIR (Vol 9) 1922 Pat 322 : 67 Ind Cas 686 (DB).

——S. 11—Effect of decree under.

Decree of Settlement Court is nothing more than a Civil Court decree — So if obtained by fraud it is nullity. (Per Dawson-Miller, C. J., and Bucknill, J., Mullick J. contra). AIR (Vol 8) 1921 Pat 193 : 2 PLT 528 : 6 P L J 373 : 1921 P H C C 209 : 62 Ind Cas 962 (FB).

——Ss. 11 and 25-A — Suit to determine whether plff. or deft is tenant.

In a suit for declaration of title to immoveable property and for correction of an entry in the record of rights prepared under the Regulation the question in dispute is whether the plff. or the deft. is the tenant of the land. This matter should be settled by the Settlement Court under S. 11 and a Civil suit does not lie except under S. 25-A and as the suit does not fall within the scope of the section, the suit is not maintainable. AIR (Vol 1) 1914 Cal 178 : 19 CLJ 232 : 19 Ind Cas 874 (DB).

—— Ss. 11, 25— Question of tenancy — Civil Court jurisdiction.

The Civil Courts in Sonthal Perghanas have no jurisdiction to determine the question whether the defendant is, or is not a tenant of the land in dispute. (1913) 17 C L J 599 : 20 Ind Cas 503 (DB).

——S. 14.

——S. 14—Notice under—Minors.

The notice provided by S. 14 is to the people of the village irrespective of age or intelligence and as the law makes the Record of-Rights conclusive proof of the rights and interests therein recorded, the defts. could not be called upon to prove the service of the required notices. AIR (Vol 2) 1915 Cal 541 : 19 C W N 499 : 28 Ind Cas 241 (DB).

——S. 15.

——S. 15—Khas reserve forest block.

Even in khas reserve forest block or in a block excluded under S. 15 of the regulation, the proprietor has full proprietary rights, but he is not allowed to reclaim without the permission of the Deputy Commissioner for the obvious reason that the object and policy of the law would be otherwise defeated. AIR (Vol 17) 1930 Pat 533 (DB).

——S. 25.

See Sonthal Parganas Settlement Regulation 1872, Ss. 11 and 25-A.

——S. 25—Fraud.

Record-of-Rights, entry in, can be challenged by suit on ground of fraud. AIR (Vol 8) 1921 Pat 359 : 2 P L T 40 : 60 Ind Cas 640 (DB).

——Ss. 25 and 25-A — Record of rights—Suit challenging record—Special limitation—Lim. Act, S. 29 —Minors.

The policy of Regulation III of 1872 was to have a complete record of rights and interests in land in the Sonthal Paraghanas and to exclude the jurisdiction of Civil Courts except in certain matters provided for in the regulation. A suit for partition more than 3 years after the entry in the record of rights, so far as it regarded the proprietary rights in the land was barred by limitation under S. 25-A of the Regulation. The Limitation Act is applicable to the Sonthal Perghanas, but S. 29 of the Act saves all provisions of local laws as to limitation and does not therefore, affect the three years' rule under S. 25-A of the Regulation. The Regulation does not make any exception in favour of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act. The notice provided by S. 14 is to the people of the village irrespective of age or intelligence, and as the law makes the record-of rights conclusive proof of the rights and interests therein recorded the defts. could not be called upon to prove the service of the required notices. AIR (Vol 2) 1915 Cal 541 : 19 C W N 499 : 28 Ind Cas 241 (DB).

——Ss. 25 and 25-A—Proprietor—Decision of Settlement Court—Finality of.

S. 25-A of Reg. III of 1872 is limited to suits where only the rights of Zamindars and other proprietors as between themselves are in controversy. A person who holds a derivative title under a Zamindar is not a proprietor. The decision of a Settlement Court under S. 25 sub-S. (1), is conclusive, till it is set aside by any person prejudicially affected thereby. AIR (Vol 2) 1915 Cal 321 : 20 C L J 220 : 27 Ind Cas 84 (DB).

——Ss. 25, 25-A — Patnidar, suit by — Patnidar if proprietor.

A suit by a patnidar who is not a Zamindar for a declaration that the deft. patnidar had fraudulently caused some land to be recorded as his own in the Record of Rights is barred by sections 25 and 25-A. A patnidar is not a proprietor within the meaning of S. 25. AIR (Vol 2) 1915 Cal 271 : 20 CLJ 112: 28 Ind Cas 992 (DB).

——Ss. 25, 25-A—Record of rights—Suit for declaration of title in share of Shikmi Ghatwali Korposh grant—Forum.

Where the plaintiff sues for declaration of title and registration of his name in the settlement records in a share of Shikmi Ghatwali kharposh grant and it is found that rent is payable to the Ghatwalis and not directly to the Government, the suit is not cognisable by a Civil Court. AIR (Vol 2) 1915 Cal 197 : 20 C L J 103 : 19 C W N 549 : 27 Ind Cas 5 (DB).

——S. 25-A.

See also, Sonthal Parganas Settlement Regulation 1872, Ss. 11 and 25.

——S. 25-A—A suit under S. 25-A, Sonthal Parganas Settlement Regulation for declaration that Record of Rights is wrong is governed by Art. 17 (i) and (iii), Sch II Court fees Act. AIR (Vol 23) 1936 Pat 171 : 17 P L T 115 : 2 B R 366 : 15 Pat 386 : 161 Ind Cas 706 (DB).

——S. 25-A—Scope.

The words zemindars and "proprietors" in S. 25-A mean persons who claim to be zemindars or proprietors as against another zemindar or proprietor. The reason covers case in which the Settlement Officer refuses to record the name of the claimant to a zamindari. A I R (Vol 23) 1936 Pat 171 : 17 P L T 115 : 2 B R 366 : 15 Pat 386 : 161 Ind Cas 706 (DB).

——S. 25-A—Declaratory suit—Maintainability.

Though the Specific Relief Act is not in force in the Sonthal Parganas, S. 25-A Sonthal Parganas Settlement Regulation contemplates a declaratory suit. AIR (Vol 23) 1936 Pat 171: 17 P L T 115: 2 B R 366 : 15 Pat 386 : 161 Ind Cas 706 (DB).

——S. 25-A — Scope and applicability of — Disputes between rival claimants.

Section 25-A applies to cases where the dispute is between two rival claimants each claiming to be the proprietor of the same property. The section obviously will have no application to disputes between a landlord and a tenant or to cases where one of the parties neither is nor asserts himself to be a zemindar even though the other party may be zemindar and where there is no dispute as to any proprietary right between them. It will, however, be unduly restricting the scope of the section to hold that it will not apply unless each party admits the other party to be a zemindar or proprietor. A I R (Vol 22) 1935 Pat 306 : 14 Pat 70 : 1 B R 777 : 157 Ind Cas 433 (DB).

——S. 25-A—Pradhan.

The Pradhan is not a tenure holder but combines the attributes of head Raiyat and Ijardar. A I R (Vol 8) 9121 Pat 67 : 5 Pat L J 656 : 58 Ind Cas 43 (DB).

——S. 27.

See also, Sonthal Parganas Settlement Regulation, 1872, S. 6.

——S. 27—Applicability — Person not in possession as transferee—Eviction of—Ultra vires.

The jurisdiction to evict a person in possession from a holding under S. 27, Regulation (III of 1872), cannot be exercised unless there is a valid transfer of the right of a raiyat in his holding and the person in possession comes on the land as a transferee. A person who is not in possession of the holding as a transferee is not within the mischief of the section and is not liable to eviction whether he has been in possession for 12 years or not. An order of eviction of such a person in ultra vires. A I R (Vol 36) 1949 Pat 408 : 28 Pat 319 (DB).

——S. 27—Receiver of agricultural lands.

A decree-holder is not entitled to have Receiver appointed in respect of the agricultural lands belonging to the judgment-debtor in the Sonthal Parganas by way of equitable execution. AIR (Vol 16) 1929 Pat 700 : 118 Ind Cas 711 : 10 P L T 846 (F B).

——S. 27—Scope.

Section 27 prohibits not only voluntary alienations but also involuntary alienations of the raiyati holdings of agriculturists in the Sonthal Parganas. AIR (Vol 16) 1929 Pat 700 : 118 Ind Cas 721 : 10 P L T 846 (FB).

——S. 27—Legality of Compromise.

Compromise of a money suit in Sonthal Parganas—Defendant to pay the amount of claim in eight instalments of crops — In defauault of instalments, holding to be sold—Compromise was held legal not being against any law of the locality. A I R (Vol 15) 1928 Pat 495 : 109 Ind Cas 261.

——S. 27 — Sale of landlord's interest — Landlord's interest in raiyati holding can be sold in execution of a decree.

Section 27 prohibits the transfer by a raiyat of his right in his holding or any portion thereof by sale, gift, mortgage or otherwise; it does not prohibit the landlord from transferring his or her interest in a raiyati holding if the landlord by some means or other comes into possession of such holding. No doubt the possession of the landlord is the possession of the land as raiyati land and not as zerait or proprietor's private land, but so long as the proprietor remains in possession of this raiyati land the interest which he has in such raiyati land to remain in possession is liable to transfer and sale. A I R (Vol 13) 1926 Pat 444 : 97 Ind Cas 210 : 7 P L T 570 : 1926 PHCC 254 (DB).

——S. 27—'Any Court', meaning.

"Any Court" in sub-s. (2) of S. 27 means a Court vested with jurisdiction to question the correctness of the decree. Powers of a Court executing a decree are derived from S. 47 of the C. P. Code, and that Court cannot refuse to attach, and sell properties directed by the decree under execution although the decree is in contravention of sub-s. (1) of S. 27 of the Regulation 3 of 1872. Regulation 3 of 1872 certainly prohibits any Court from recognizing a transfer as valid if made in contravention of sub-s. (1) but the Court must be engaged in a proceeding in which it has jurisdiction to investigate the legality of the transfer. In other words the proceeding must be properly constituted and the investigation necessary. A I R (Vol 13) 1926 Pat 202 : 93 Ind Cas 935 : 4 Pat 696 : 7 P L T 468 (DB).

[Overruled in AIR 1934 Pat 666 : 153 Ind Cas 183 (FB).]

——S. 27 (2)—Prohibitive nature of.

The words of sub-s. (2) of S. 27 are absolutely prohibitive and whether or not another Court has pronounced the decree and said that the property in question can be sold, the executing Court is prevented from implementing such decree and from granting a cerificate of sale or delivering possession under such a sale.

The fact that the judgment-debtor did not raise the question in the mortgage suit which he might and ought to have raised does not operate an an estoppel in a subsequent case, inasmuch as there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding and once it is found that the lands in dispute do form the raiyati holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in face of the clear provisions of S. 27. Consequently, the executing Court is competent to examine the nature of the property directed by the Court to be sold. A I R (Vol 13) 1926 Pat 202 : 93 Ind Cas 935, Overruled. A I R (Vol 21) 1934 Pat 666 : 15 P L T 661 : 14 Pat 52 : 153 Ind Cas 183 (FB).

SONTHAL PARGANAS SETTLEMENT (AMENDMENT) REGULATION (3 of 1908)

——S. 5.

——S. 5 — Effect of section — Effect of section is to exclude jurisdiction of Civil Courts only during period of settlement — Property partly situated in Bhagalpur district and partly in Sonthal Parganas—Bhagalpur Court has jurisdiction.

The effect of S. 5 of Regulation 3 of 1908, which replaced S. 5 of the Regulation of 1872, has been to exclude for the future after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas, only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed.

Where a mortgage was made in Bhagalpur and some part of the mortgage lands were within the local

limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and the rest in Sonthal Parganas.

Held, that the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not excluded by the substituted S. 5 of the Regulation of 1872 and in entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of S. 6 of Regulation 3 of 1872 as amended by Regulation 5 of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. A I R (Vol 12) 1925 P C 280 : 50 M L J 1: 91 Ind Cas 1033: 24 A L J 33 : 1926 MWN 49 : 5 Pat 135: 7 P L T 97 : 28 Bom L R 1126 : 30 C W N 482 : 52 I A 418 : 42 C L J 592.

SOVEREIGN

See (1) Act of State.
(2) Crown.
(3) Evidence Act, S. 57.
(4) Master and Servant.
(5) Tort.

SOVEREIGN POWER

——Cession of territory by one Sovereign Power to another — Effect on the rights of inhabitants.

Where a Sovereign Power (in this case the House of Sindhia of Gwalior) cedes certain territory to another Sovereign Power (in this case to the British) the rights, which the inhabitants of that state enjoyed against its former rulers will not be available against the new Sovereign Power and could not be asserted in the Courts established by the power except so far as they had been recognized by that new Sovereign Power. Recognition may be by legislation or by agreement express or implied. This rule of law is peculiarly applicable to an office to which material benefits appertain and which is regarded as within the disposition of the Sovereign Power. AIR (Vol 34) 1947 P C 1 : 1946 A L J 451 : 51 C W N 71 : 1946 A W R (P C) 190 : 1946 O A (P C) 190 : 49 Bom L R 235 : 27 Pat L T 339 : 13 B R 392 : I L R (1947) Kar (P C) 38 : 229 Ind Cas 502.

SPEAR-HEADS

See Arms Act, S. 19.

SPECIAL APPEAL

See (1) Civil P. C., S. 115
(2) Judicial Committee Rules.
(3) Privy Council.

SPECIAL CRIMINAL COURTS ORDINANCE (2 of 1942).

——S. 1.

See also S. 26.

——S. 1—If ultra vires.

Existence of emergency — Competency of Courts to challenge — Ordinance providing for constitution of Special Courts but not setting them up itself—Actual setting up left to Provincial Governments—If constitutes delegated legislation — Power of Governor-General to alter law as to High Court's revisional jurisdiction—Competency of Indian law-making authority to empower executive authority to choose forum of trial after arrest for an offence — Government of India Act, Sch. IX, Para. 72. AIR (Vol 32) 1945 P C 48 : 1946 A W R (P C) 44 : 1946 O A (P C) 44.

——S. 1—Scope and object of Act—Changes in law.

Ordinance 2 of 1942 contemplated the alteration of the Criminal P. C., but it did not contemplate an alteration of the Evidence Act. AIR (Vol 31) 1944 Sind 1 : I L R (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——S. 1 — Ordinance, if ultra vires — Fact that its enforcement was made dependent on Provincial Government being satisfied of emergency, whether affects its validity.

Per Full Bench.—The words used in Items Nos. 1 and 2 of the Provincial Legislative List in Sch. VII of the Government of India Act, 1935 are no doubt words of wide import, but the generality of those words is restricted and controlled, not only by Item No. 2 of the Concurrent Legislative List, but also by the words "with respect to any of the matters in this list" that find a place in Item No. 2 of the Provicial List. Hence, Item No. 2 of the Provincial List confers upon the Provincial Legislature the exclusive right to enact laws defining jurisdiction and power of all Courts only with respect to the matters specified in the Provincial List. "Criminal Law, including all matters included in the I. P. C," is, however, a matter enumerated in the Concurrent and not in the Provincial Legislative List. The power to make laws dealing with jurisdiction and power of Courts as regards "criminal law or matters included in the I. P. C." are not, therefore, within the exclusive competence of the Provincial Legislature. Both the Federal and the Provincial Legislatures have concurrent authority to make laws defining jurisdiction and powers of Courts that have to administer the criminal or the penal law enacted or promulgated in conformity with Item No. 1 of the Concurrent List. The Special Criminal Courts Ordinance (II of 1942) defining as it does the jurisdiction and power of the Special Criminal Courts constituted by it to try offences that are included in the I. P. C. falls, therefore within Item No. 15 of the Concurrent and not under Item No 2 of the Provincial List. The Ordinance, to the extent that it defines the jurisdiction and power of the Special Criminal Courts contemplated by it, is therefore, intra vires the Governor-General.

If the Ordinance No. II of 1942 was validly promulgated on January 2, its validity could not be questioned on the ground that its enforcement was deferred and was made dependent on any specified set of facts, e g., on the Provincial Government being satisfied of the existence of an emergency. The power to promulgate an Ordinance necessarily carries with it the power to specify the conditions necessary for its enforcement. The Ordinance is, therefore, intra vires the Governor-General AIR (Vol 30) 1943 All 26 : 1942 A W R 392 (1) : 44 Cr L J 216 : 1942 A L J 686:I L R (1943) All 238:205 Ind Cas 113 (FB).

——S. 1 — Applicability of Ordinance to pending proceedings.

Per Full Bench.—The Ordinance was intended to govern judicial proceedings initiated after the date that it came into force and not the judicial proceedings pending on the date of its enforcement. A I R (Vol 30) 1943 All 26 : 1942 A L J 686 : 1942 A W R 392 (1) : 44 Cr L J 216 : I L R (1943) All 238 : 205 Ind Cas 113 (FB).

——S. 1—Applicability.

Per Iqbal Ahmad, C. J., Bajpai, J , contra. — The Ordinance applies even to offences committed before the Ordinance came into force. AIR (Vol 30) 1943 All 233 : 1943 A L J 184 : 1943 A W R 106 : 44 Cr L J 575 : I L R (1943) All 584 : 207 Ind Cas 118 (FB).

——S. 1—Ordinance, validity of — Interpretation — Things to be considered—Retrospective effect.

The Special Criminal Courts Ordinance (II of 1942) which was promulgated by the Governor-General under S. 72 in Sch. IX, Government of India Act, 1935 (which schedule incorporates various provisions of the Government of India Act, 1915, which were to apply until Federation was introduced) is a valid Ordinance. In construing the Ordinance, the Courts have, according to the ordinary canons of construction, to ascertain what was the intention of the authority promulgating the Ordinance. The Courts have to ascertain that intention from the language used giving to such language its natural meaning having regard to the context in which the particular words are found, and to the circumstances in which the Ordinance was passed. The Ordinance was intended to apply retrospectively. AIR (Vol 30) 1943

Bom 169 : 44 Cr L J 616 : I L R (1943) Bom 331 : 45 Bom L R 323 : 207 Ind Cas 147 (FB).

——S. 1 — Section 14, Defence of India Act, 1939, does not control in any way Ordinance No. II of 1942, and the provisions of the Ordinance creating Special Magistrates and prohibiting recourse to ordinary Courts are not invalid. AIR (Vol 30) 1943 Cal 224 : 47 C W N 354 : 44 Cr L J 417:205 Ind Cas 554 (DB).

——S. 1—Duty of Magistrate.

All that the Ordinance says is that the Special Magistrate shall try such offences. It is his duty when he takes up his duties of Special Magistrate to make it clear to everyone including the accused that he is doing so, and then no question can arise of the accused person not knowing what his rights are. AIR (Vol 30) 1943 Cal 224 : 47 C W N 354 : 44 Cr L J 417 : 205 Ind Cas 554 (DB).

——S. 1—Ordinance is intra vires.

Per Niyogi and Digby, JJ. — The Special Criminal Courts Ordinance is intra vires of the powers of the Governor General under S. 102 and Sch. IX, S. 72, Government of India Act, 1935. AIR (Vol 30) 1943 Nag 36 : I L R (1943) Nag 73 : 1943 N L J 16 : 44 Cr L J 237 : 205 Ind Cas 161 (DB).

——S. 1 — Applicability of Ordinance to pending cases.

The District Magistrate is given wide powers under the Special Criminal Courts Ordinance of directing what cases shall be tried thereunder and these powers cannot be limited by holding that he has not the power to direct that a case which is awaiting trial in which no proceedings have taken place shall be tried under the Ordinance. Where the magisterial enquiry has been completed and the case has been committed to the Court of Session for trial, different considerations may prevail. The District Magistrate has not the power under the Ordinance to intervene and say that it should be tried, not under the ordinary law, but under the Ordinance. AIR (Vol 30) 1943 Oudh 44 : 1942 OWN 705 : 44 Cr L J 92 : 18 Luck 679 : 203 Ind Cas 505.

——S. 1—Retrospective effect.

From the wide powers which have been given to the District Magistrate by the Special Criminal Courts Ordinance, to direct what cases should be tried under the Ordinance, it can reasonably be said to apply to all offences whether committed before or after the Ordinance came into force. AIR (Vol 30) 1943 Oudh 44 : 1942 O W N 705 : 44 Cr L J 92 : 18 Luck 679 : 203 Ind Cas 505.

——S. 1—State emergency—Who can decide.

It is for the executive authorities to consider and decide what offences shall be tried under the Special Criminal Courts Ordinance. It is not for the Special Judges to sit in judgment on the District Magistrates and make enquiry and decide whether a particular offence was or was not connected with the State emergency referred to in the Ordinance. AIR (Vol 30) 1943 Oudh 44 : 1942 O W N 705 : 44 Cr L J 92: 18 Luck 679 : 203 Ind Cas 505.

——S. 1 — Applicability of Ordinance to pending cases.

The District Magistrate is given very wide powers under the Special Criminal Courts Ordinance of directing what cases shall be tried thereunder, and there is no reason to limit these powers by holding that he has not the power to direct that a case which is awaiting trial but in which no proceedings other than the production of the accused in Court or the summoning of witnesses have taken place, shall be tried under the Ordinance. Where the Magisterial enquiry has been completed and the case has been committed to the Court of Session for trial by that Court, the District Magistrate has no power under the Ordinance to intervene, take the case out of the hands of the Sessions Judge, and direct that it be tried not under the ordinary law, which has governed the procedure previously followed in the case, but under the Ordinance. On general principles it is undesirable that a different procedure should be adopted at different stages, of course, procedure under the ordinary law initially, and a change sometime thereafter to the procedure prescribed by the Ordinance. AIR (Vol 30) 1943 Oudh 41 : 1942 OWN 709 : 44 Cr L J 86 : 18 Luck 657 : 1942 A W R 347 : 203 Ind Cas 510.

——S. 1—Applicability of Ordinance—Offence not connected with state of emergency.

There is nothing in the Special Criminal Courts Ordinance to show that the Ordinance has no application to offences not connected with the state of emergency on account of which the Ordinance was promulgated. Very wide powers are given under the Ordinance to District Magistrates to direct what cases shall be tried under it. It is, therefore, implied in the Ordinance that it is for the executive authorities to consider and decide what offences shall be tried under it. AIR (Vol 30) 1943 Oudh 41 : 1942 O W N 709 : 44 Cr L J 86 : 1942 AWR 347 : 18 Luck 657 : 203 Ind Cas 510.

——S. 1—Retrospective effect.

It is true that there is no express provision making the Special Criminal Courts Ordinance applicable to offences committed before the Ordinance came into force but from the wide powers which are given to District Magistrates to direct what cases shall be tried under it, it must be held to apply to all offences, whether committed before or after August 20, 1942, i.e. the date on which the Ordinance came into force in the United Provinces, in which the trial has not already commenced, that is, in which evidence had not been recorded under the ordinary law. AIR (Vol 30) 1943 Oudh 41 : 1942 O W N 709 : 44 Cr L J 86 : 1942 A W R 347 : 18 Luck 657 : 203 Ind Cas 510.

——Ss. 1, 11 (2) — When proceedings can be said to commence—Accused, when gets to form of trial—Mere taking of cognizance, if gives right.

Per Special Bench — Proceedings commence only when the accused person is made a party before the Court. That clearly follows from the position of S. 204, Criminal P. C. and the heading of the chapter of which it forms the first section. In Police cases, judicial proceedings cannot necessarily be said to have commenced merely because a person is sent up and remanded to custody. His prosecution has not started and does not start until the Magistrate makes up his mind to act upon a charge sheet and take some overt action to implement his decision. Such an order may be an order to produce the accused from custody on a particular date to stand his trial. Such an order is the order corresponding to the order for issue of process where the accused is not in custody, to the order under S. 204, which marks the commencement of judicial proceedings. That is the point at which vested right such as a right of appeal or right of trial by jury may accrue to a person proceeded against if the law, as it stands at that date, gives them to him. No doubt prior to that stage a person detained in custody may have certain rights. He may have a right to apply for bail; he may have a right to come up to the High Court for a writ of habeas corpus under S. 491. But these right, however valuable they may be, are not rights appertaining to any pending judicial proceedings against him. The fact that such rights as these may have accrued to a person cannot in itself involve also the accrual of a vested right in any particular form and manner of trial, appeal, or punishment. The mere fact of taking cognizance does not give the accused any vested right. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 1—Ordinance, whether ultra vires.

The Special Criminal Courts Ordinance is not ultra vires as all the conditions under S. 102, Government of India Act, 1935, have been fulfilled.

Quaere.—Whether the Ordinance falls under Item No. 1 List II or Item No. 2 of List III, Government of India Act. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 1—Scope of Ordinance—Taking cognizance of offences what is.

The Ordinance sets up new Courts and prescribes a new procedure for trial of cases in those Courts. It lays down no new procedure for dealing with cases in the preparatory stages up to the point when the case becomes ready for trial. It clearly contemplates that the taking of cognizance and all preliminary orders such as orders for inquiry shall be made by the Sub-Divisional Officer or the District Magistrate as the case may be in the ordinary way under the provisions of the Criminal P. C. This being so the fact that cognizance is, in the first instance, taken by the Sub Divisional Officer, and preliminary orders are passed by him, can be no indication that trial in the ordinary Courts is contemplated and obviously the fact that such steps are taken in the Court of the Sub-Divisional Officer can give rise to no right to be tried in his Court or under ordinary procedure.

Taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence. The word "cognizance" is used in the Code to indicate that point when a Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate. Cognizance is taken of cases, not of persons, and there is nothing in theory to prevent a Magistrate from taking cognizance of a case even where the offenders are unknown. The fact that a Magistrate has taken cognizance does not necessarily mean that there will be judicial proceedings against any one. Therefore cognizance is something prior to and does not necessarily mean the commencement of judicial proceedings against any one. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 1—Ordinance not ultra vires.

The Ordinance II of 1942 has the same force as the law passed by the Federal Legislature and it is quite clear from S. 100 cl. (4), Government of India Act that where a law is to be enacted not for a Province or any part thereof, but for the whole country the Federal Legislature (in the present case the Governor-General) has the power to make laws even though they may be with respect to matters in the Provincial Legislative List. Hence, the Ordinance is not repugnant to Ss. 89 and 100, Government of India Act. AIR (Vol 30) 1943 Pat 24 : 23 P L T 747: 9 B R 146 : 44 Cr L J 209 : 22 Pat 160 : 204 Ind Cas 430 (FB).

——S. 1 — Ordinance, whether imperfect or ultra vires.

The mere fact that the Governor-General having decided that the constitution of special Courts was necessary, left it to the discretion of the Provincial Governments to constitute these Courts as soon as it was necessary to do so, does not show that the Ordinance is imperfect, or that it is void because the Governor-General himself did not constitute the Special Courts. AIR (Vol 30) 1943 Pat 24 : 23 P L T 747 : 9 B R 146 : 44 Cr L J 209 : 22 Pat 160 : 204 Ind Cas 430 (FB).

——S. 1—Retrospective effect.

The Ordinance cannot be given retrospective operation and is not applicable to those cases in which the criminal proceedings started before it came into force. Either the summoning of the accused person or any other step which is equivalent to it must be held to mark the initiation of the criminal proceedings against him and as these steps follow automatically after a Magistrate has taken cognizance of a particular offence, it may be safely laid down that there is a criminal case against the accused person as soon as a Magistrate has taken cognizance. A I R (Vol 30) 1943 Pat 18 : 9 B R 154 : 44 Cr L J 273 : 24 P L T 50 : 22 Pat 175 : 204 Ind Cas 451 (FB).

——S. 1 (3) — Ordinance is not ultra vires — Test to decide whether Ordinance is ultra vires.

Where it was contended that the Special Criminal Courts Ordinance was invalid either because the language of S. 1 (3) showed that the Governor-General notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because S. 1 (3) amounted to what was called "delegated legislation", by which the Governor-General, without legal authority, sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself :

Held, that the Ordinance was not invalid on any of the above grounds.

As regards the first ground, emergency may well exist which "makes it necessary to provide for the setting up of Special Criminal Courts" without requiring such Courts to be actually set up forthwith all over India. The Governor-General may well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. It was perfectly possible, and indeed it was quite obvious, that the Governor-General regarded the situation on January 2, 1942, as constituting an emergency—in view of what was happening, it would be remarkable if he did not—and this justified and authorised the Ordinance providing in advance for Special Courts. It did not in the least follow that the bringing of Special Courts into actual existence and operation all over India must take place at the same time.

The second objection was equally unfounded. It was undoubtedly true that the Governor-General, acting under para. 72 of the 9th Schedule, must himself discharge the duty of legislation there cast upon him and cannot transfer it to other authorities. But the Governor-General had not delegated under S. 1 (3) his legislative powers at all. His powers in this respect, in case of emergency, were as wide as the powers of the Indian Legislature which, in view of the proclamation under S. 102, had power to make laws for a Province in respect of matters which would otherwise be reserved to the Provincial Legislature. There could be no valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of Special Court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It was merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute was determined by the judgment of a local administrative body as to its necessity. A I R (Vol 32) 1945 P C 48 : I L R (1945) Kar (PC) 97 Sup : (1925) F C R 161 : 1945 M W N 41 (2) : (1945) 1 M L J 76 : 49 C W N 178 : 47 Bom L R 260 : 11 B R 417 : 1945 A L J 258 : 46 Cr L J 589 : 26 P L T 137 : 219 Ind Cas 263 : 58 M L W 64 : 72 I A 57 ; 1945-8 F L J 1 : 1945 Pesh L J 48.

——S. 1 (3)—Preamble—Act need not, in all its provisions be brought into force at once—Ordinance is not invalid on the ground that it confers powers on

Provincial Government which may be exercised in anticipated emergency.

Looking at Special Criminal Courts Ordinance II of 1942, there is nothing in law or drafting practice which precludes the Governor-General legislating on the basis that a general emergency in his judgment exists, which affects and requires an Ordinance to protect the whole of British India, and yet to provide in the Ordinance itself certain powers to which the Provincial Government may have recourse when the emergency approaches nearer and more particularly threatens a particular province. A I R (Vol 31) 1944 Sind 1 : ILR (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——Ss. 1 (3), 5—Ordinance not ultra vires—It is not delegated but conditional legislation.

Per Derbyshire, C. J. and Khundkar, J. (Sen, J., contra).—The sole judge of whether a state of emergency exists and also whether the Ordinance conduces to peace and good Government is the Governor-General and the Governor-General alone, and where the Governor-General has declared that an emergency exists, no Court may go behind that. Nor is it competent to any Court to enquire whether the Ordinance is really made for purposes of peace and good Government. The mere fact that the Ordinance is to come into force only when the Provincial Government declares it to be in force in that Province does not make the Ordinance a delegated legislation. It is only a conditional legislation. It is conditional legislation only to this extent that as to the whole of it, it will not be operative unless called into force in its entirety by the Provincial Government by a declaration. A I R (Vol 30) 1943 Cal 285 : 44 Cr L J 673 : 207 Ind Cas 481 (SB).

——S. 1 (3)—"Proceeding."

Per Grille, C. J.—The word "proceeding" in S. 1 (3) of the Special Criminal Courts Ordinance cannot be interpreted otherwise than as meaning a judicial proceeding. It does not refer to Police proceedings. The meaning cannot be, as is contended, a proceeding as opposed to a trial but must rather be a proceeding subsidiary to or analogous to a trial. A I R (Vol 30) 1943 Nag 36 : I L R (1948) Nag 73 : 1943 N L J 16 : 44 Cr L J 237 : 205 Ind Cas 161 (DB).

——S. 1 (3)—Scope—Delegation of legislative authority to Provincial Government.

Per Niyogi and Digby, JJ.—Sub-section (3) of S. 1, Special Criminal Courts Ordinance does not delegate any legislative authority to the Provincial Government but only authorsies it to enforce the law on the fulfilment of the specified conditions. The Provincial Government is concerned with the Ordinance in its administrative capacity only. It is quite open to the legislative authority to make a law and prescribe the conditions in which it is to be administered. A I R (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 N L J 16 : 44 Cr L J 237 : 205 Ind Cas 161 (DB).

——S. 1 (3) — Powers of Provincial Government, nature of — Governor enforcing Ordinance has not encroached upon authority of High Court.

Per Niyogi and Digby JJ.—The Provincial Government in enforcing the Special Criminal Courts Ordinance, is acting under S. 93, Government of India Act, 1935. The Ordinance would be enforceable even if there had been a Council of Ministers to advise the Governor. Section 93 has no bearing on the issue as the Provincial Government enforced the Ordinance in terms of S. 1 (3) of the Ordinance itself. The Ordinance is not made and promulgated by the Governor; nor has he encroached upon the authority of the High Court. The Governor-General acting in his Legislative capacity, promulgated the Ordinance which by its terms conferred upon the Provincial Government the power to enforce it. A I R (Vol 30) 1943 Neg 36 : 1943 N L J 16 : I L R (1943) Nag 73 : 44 Cr L J 237 : 205 Ind Cas 161 (DB).

—— S. 3.

——Ss. 3 and 4 – Special Judge is not persona designata but he must preside at Revenue Headquarters of his jurisdiction — Hence complaints by Special Judge for Warora under Ss. 195 and 476, Criminal P. C., while sitting at Nagpur cannot be entertained by any criminal Court.

The Special Judge appointed under the Special Criminal Courts Ordinance was not only a persona designata but a Court :

He could not be deemed to be a Special Judge appointed under S. 4 of Ordinance 2 [II] of 1942 except when he would be presiding over the Court at the headquarters of the revenue district in which the area of his jurisdiction would be included. Hence, the complaints under Ss. 476 and 195, Criminal P. C., filed by Special Judge, for Warora while at Nagpur are neither filed by the Special Judge nor by the Court of the Special Judge. Consequently they cannot be entertained by any Criminal Court in view of the provisions of S. 195, Criminal P. C. A I R (Vol 33) 1946 Nag 38 : I L R (1945) Nag 788 : 1945 N L J 551.

——S. 5.

——Ss. 5, 10 and 16 are not ultra vires.

Sections 5, 10 and 16 of the Special Criminal Courts Ordinance are not ultra vires on the ground that they empowered the executive to decide what offences or classes of offences and what cases or classes of cases should be tried by the Special Courts and not by the ordinary Courts under the well established criminal procedure, A I R (Vol 30) 1943 F C 36 and AIR (Vol 30) 1943 Cal 285 (SB), Reversed. AIR (Vol 32) 1945 PC 48 : 47 Bom L R 260 : 11 B R 417 : 49 C W N 178 : 1945 A L J 258: 46 Cr L J 589: 219 Ind Cas 263.

——Ss. 5, 10, 26—Concurrent jurisdiction might be conferred on both Courts of Special Judge and Special Magistrate to try particular offence.

Per Full Bench (Agarwala, J., contra).—The words contained in Ss. 5 and 10 are in themselves precise and unambignous. In exercise of the power conferred by S. 5, the District Magistrate could direct a Special Judge to try the offence of dacoity and in exercise of the power conferred by S. 10, he could direct Special Magistrates to try the offence of dacoity. Hence by these two sections, the Legislature contended that concurrent jurisdiction might be conferred on both Courts to try the offence of dacoity. A I R (Vol 32) 1945 Pat 98 : 11 B R 249 : 46 Cr L J 399 : 26 P L T 120 : 218 Ind Cas 122 (FB).

——S. 5—Construction—Retrospective effect.

When interpreting emergency legislation designed to ensure the safety of the State, the ordinary presumption that no interference is contemplated with the rights of the subject should not be drawn.

Intention of Ordinance II of 1942 was not to preserve the rights of persons charged with very serious offences at the time when the Ordinance was brought into operation to be tried by Courts constituted in times other than those of emergency and by a procedure designed for times other than those of emergency. It was intended that there should be read into the words used in S. 5 and other corresponding sections of the Ordinance in this emergency legislation, the direction that the provisions of the Ordinance should apply not only to offences committed before the Ordinance came into force, but also to persons whose trials for such offences had not commenced before the Ordinance came into force. A I R (Vol 31) 1944 Sind 1 : I L R (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——S. 5 — "Offences" in S. 5—Transfer of case to Special Judge before the trial begins, legality —

Offence exclusively triable by Sessions — Committal order passed after Ordinance was put in operation— Accused, if can be tried by Special Judge.

The word "offences" in S. 5 means offence or offences charged. The direction of the Government may be by reference to offences, that is to say, offences of murder, or arson, or as the case may be, or by reference to particular case by reference to its number and the names of the accused. If the trial has not commenced, under S. 5, the case can be placed before a Special Judge, e.g., in a case exclusively triable by the Court of Session with jury, the trial can be transferred to Special Judge even though committal proceedings had begun before the Ordinance is made applicable if the trial has not begun before the Court of Session. Because, in cases which could be tried by a Magistrate, the trial may begin when cognizance has been taken but in cases which are exclusively triable by a Court of Session, the trial does not begin unless and until an order of commitment is made.

The liability of the accused to be tried by a Special Judge came into existence when the Ordinance was applied to the Province. The right to bail and appeal ceases to exist at the date when the law of procedure was changed in the Province and not at the date when the administrative order of sending the case to the Special Judge was passed. Hence, the general principle that once the trial proceeds under the existing law and if the law is amended during the pendency of the trial, the accused cannot be tried to his detriment under the new law, has no application to a case where the accused is committed to the Court of Session after the Ordinance. AIR (Vol 30) 1943 Bom 169 : 45 Bom L R 323 : 44 Cr L J 616 : I L R (1943) Bom 331 : 207 Ind Cas 147 (FB).

——Ss. 5, 10, 26 — Applicability — Retrospective effect.

Per Grille, C. J. and Digby, J. (Niyogi, J. dissenting) — The intention of the Special Criminal Courts Ordinance No II of 1942 is to provide for the trial by the Special Courts of offences which may have been committed both before and after the date of the Ordinance coming into effect and Ss. 5 and 10 of the Ordinance are drafted with that intention and the words used convey that intention and they are not susceptible of a contrary interpretation.

The Ordinance relates to the setting up of Special Criminal Courts and the mode of trial in such Courts only. No words more express than those used are necessary to bring within its purview offences committed before its promulgation but cognizance of which was taken by the Special Magistrate after the Ordinance came into force because no question of vested rights of the accused in procedure e. g., right of appeal or revision being affected by the Ordinance can arise inasmuch as a person acquires a vested right in appeal or revision only when cognizance of the offence is taken by the Magistrate and not merely by committing the offence. As the trial commences only when the Magistrate takes cognizance of the offence, the investigation or enquiry by the Police before that cannot be said to be "proceeding pending" within the meaning of the proviso to S. 1 (3) so as to deprive the Special Criminal Courts of jurisdiction to try that offence. The date of the commission of the offence and the date of the first information report and arrest are alike immaterial when cognizance of the offence was taken by the Special Court after the Ordinance came into force though the offence was committed before its promulgation. It was, therefore, competent to the Provincial Govt. to direct the trial by the Special Criminal Courts of Offences committed prior to its coming into force but cognizance of which was not taken of when the Ordinance came into force. A I R (Vol 30) 1943 Nag 36 : I L R (1943) Nag 73 : 1943 N L J 16 : 44 Cr L J 237 : 205 Ind Cas 161 (D B).

——Ss. 5, 6 — Offences committed after Ordinance was declared in force — Proceedings initiated in ordinary Courts and accused remanded — Subsequently, offence declared to be triable by Special Courts — Trial of accused by Special Courts.

There is a wide difference between the expressions 'coming into force" and "coming into operation." The reason for the rule of construction that a statute shall not be held to operate retrospectively unless the language is compelling in that regard, is that it shocks the conscience for a new law to affect the subject adversely in respect of something already over and done with. That reason does not apply in a case where Ordinance II of 1942 has been declared to be in force in the province but machinery for its operation has been set up subsequently. After a law has come into existence, whether or not the machinery for its operation has been set up — once that law is declared to be in force and the subjects of the Province are put upon notice of that fact by official publication — no one can have any just grievance if his acts and rights thereafter are to be determined in accordance with that law. Not only was the Ordinance declared to be in force on August 21, but on the 22nd, Special Courts were constituted. They were in existence before any steps at all were taken against the petitioners. It may be that they could not function. Nevertheless, the petitioners must be deemed to have known that these Courts existed, and that, in due course orders would be passed enabling them to function. That was a natural consequence upon promulgation of the Ordinance in the Province. Consequently, the petitioners do not get a vested right of trial in ordinary Courts merely because the proceedings were initiated in that Court. Trial of such persons by the Special Courts after the District Magistrate had declared the offence committed to be one triable by Special Courts is not illegal. A I R (Vol 30) 1943 Pat 239 : 10 B R 13 : 44 Cr L J 708 : 208 Ind Cas 15 (D B).

——S. 6.

——S. 6 — Memorandum of substance of evidence, what is.

Under the provisions of S. 6 of Ordinance No. II of 1942, the Special Judge was not bound to record the evidence of any witness verbatim, but he was bound to record a memorandum of the substance of the evidence of each witness examined. The statement that other witnesses corroborated or supported the statement of a prosecution witness or gave the same story as the prosecution witness with respect to certain incidents surely does not constitute a memorandum of the substance of the evidence given by those witnesses. A I R (Vol 31) 1944 F C 1 : 1944 M W N 1 : 48 C W N F C 43 : 23 Pat 159 : 45 Cr L J 413 : 10 B R 444 : 1944 A W R 1 : (1944) 1 M L J 305 : 78 C L J 14 : I L R (1944) Kar (F C) 8 Sup : (1944) F C R 61 : 211 Ind Cas 566.

——S. 6 (1), Proviso — Adjournment, meaning of

The word "adjournment" in S. 6 (1) proviso of the Special Criminal Courts Ordinance is not qualified in any way in the Ordinance and it covers both those adjournments which the Courts always have discretionary powers to grant and also those adjournments which the accused is entitled to receive under the Criminal P. C. The meaning of the proviso is that the accused has no right to an adjournment even in those cases where, under the ordinary procedure, he is entitled as of right to an adjournment e. g., an adjournment which an accused is entitled to under the ordinary procedure prescribed for the trial of warrant-cases for the production of defence witnesses. A I R (Vol 30) 1943 Pat 359 : 45 Cr L J 283 : 10 B R 302 : 210 Ind Cas 570.

——S. 8.

——S. 8—Execution of sentences.

Sentences passed by Special Criminal Courts established under Special Criminal Courts Ordinance, 1942, cannot be executed until confirmed by the High Court under the Criminal P. C. A I R (Vol 31) 1944 F C 1 : I L R (1944) Nag 300.

——S. 8 — Reference under — Competence of.

The Special Judge can make a reference under S. 8, Special Criminal Courts Ordinance only in cases specified in cls. (a) and (b) of S. 8. Where the case was not tried by the Special Judge and no appeal lay to him under S. 13 of the Ordinance, a reference by him under S. 8 is incompetent. A I R (Vol 30) 1943 All 329 : 1943 A L J 397 : 44 Cr L J 792 : 1943 A W R 286 (2) : I L R (1943) All 786 : 208 Ind Cas 490.

——S. 8 — Appeal to High Court.

Ordinance II of 1942 expressly deprives a person convicted before a Special Judge of the right of appeal in the ordinary way. The necessary meaning of the wording of S. 8 must be that the right of appeal is abrogated and that only in certain cases can convictions be re-considered at all and that too not by the High Court as such but by a persona designata by the Provincial Govt., namely, the High Court Judge sitting under the provisions of the Ordinance. A I R (Vol 30) 1943 Mad 464 : 56 L W 180 : (1943) 1 M L J 267 : 1943 M W N 195 : 44 Cr L J 744 : 208 Ind Cas 217.

——S. 8 — Enhancement of sentence on review.

The power to enhance a sentence like the right to appeal, is the creation of statute. The power to review under Ordinance II of 1942 did not confer any right to enhance the sentences passed by the Special Courts. A I R (Vol 30) 1943 Pat 413 : 10 B R 464 : 45 Cr L J 577 : 212 Ind Cas 186 (D B).

——S. 10.

—— S. 10—Section 10 of the Special Criminal Courts Ordinance is not ultra vires. A I R (Vol 32) 1945 P C 48 : 47 Bom L R 260 : 11 B R 417 : 49 C W N 178 : 1945 A L J 258 : 46 Cr L J 589 : 219 Ind Cas 263.

——S. 10 — Scope.

Section 10 is no bar to a Special Magistrate trying any offence punishable with death under the Penalties (Enhancement) Ordinance. A I R (Vol 31) 1944 Pat 232 : 23 Pat 108 : 10 B R 661 : 214 Ind Cas 95 : 45 Cr L J 725 (D B).

——S. 10 — Special order directing trial of specific case by Special Magistrate, ligality of — Transfer of case.

The appropriate authority can vary a general order under S. 10 that certain offences under Defence of India Rules should be tried by Special Judge, in any specific case and direct that a particular offence be tried by a particular Special Magistrate. But that does not mean that the appropriate authority has any power to withdraw the case actually going on before a Special Judge. A I R (Vol 31) 1944 Pat 211 : 23 Pat 139 : 46 Cr L J 129 : 11 B R 108 : 216 Ind Cas 142 (D B).

——S. 10 — Offence committed before Ordinance — Trial commencing afterwards — Trial is not without jurisdiction.

Per Full Bench, Bajpai, J. contra — As there is nothing in the language of the Ordinance to make it retrospective, it must be taken to have prospective and not retrospective effect.

An offence committed before the Ordinance came into force can, however, be tried in accordance therewith, if the trial commences on or after the date on which the Ordinance was put into operation. A I R (Vol 30) 1943 All 26 : 1942 A L J 686 : 44 Cr L J 216 : 1942 A W R 392 (1) : I L R (1943) All 238 : 205 Ind Cas 113 (F B).

——S. 10 — Magistrate signing order as Special Magistrate under Ordinance — Presumption—Jurisdiction depending upon special authorization — Authority should be exhibited in case.

Where the Magistrate signed the order as a Special Magistrate under the Ordinance, it may be presumed that in signing it in that capacity, he was signing the order as a Magistrate who had been authorised to try the case. It is, however, desirable in cases where jurisdiction depends upon special authorisation, e. g., under S. 10 of the Ordinance, that the authority should be exhibited in the case so as to avoid the possibility of the case being tried by an unauthorised person or that superior tribunals may not have before them the materials necessary for determining whether jurisdiction has been properly assumed or not. AIR (Vol 30) 1943 Pat 359 : 10 B R 302 : 45 Cr L J 283 : 210 Ind Cas 570.

—— S. 10—Scope — District Magistrate, if can delegate powers to Sub-Divisional Officer.

Section 10 of the Ordinance provides that the Provincial Govt. may delegate its power to any servant of the Crown. There is no provision for a double delegation, for delegation of power by any one other than the Provincial Govt. Hence, a District Magistrate to whom the Provincial Govt. has delegated powers cannot further delegate such powers to Sub-Divisional Officer. A I R (Vol 30) 1943 Pat 245 : 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 10—Order referring to R. 38 (5), Defence of India Rules—Jurisdiction of Magistrate.

Rule 34 (6) of the Defence of India Rules does not constitute any offence. It merely defines various classes of prejudicial acts. It is R. 38 that constitutes the offence inter alia, the offence of doing a prejudicial act. Hence, where an order under S. 10 of the Ordinance refers to R. 38 (5), Defence of India Rules, but not to R. 34 (6), the Special Magistrate cannot be said to have no jurisdiction. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 10—Proper order.

Whether an order was passed by a District Magistrate purporting to be under S. 10 appointing Special Magistrate "for all cases" in the District :

Held, per Fazl Ali, C. J. and Manohar Lal, J. Meredith, J. contra.—The order could not be constituted to be an order under S 10. The Special Magistrate had no jurisdiction to try certain offences as a Special Magistrate because, on the dates he tried the offences he had not been empowered to try them by an order under S. 10. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433: 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 10—Order directing Special Magistrate to decide their powers — Legality.

Where an order under S. 10 makes the Special Magistrates themselves judges of their own jurisdiction in that it leaves them to decide in each case whether they have jurisdiction to try it or send the case to the Sub-Divisional Officer for orders, this amounts to no less than a delegation to the Magistrate themselves of the power of passing the necessary order under S. 10. This the District Magistrate has no power to do and every Special Magistrate purporting to assume jurisdiction and try a case under this order really does so without any valid order under S. 10 by the District Magistrate. AIR (Vol 30) 1943 Pat 245 : 10 B R 193 : 45 Cr L J 177 : 22 Pat 433 : 209 Ind Cas 482 (SB).

——S. 10 — Difference between coming into force and coming into operation—Procedure in Ordinance is only for trial of cases — Preparatory stages are governed by Criminal P. C.

Per Meredith, J. — There is a wide difference between the coming into force of the Ordinance and its coming into operation. After a law has come into

existence, whether or not the machinery for its operation has been set up—once that law is declared to be in force and the subjects of the province are put upon notice of that fact by official publication—No one can have any just grievance if his acts and rights thereafter are to be determined in accordance with that law. Hence, where the Ordinance has been declared to be in force by the fact that it is not brought into operation by an order under S. 10, accused cannot be said to have acquired any vested right to be tried in the ordinary Courts. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

— S. 10—Scope.

Section 10 of the Ordinance provides that the Provincial Govt. may delegate its power to any servant of the Crown. There is no provision for a double delegation, for delegation of power by any one other than the Provincial Govt. Hence a District Magistrate to whom the Provincial Govt. has delegated powers cannot further delegate such power to Sub-Divisional Officer. AIR (Vol 30) 1943 Pat 245 : 45 Cr L J 177 : 22 Pat 433 : 10 B R 193 : 209 Ind Cas 482 (SB).

——S. 13.

——S. 13—Appeal—Sentence in default of fine is not to be considered.

Per Full Bench; Bajpai, J. contra.—The Ordinance draws a sharp distinction between a substantive sentence of transportation or imprisonment as distinguished from an order directing a convicted person to undergo imprisonment in default of payment of fine. In determining the right of appeal given to an accused person by S. 13, only the substantive sentence of imprisonment can, therefore, be taken into account and not the sentence in default of payment of fine. AIR (Vol 30) 1943 All 26 : 1942 A L J 686 : 1942 A W R 392 (1) : 44 Cr L J 216 : I L R (1943) All 238 : 205 Ind Cas 113 (FB).

——S. 16.

——S. 16—Section 16 of the Special Criminal Courts Ordinance is not ultra vires. AIR (Vol 32) 1945 P C 48 : 47 Bom L R 260 : 49 C W N 178 : 11 B R 417 : (1945) A L J 258 : 46 Cr L J 589 : 72 I A 57 : I L R (1945) Kar P C 97 : 219 Ind Cas 263.

——S. 23.

——S. 23—Trial under ordinance—Ordinary rules of evidenoe apply unless expressly abrogated. Prosecution case should not be supported by inadmissible evidence. AIR (Vol 31) 1944 Mad 388 : 57 L W 323 : (1944) 1 M L J 431 : 46 Cr L J 249 : 217 Ind Cas 157 (DB).

——S. 23—Scope — Conviction based on confession of accused — Legality.

Section 23 modifies the law as to confession embodied in S. 32, Evidence Act, and does not touch Ss. 24 to 30 of the Act. Hence it is not permissible to base a conviction solely on the confession of a co-accused. A I R (Vol 31) 1944 Mad 302 : 57 L W 100 : 1944 M W N 57: (1944) 1 M L J 91 (DB).

——S. 25-A.

——S. 25-A—Applicability of.

Section 25-A of the Ordinance is evidently intended to come into operation only after a Special Court created under the Ordinance is in seisin of a case. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193: 45 Cr L J 177 : 209 Ind Cas 482 (SB).

——S. 26.

——S. 26 — Trial and conviction of accused by Special Magistrate — Revision to High Court under S. 439, Criminal P. C. — It assumes validity of trial Court—Validity of Ordinance questioned — Proper remedy is by application under S. 491, Criminal P.C.

A petition for revision to the High Court under Ss. 435 and 439, Criminal P. C. by an accused against his conviction by a Special Magistrate under the Special Criminal Courts Ordinance assumes that the Court of the Special Magistrate was a valid inferior Court whose decision calls, in the view of the accused who were convicted and sentenced by it for revision. But if the Special Magistrate who tried the case was a valid Court duly authorised by the Ordinance then, by the very terms of the Ordinance there is no appeal to the High Court. If, on the other hand, the Ordinance had no validity, the Special Magistrate was in the same position as a private person who took upon himself to conduct a trial of the accused and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of habeas corpus (S. 491 of the Criminal P. C.) would be the appropriate remedy. A I R (Vol 32) 1945 P C 48 : 47 Bom L R 260 : 11 B R 417 : 1945 A L J 258 : 49 C W N 178 : 72 I A 57 : I L R 1945 Kar P C 97 : 46 Cr L J 589 : 219 Ind Cas 263.

——S. 26.

——S. 26 is not ultra vires on ground of being in conflict with S. 223, Government of India Act.

It cannot be said, in view of S. 311 (6), Govt. of India Act, that the Governor-General, when making an Ordinance in cases of emergency under S. 72 of Sch. IX, Govt. of India Act, is not a "Legislature" as contemplated by S. 223 of that Act. Provided that the condition as to emergency is fulfilled, the Governor-General acting under para. 72 may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do. Hence S. 26 of the Special Criminal Court Ordinance, which excludes the revisional and appellate powers of the High Court in cases dealt with by the Special Courts constituted under the ordinance is not ineffective and ultra vires as being in conflict with S. 223 of the Govt. of India Act. AIR (Vol 32) 1945 P C 48: 47 Bom L R 260: 49 CWN 178: 1945 ALJ 258: 11 B R 417: 46 Cr L J 589: 72 I A 57: ILR (1945) Kar P C 97: 219 Ind Cas 263.

——S. 26—Habeas Corpus writ of—Jurisdiction.

Per Shearer J.—High Court is disabled by S. 26 from granting writ of habeas corpus to persons brought before Special Court. An order under S. 491, Criminal P. C. cannot be made in respect of persons regularly tried and convicted by Special Court unless a complete absence of jurisdiction on the part of the Special Judge to try him has been conclusively shown. AIR (Vol 32) 1945 Pat 98: 11 B R 240: 46 Cr L J 399: 26 P L T 120: 218 Ind Cas 122 (FB).

—— S. 26—(As Amended by Ordinance X of 1913). Ss. 26, 27, 25-A—Transfer of case—Power of High Court).

Under S. 26 of the Ordinance, no Court is entitled to transfer a case which is pending before a Court duly constituted under the Ordinance save as provided in the Ordinance. The Ordinance gives power only to the District Magistrate to transfer a case from one Special Magistrate to another Special Magistrate within the district and only to the Provincial Govt. to transfer a case outside the district. The High Court is not, therefore empowered to transfer a case from one Special Magistrate to another Special Magistrate. Sections 26 and 27 have to be read together and on doing so, it becomes clear that it would be inconsistent with the provisions of the Ordinance if the High Court were to assume power under S. 526, Criminal P. C. to transfer a case from one Special Magistrate to another Special Magistrate when that power has been expressly taken away by S. 26. AIR (Vol 31) 1944 Nag 90: 1944 NLJ 27: 45 Cr L J 575: 212 Ind Cas 387.

— S. 26—Habeas Corpus—Powers of High Court.

Per Iqbal Ahmad, C. J. and Allsop, J.—Section 26 explicitly prohibits the passing of an order under S. 491 Criminal P. C. in cases taken cognizance of by

Special Magistrates or Special Judges and this prohibition is absolute. AIR (Vol 30) 1943 All 233: 1943 ALJ 184: 44 Cr L J 575: 1943 AWR 106: ILR (1943) All 584: 207 Ind Cas 118 (FB).

——S. 26—Power of High Court.

Per Allsop J —The High Court can go into the question as to whether a Special Criminal Court set up under the Ordinance is a properly constituted Court or not. AIR (Vol 30) 1943 All 233: 1943 ALJ 184: 1943 AWR 106: 44 Cr L J 575: ILR (1943) All 584: 207 Ind Cas 118 (FB).

——S. 26—Sessions Judge, held entertained and decided appeal as Special Judge—High Court held precluded from entertaining revision.

M a First Class Magistrate acting as a Special Magistrate under the Special Criminal Courts Ordinance convicted the accused under S. 436, I. P. C. As M had exercised the powers of a First Class Magistrate for less than two years he was incompetent in view of S. 9 of the Ordinance to act as a Special Magistrate. The accused appealed under S. 13 of the Ordinance against their conviction to the Sessions Judge in his capacity as a Special Judge under the Ordinance. The Special Judge, holding that the Ordinance was not applicable to the offence committed by the accused directed that the accused be committed to the Court of Session for trial after holding regular commitment proceedings. The Provincial Govt. went in revision against the order.

Held, (Per Iqbal Ahmad, C. J. Allsop, Mohammad Ismail and Hamilton, JJ., Bajpai, J., contra.) that as the Special Judge entertained, heard and decided the appeal as the Special and not as a Sessions Judge and as the Special Judge was a Court validly constituted under the Ordinance, the High Court had, under S. 26, no jurisdiction to revise an order passed by him howsoever erroneous or unjust it might be. AIR (Vol 30) 1943 All 233: 1943 AWR 106: 1943 ALJ 184: 44 Cr L J 575: ILR (1943) All 584: 207 Ind Cas 118 (FB).

——S. 26—Revisional jurisdiction of High Court.

Per Full Bench: Bajpai, J.—contra.—The words of S. 26 of the Ordinance are very wide, and completely bar the revisional jurisdiction of the High Court in cases tried and decided by Special Magistrate or Special Judges. AIR (Vol 30) 1943 All 26: 1942 ALJ 686: 1942 AWR 892 (1): 44 Cr L J 216: ILR (1943) All 238: 205 Ind Cas 113 (FB).

—— Ss. 27, 13—Ordinance if ultra vires.

The making of Ordinance No. II of 1942 (Special Criminal Courts Ordinance) was within the legislative competence of the Governor General and is not ultra vires. AIR (Vol 30) 1943 Cal 224: 47 CWN 354: 44 Cr L J 417: 205 Ind Cas 554 (DB).

——S. 26—Accused's right of appeal or revision.

Under the Ordinance, the accused has no right to appeal where his sentence was six months only and the revisional jurisdiction of the High Court is taken away by the provisions of S. 26 of the Ordinance. AIR (Vol 30) 1943 Cal 224 : 47 CWN 354: 44 Cr L J 417: 205 Ind Cas 554 (DB).

——S. 26—Power of High Court.

Irregularities alleged to have taken place in the conduct of the trial cannot be presented before the High Court as the High Court has by virtue of S. 26 of the Special Criminal Courts Ordinance, no such jurisdiction. AIR (Vol 30) 1943 Nag 211: 1943 NLJ 311: I L R (1943) Nag 369 : 44 Cr L J 731 : 208 Ind Cas 97 (DB).

——S. 26—Ordinance not ultra vires.

The promulgation of Special Criminal Courts Ordinance, No. II of 1942 is not ultra vires of the power of the Governor-General in view of the existence of the Defence of India Act and particularly of S. 14 of that Act. The power to set up Special Courts is not controlled in any way by the Defence of India Act which cannot provide for its own non-repeal; nor is it restricted by S. 72, Sch. IX of the Govt. of India Act which provides that an ordinance may be controlled or superseded by any future piece of legislation but cannot be automatically controlled by existing legislation. AIR (Vol 30) 1943 Nag 211: 1943 NLJ 311: ILR (1943) Nag 309: 44 Cr L J 731: 208 Ind Cas 97 (DB).

——S. 26—(As amended by Ordinance XLII of 1942) —Executive directing trial by Special Court of offences committed before August 21, 1942—S. 26 does not preclude High Court from considering whether executive acted intra vires of Ordinance or no.

Per Grille, C. J., and Niyogi, J. (Digby, J. contra) —The wording of S. 26 of the Ordinance does not preclude the High Court from considering whether the executive has acted intra vires or no in respect of directing the trial of a certain class of cases namely, cases relating to offences committed before August 21, 1942. The concluding words of S. 26, limit the prohibition of making any order under S. 491, Criminal P. C. to matters which are proceedings in a duly constituted Court and cannot operate as a bar to the entertainment of matters affecting the jurisdiction of the Executive to bring cases before such Special Court. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73 1943 NLJ 16: 44 Cr L J 237: 205 Ind Cas 161 (DB).

——S. 26—Powers of Indian and Provincial Legislature to establish Special Courts outside sphere of High Court's superintendence—Ordinance not importing High Court's power under S. 205, Government of India Act—No incursion into Federal Court.

Per Niyogi and Digby, JJ. The Indian Legislature has power to establish Courts of special jurisdiction for special purposes and place them outside the purview of the High Courts' superintendence. That is clear from S. 223, Govt. of India Act itself.

The enactment which sets up Special Courts may choose to keep them independent of the High Courts. Even the provincial Legislature has power to establish such Courts functioning outside the sphere of the High Court's superintendence, as for example Debt Relief Courts. The ordinance in no way impairs the power of the High Court under S. 205, Govt. of India Act, and, consequently, it cannot be said that it makes any incursion into the domain of the Federal Court by closing the avenue of approach to the Federal Court. AIR (Vol 30) 1943 Nag 36: ILR (1943) Nag 73: 1943 NLJ 16: 44 Cr L J 237: 205 Ind Cas 161 (DB).

——S. 26—Special Court having no jurisdiction—Interference by High Court.

Where the Special Magistrate had no jurisdiction over the petitioners, in spite of what is contained in S. 26 of the Ordinance, the High Court has power and is bound ex debito justitiae to make a direction in the nature of a habeas corpus, although the warrant under which the petitioners are detained is a warrant which has been issued by a Special Magistrate. AIR (Vol 30) 1943 Pat 288: 10 B R 53: 24 PLT 85: 44 Cr L J 777: 208 Ind Cas 322 (DB).

——S. 26—Interference by High Court.

Section 26 of the Ordinance expressly provides against interference by any other Court with the proceedings of a Court constituted under the Ordinance. There is an express reference to S. 491, Criminal P. C. and since only High Courts can act under S. 491, S. 26 must have been designed to exclude interference by all other Courts including the High Courts. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 26—Special Magistrate having no jurisdiction when he began trial but having full jurisdiction at time of convicting—No interference by High Court.

Where a Special Magistrate who has no jurisdiction to try when he begins the trial but has full jurisdiction at the time of convicting the accused, it might possibly be said that he acted illegally in part at least upon evidence which he had not recorded as Special Magistrate. That, however, is not enough. As long as the conviction was made with full jurisdiction, S. 26 of the Ordinance comes into operation to bar interference by the High Court AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 26—Proceedings and conviction by Special Magistrate void—Power of High Court.

Where the proceedings in which a Special Magistrate has convicted a person, are found to be void, the position is that in the eye of the law, the person's trial and conviction being void, he has not been tried and convicted. There is no conviction to set aside. It is merely a question of indicating the position, and nothing in the provisions of S. 26 can prevent the High Court from indicating that position. It is that the person is being detained in custody by the executive authorities as a convicted prisoner, when they have no legal authority to do so (though of course, his detention as an under-trial prisoner might be quite lawful). Therefore, the High Court can and should interfere to put a stop to that detention under the provisions of S. 491. It is not a case of revising the order of the Special Magistrate, or assuming any jurisdiction to interfere with his proceedings under S. 491, a jurisdiction which S. 26 takes away. It is interfering only with the act of the executive authorities in detaining in custody as a convict a person who has not been convicted. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 26—Transfer of case.

Section 26 of the Ordinance does not affect S. 192, Criminal P. C., because all that it provides is that no Court shall have authority to transfer any case from a "Court" constituted under the Ordinance. This section evidently applies only after a Court constituted under the Ordinance is in seisin of the case. In other words, the jurisdiction which is contemplated in this section is the jurisdiction which is contemplated by S 526, Criminal P. C., and does not affect the power of distributing cases with which the Sub-Divisional Officer is invested by S. 192. The transfer of a case by Sub-Divisional Officer who has taken cognizance of the case to a Special Magistrate under S. 192 is proper. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 26—Certiorari—Writ of—Proceeding under Ordinance II of 1942—Power of Patna High Court to issue writ—S. 26 of Ordinance—Effect of.

The Patna High Court has no power at all to issue any writ of certiorari. Even if it has the power, then S. 26 of the Ordinance has certainly taken it away, except possibly in cases where the High Court could more suitably act under S. 491 upon the ground of lack of jurisdiction. The words "have no jurisdiction of any kind" which occur in S. 26 are comprehensive enough to cover the power to issue the writ of certiorari if such power existed. AIR (Vol 30) 1943 Pat 245: 22 Pat 433: 10 B R 193: 45 Cr L J 177: 209 Ind Cas 482 (SB).

——S. 26—High Court has no power to revise convictions or sentences of Special Courts.

It is very difficult to hold that the old Nizamat Court possessed any higher powers than those possessed by the present High Courts under various statutes such as the High Courts Act and the Govt. of India Act and under the Letters Patent. Thus, if the High Court cannot interfere with the convictions in the cases before it under the powers conferred upon by various statutes and Letters Patent, it cannot interfere by reason of some undefined powers which were once exercised by the Nizamat Court.

The High Court has no power to revise and interfere with the convictions and sentences passed by the Special Magistrates or Special Courts under the Ordinance. The High Court cannot also pass orders under S. 562, Criminal P. C. AIR (Vol 30) 1943 Pat 24: 23 PLT 747: 9 B R 146: 44 Cr L J 209: 22 Pat 160: 204 Ind Cas 430 (FB).

——S. 26—Offences committed prior to Ordinance—Trial beginning subsequently, if ultra vires.

Special Criminal Courts Ordinance can be made applicable not only to those cases where the offence is alleged to have been committed after the Ordinance came into operation but also to offences committed prior to the date when the Ordinance came into operation. It did affect the right of the accused to be tried under the normal procedure by the Courts which would have tried the offences in question under the Criminal P. C. and accordingly, the trial of the offenders by the Special Magistrates was not ultra vires. Until the Police investigation was completed and a charge-sheet was submitted against the accused, it was premature to say whether they would be placed on trial or whether the Police would send up a final report stating that the case against them had not been made out. The question of procedure or the right of appeal could have arisen only after the submission of a charge sheet and after the accused had been placed on trial. Until then, it could not be said whether the accused would be tried by a Magistrate holding first class powers or second class powers or whether they were to be tried by a Magistrate empowered to try summary cases or by a Court of Session or they would be tried at all. Hence, trial of such persons for offences prior to the Ordinance but after the establishment of Special Courts is not illegal. AIR (Vol 30) 1943 Pat 24 : 23 P L T 747 : 9 B R 146 : 44 Cr L J 209 : 22 Pat 160 : 204 Ind Cas 430 (FB).

——S. 26—High Court's revisional power.

If the Special Criminal Courts Ordinance is found to be applicable to certain cases, High Courts can have no jurisdiction to revise the order of conviction and sentence. AIR (Vol 30) 1943 Pat 18 : 9 B R 154 : 44 Cr L J 273 : 24 P L T 50 : 22 Pat 175 : 204 Ind Cas 451 (FB).

——S. 26—Orders by Special Magistrate — High Court's power of revision under Ss. 435 and 439, Criminal P. C. — Ordinance not applicable—S. 491, Criminal P. C., can be resorted to.

The High Court cannot revise the order of conviction or sentence passed by the Special Magistrates concerned under Ss. 435 and 439, Criminal P. C. because this power of revision can be exercised only as against orders passed by Magistrate exercising jurisdiction under the Criminal P. C. As the Special Magistrates derived their jurisdiction from the Ordinance they cannot be properly described as "inferior Criminal Courts" and the High Court cannot revise their order. It does not, however, necessarily follow from this that the High Court is entirely powerless in the matter. Under S. 491, Criminal P. C., the High Court may direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction be set at liberty. If the Ordinance under which the petitioners were tried was not applicable to their cases, then their trial was no trial at all in the eye of law and they cannot be detained in a prison, because they should be deemed to have been committed to

prison without a trial and because the Magistrates who have sentenced them to imprisonment had no power to send them to prison. AIR (Vol 30) 1943 Pat 18 : 9 B R 154 : 44 Cr L J 273 : 24 P L T 50 : 22 Pat 175 : 204 Ind Cas 451 (FB).

——S. 27.

—— S. 27—Construction.

Section 530, Criminal P. C. is in no way inconsistent with the provisions of the Ordinance and its operation is, therefore, preserved by S. 27 thereof. Hence proceedings by Special Magistrate who is not properly empowered to do so are void. AIR (Vol 30) 1943 Pat 245 : 22 Pat 433 : 10 B R 193 : 45 Cr L J 177 : 209 Ind Cas 482 (SB).

SPECIAL CRIMINAL COURTS (REPEAL) ORDINANCE (19 of 1943)

——Interpretation.

Per Khundkar J. — As regards the provision for appeal and revision, so much of it as is meaningless and unworkable may be disregarded. Regard may be paid to the section only so far as it provides for the exercise of revisional powers under S. 435, Criminal P. C. AIR (Vol 30) 1943 Cal 489 : 47 C W N 757 : 45 Cr L J 37 : 78 C L J 281 : 208 Ind Cas 605 (SB).

——Ordinance not ultra vires—It has obviated retrial.

Ordinance 19 of 1943 has obviated the necessity of a re-trial of every case the trial of which had already been concluded by giving legal effect to the sentences subject to the right of appeal and liability to revision. The substance of the Ordinance, that is to say, the execution of sentences passed by the Special Courts, subject to such modification as may be made on the merits on appeal or in review, has been expressed with sufficient clarity to take effect and is not ultra vires. AIR (Vol 30) 1943 Pat 346 : 10 B R 67: 22 Pat 565 : 24 P L T 302 : 44 Cr L J 809 : 209 Ind Cas 55 (DB).

——S. 3.

——S. 3 (1) and (2)—Word 'sentence' is used in narrower sense as meaning 'punishment imposed' — Sentence passed by Special Magistrate acting under Criminal Courts Ordinance (2 of 1942) — Revision—High Court has power under S. 3 (2) to enhance or reduce sentence but has no power to set aside conviction or direct retrial.

The word "sentence" used in relation to the decision of a Criminal Court may bear the wider or narrower meaning according to the context, but the primary meaning of "sentence passed", the expression used in Ordinance 19 of 1943, is "punishment imposed." The passing of sentence in a criminal trial is a distinct step which follows conviction, it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt.

Under S. 3 (1) of Ordinance 19 of 1943 it is the sentence passed which is to be treated as having been lawfully passed under the Criminal Procedure Code, and nothing is said about the conviction recorded.

There is nothing in the language of S. 3 (1) of Ordinance 19 of 1943 to suggest that the Governor-General intended to do more than to render valid the punishment imposed by the special Courts, leaving the validity of the convictions to rest on judicial decision. Sub-section (2) of S. 3 mitigates the rigour of sub-section (1) by providing that any sentence referred to in sub-s (1) shall be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the Criminal P. C. if the sentence at the trial so held had been passed on the date of the commencement of the Ordinance. Sub-section (2) is a necessary corollary to sub-section (1). Sentences rendered valid by sub-section (1) by treating them as having been lawfully imposed under the Code are to be subject to the same rights in appeal and revision as they would have been subject to if actually so imposed. But it is clear both from the opening reference to "any such sentence as is referred to in sub-section (1) "and from its plain intent that the subject-matter of sub-section (2) is the same as that of sub-section (1) and if sub-section (1) is confined to punishments imposed, sub-section (2) is similarly limited.

Consequently a High Court has power under S. 3(2) of Ordinance 19 of 1943 to revise a sentence passed by a Special Magistrate under Ordinance 2 of 1942, i. e., to enhance or to reduce it, but it has no power to set the conviction aside or to direct a retrial. [AIR (Vol 31) 1944 Sind 1 : I L R (1943) Kar 449 : 212 I C 56 (FB). Overruled.] AIR (Vol 33) 1946 P C 169 : (1946) 2 M L J 299: 1946 Pesh L J P C 169: 1946 M W N 622 : 59 M L W 652 : 47 Cr L J 933 : 73 I A 199 : I L R (1946) Kar P C 153 : 1946 A L J 485 : 226 Ind Cas 414.

——S. 3 (1)—Scope of.

Section 3 of Ordinance 19 of 1943 applies to judgments of acquittal passed by Special Courts constituted under the Special Criminal Courts Ordinance II of 1942 and cl. (1) of that section requires sentences to be treated as if the trial at which they were passed had been held in accordance with the Criminal P. C., whether such trial has ended in a conviction or acquittal. AIR (Vol 32) 1945 Sind 33 : I L R (1944) Kar 430 : 46 Cr L J 422 : 218 Ind Cas 204 (DB).

——S. 3 (1)—Object.

The purpose of S. 3 (1) is to indicate not merely the forum but also the nature and extent of the relief to be had. "At a trial so held" in sub-s. (2) means, as set out in sub-s. (1), a trial held in accordance with the Code and by a Court having competent jurisdiction under the Code. As sub-s. (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. AIR (Vol 31) 1944 F C 1 : 1944 M W N 1 : 48 C W N F C 43 : 23 Pat 159: 45 Cr L J 413: 10 B R 444 : (1944) 1 M L J 305 : 78 C L J 14 : 1944 A W R 1 : I L R (1944) Kar (FC) 8 Sup : (1944) F C R 61 : I L R (1944) Nag 300 : 211 Ind Cas 556.

——S. 3 (1)—Scope.

What the Ordinance (19 of 1943) has attempted to do, does not amount to an exercise of judicial power. AIR (Vol 31) 1944 F C 1: 1944 M W N 1: 48 C W N F C 43 : 23 Pat 159 : 45 Cr L J 413 : 10 B R 444 : 1944 A W R 1 : (1944) 1 M L J 305 : 78 C L J 14 : (1944) F C R 61 : I L R (1944) Nag 300 : I L R (1944) Kar (FC) 8 Sup : 211 Ind Cas 556.

——S. 3 (1)—Scope.

Since S. 3 (1) requires the sentence to be treated as one passed by a competent Court at a proper trial no separate provision referring to the "conviction" was necessary. AIR (Vol 31) 1944 F C 1 : 23 Pat 159 : 1944 M W N 1 : 48 C W N F C 43 : 45 Cr L J 413 : 10 B R 444 : (1944) 1 M L J 305 : 78 C L J 14 : 1944 A W R 1 : ILR (1944) Kar (FC) 8 Sup : (1944) F C R 61 : ILR (1944) Nag 300 : 211 Ind Cas 556.

——S. 3 (1)—Scope.

Section 3 (1) confers validity and full effectiveness on sentencs passed by Special Courts functioning under the Special Criminal Courts Ordinance (Ordinance No. II of 1942) and this provision is not ultra vires the Governor-General. AIR (Vol 31) 1944 F C 1 : 10 B R 444 : 1944 M W N 1 : 48 C W N F C 43 : 23 Pat 159 : 45 Cr L J 413 : (1944) 1 M L J 305 : 78 C L J 14 : 1944 A W R 1 : I L R (1944) Kar (FC) 8 Sup : (1944) F C R 61 : ILR (1944) Nag 300 : 211 Ind Cas 556.

——S. 3 (1) — Section 3 is not ultra vires. AIR (Vol 31) 1944 F C 1 : 1944 M W N 1 : 23 Pat 159 :

48 C W N 43 : 45 Cr L J 413 : 10 B R 444 : (1944) 1 M L J 305 : 78 C L J 14 : 1944 A W R 1 : I L R (1944) Kar (FC) 8 Sup : 1944 F C R 61 : I L R (1944) Nag 300 : 211 Ind Cas 556.

— S. 3 (1)—Retrospective effect.

Section 3 (1) is not retrospective. AIR (Vol 31) 1944 F C 1 : 1944 M W N 1 : 23 Pat 159 : 48 C W N F C 43 : 45 Cr L J 413 : 10 B R 444 : (1944) 1 MLJ 305 : 78 C L J 14 : 1944 A W R 1 : ILR (1944) Kar (F C) 8 Sup : 1944 F C R 61 : ILR (1944) Nag 300 : 211 Ind Cas 556.

——S. 3 (1) — Trial under R. 130 (3), Defence of India Rules—Validity.

Ordinance validates a trial held by virtue of R. 130 (3), Defence of India Rules. Reference to procedure in S. 3 (1) is only to the procedure adopted at the trial and not to the provisions of law whenever contained which lay down the particular Courts by which offences are to be tried. AIR (Vol 31) 1944 Pat 232 : 23 Pat 108 : 10 B R 661 : 45 Cr L J 725 : 214 Ind Cas 95 (DB).

— S. 3 (1)—Interpretation—Special Judge passing death sentence—Whether it is incumbent on High Court to consider confirmation of death sentence—High Court if can consider questions of fact.

The reasonable interpretation of sub-s. (1) of S. 3 is that a sentence of death passed by a Special Judge shall have all the ordinary consequences under the law which follow according to the appropriate provisions of the Criminal P. C. One of the effects of a death sentence passed by a Sessions Judge is, under the law, that it must be confirmed by the High Court before it can be carried out. Therefore, sub-s. (1) of S. 3 of the Ordinance must be interpreted in such a way as not only to permit the High Court but to make it incumbent upon it to consider the confirmation of any death sentence passed by a Special Judge in the same way as it should consider the confirmation of a death sentence passed by a Sessions Judge under the Criminal P. C. In such a case, the High Court can consider all questions of law and fact that may arise. AIR (Vol 31) 1944 Sind 83 : 45 Cr L J 598 : 212 Ind Cas 352 (FB).

——S. 3 (1)—Scope.

Section 3 (1) refers not only to the exercise of a jurisdiction conferred by or under Ordinance II of 1942, but also to a jurisdiction purported to be conferred on the Special Judge. It refers only to the conferring of a jurisdiction by the Provincial Government and the exercise of that jurisdiction by a Special Judge but covers a case where the jurisdiction exercised by the Provincial Government is doubtful because the application of the Ordinance in a particular case is doubtful. AIR (Vol 31) 1944 Sind 1 : ILR (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——S. 3 (1)—Effect of.

In Emperor v. Benoari Lall Sarma, [AIR (Vol 30) 1943 F C 36 : 208 I C 564 : 45 Cr L J 1 (FC)] the Federal Court did not decide that it was ultra vires to set up Special Courts and give them jurisdiction under Ordinance II of 1942. It was the method of giving them jurisdiction which was ultra vires. The practical effect of Ordinance XIX of 1943 is that the legislative authority ratifies the invalid acts of the officers of the Crown. Since the legislative authority can avoid the error of method, the Legislature can ratify the invalid acts. Hence the ratification of the invalid acts of the officers of the Crown by Ordinance XIX of 1943 is effective and that Ordinance is not made invalid by decision in A I R (Vol 30) 1943 F C 36 : 208 Ind Cas 564 : 45 Cr L J 1. AIR (Vol 30) 1943 Pat 446: 24 P L T 424: 10 B R 469 : 45 Cr L J 557 : 22 Pat 614 : 212 Ind Cas 197 (DB).

——S. 3 (1), is ultra the Governor-General.

Per Iqbal Ahmed, C. J. and Allsop, J., Bajpai J., contra.—Sub-section (1) of S. 3 is valid and operative and is intra vires the Ordinance making power of the Governor-General. The sentences passed by the Special Courts are, therefore, valid till set aside on their merits by an Appellate Court.

Per Iqbal Ahmed, C. J.—The power vested in the Governor-General by S. 72 of Sch. IX, Government of India Act 1935, to make and promulgate Ordinance is co-extensive with the power of the Indian Legislature to make laws. The Ordinance (XIX of 1943) deals with some of the matters dealt with by the Criminal P. C., e.g., it makes provision about appeals and revisions as also about sentences, and as such, comes within Item No. 2 of the Concurrent List. It is thus clear that the Ordinance deals with a matter falling within the field of the legislation entrusted to the Indian Legislature. It follows that the Governor-General, in the exercise of his Ordinance making power was competent to make and promulgate the Ordinance. By "antecedent" legislation the Governor-General was competent to constitute Special Courts and to invest them with jurisdiction to try the cases which culminated in the sentences that were validated by sub-s. (1) of S. 3. The Governor-General had, therefore, the authority to validate all acts done and the sentences imposed by such Courts.

Per Allsop, J.—If the persona designata who presided over the Special Courts set up by Ordinance II of 1942 had no power to try and punish offenders, their position was no better or worse than that of Courts Martial and there is no reason why the principles laid down in [(1907) A C 93 : 95 L T 853] should not apply to this case. AIR (Vol 30) 1943 All 379 : 1943 A L J 511 : 45 Cr L J 491 : I L R (1944) All 42 : 1943 A W R 332 : 212 Ind Cas 83 (FB).

——S. 3 (1)—Effect of.

Per Iqbal Ahmed, C. J. — An Ordinance may, in effect modify the operation of a statute by enacting something repugnant to the provisions of the latter. The combined effect to sub-ss. (1) and (2) of S 3 is to restore the right of appeal and the power of revision given by the Code that was practically denied by Ordinance II of 1942 but the jurisdiction so vested in the Appellate and the Revisional Courts by sub-s. (2) is subject to the all important condition that these Courts must approach the consideration of the appeals or revisions on the assumption that the sentences passed by Special Courts were passed by Courts of competent jurisdiction. To this extent no doubt sub-s. (1) modifies the provisions of the Code, but this is permissible. AIR (Vol 30) 1943 All 379 : 1943 A L J 511 : 45 Cr L J 491 : 1943 A W R 332 : ILR (1944) All 42 : 212 Ind Cas 83 (FB).

——S. 3 (1)—Retrospective effect.

Sub-section (1) of S. 3 has no retrospective effect. It speaks from the moment that it was made and promulgated. When it ordains that the sentences "shall have effect." and "shall continue to have effect," it means that the sentences will be operative from June 5, 1943, the date on which Ordinance XIX was enacted. AIR (Vol 30) 1943 All 379 : 1943 A L J 511 : 45 Cr L J 491 : 1943 A W R 332 : I L R (1944) All 42 : 212 Ind Cas 83 (FB).

——S. 3 (1)—Object of.

per Khundkar J.—One plain and obvious purpose of Ordinance XIX of 1943 is to remedy the hardship and the anomaly which would ensue if punishments which have already been dealt out are to be continued but are to be exempt from judicial examination. This is how sub-s. (2) of S. 3 came to be enacted, and it is not inconsistent with the view that the Legislature had owed to the authosity of the Federal Court in the matter of the jurisdiction of the Special Courts. AIR (Vol 30) 1943 Cal 489 : 47 C W N 757 : 45 Cr L J 37 : 78 C L J 281 : 208 Ind Cas 605 (SB).

——S. 3 (1) - **Validity.**

The Special Courts set up by Ordinance II of 1942 were no Courts at all, as they had not been validly constituted. Hence the Governor-General had power to pass an Act validating sentences imposed by Courts which had no legal existence. Sub-section (1) of S. 3 of the Special Criminal Courts (Repeal (Ordinance XIX of 1943) is not invalid and the section means what it says. AIR (Vol 30) 1943 Mad 602 : 56 L W 454 : 1943 M W N 504 : (1943) 2 M L J 247 : 45 Cr L J 59 : I L R (1943) Mad 737 : 209 Ind Cas 61 (FB).

——S. 3 (1), (2)—**Interpretation and effect.**

The words "as if the trial at which it was passed had been held in accordance with the Criminal P.C." in S. 3 (1), Special Criminal Courts (Repeal) Ordinance mean unequivocally that it is to be deemed that the provisions of the Code were complied with even though in fact they were not and the sentences are to be treated as if they had been passed at a notional trial in which the rules of the Criminal P. C. had been complied with. It is not open to the appellant or petitioner to say on appeal or in revision under S. 3 (2) that the trial was not in fact held in accordance with the provisions of the Criminal P. C. No doubt the Court may exercise its inherent jurisdiction to set aside a sentence if the prisoner is not shown to have had a fair trial, but technical objections that this or that section of the Code have not been complied with cannot be entertained. It is, therefore, not correct to say that an Appellate or Revisional Court acting under S. 3 (2) is bound to set aside the sentence and direct the release of the accused or order a re-trial. in every case tried by the Special Court, except, possibly, where it is shown that in spite of the provisions in the Ordinance of 1942 relating to the procedure of the Special Courts, the procedure prescribed by the Code for the trial of offences under the Code has been strictly followed. Retrial would be a question for the Courts sitting in appeal or revision after consideration of the merits of each case. AIR (Vol 30) 1943 Pat 446: 22 Pat 614: 24 P L T 424 : 10 B R 469 : 45 Cr L J 557 : 212 Ind Cas 197 (DB).

—— S. 3 (2)—**Right of appeal not illusory.**

The right of appeal conferred by sub-s. (2) of S. 3 cannot be said to be illusory although no doubt, when an actual appeal is allowed to be brought against a purely notional trial, some anomalies may arise with which the Courts which hear the appeals will have to deal. A I R (Vol 31) 1944 Bom 121 : 46 Bom L R 54 : 45 Cr L J 567 : I L R (1944) Bom 142 : 212 Ind Cas 436 (FB).

——S. 3 (2) and (1) — **Right of appeal.**

Under S. 72, Sch. IX, Govt. of India Act, an Ordinance passed by the Governor-General in the circumstances covered by the Schedule has the like force of law as an Act passed by the Indian Legislature. The provisions of S. 3 (1) of the Ordinance XIX of 1943 validating sentences illegally passed fall within items Nos. 1 and 2 of the Concurrent List 3, Sch. VII, Govt. of India Act, as coming within the general headings "Criminal Law" and "Criminal Procedure" and also within item No. 1 of the Provincial List 2 as covered by "the administration of justice" and, therefore, are within the competence of the Indian Legislature. It was, therefore, within the competence of the Governor General to enact S. 3 (1). Section 3 (1) of the Ordinance accepts the decision of the Federal Court in A I R (Vol 30) 1943 F C 36 : 208 Ind Cas 564 : 45 Cr L J 1 that the convictions by the Special Courts under Ordinance II of 1942 were invalid and validates only the illegal sentences and not the illegal convictions and therefore, S. 3 (1) of Ordinance XIX of 1943 cannot be held to be invalid on the ground that it runs counter to the decision of the Federal Court as to the validity of the convictions under Ordinance II of 1942. Hence, S. 3 (1) of Ordinance XIX of 1943 is valid. A I R (Vol 31) 1944 Bom 121 : 46 Bom L R 54 : 45 Cr L J 567 : I L R (1944) Bom 142 : 212 Ind Cas 436 (F B).

——S. 3 (2)—**Appeal—Interference with sentence.**

In an appeal under S. 3, interference with sentence is permissible only if the Special Judge has gravely erred in the exercise of his discretion or has obviously failed to appreciate the nature and gravity of the crime committed. Interference is not justified merely because the Special Judge's view of what is the correct sentence is different from that of the High Court. AIR (Vol 31) 1944 Mad 302: 1944 M W N 57 : (1944) I M L J 91 : 57 L W 100 (DB).

——S. 3 (2) — **Scope.**

Section 3 (2) provides, not only for an appeal against sentences but also for an appeal against convictions, and, therefore, in dealing with an appeal under S. 3 (2), the High Court can set aside the convictions. A I R (Vol 31) 1944 Sind 83 : 45 Cr L J 598 : 212 Ind Cas 352 (FB).

——S. 3 (2) — **Right of Appeal.**

Where, at the time the case came before the Special Judge under Ordinace II of 1942, it was pending before the Magistrate who had started enquiry for committing the accused to the Court of Session, it was held that although if the trial of case had been held by the Sessions Judge, it would have been a trial by jury, nevertheless as there has been in fact no trial by jury an appeal will lie under S. 3 (2) of Ordinance XIX of 1943 read with Ss. 268 and 418, Criminal P. C. against the sentences and convictions by the Special Judge of these appellants on question of law as well as fact. But the convictions could not be set aside because the Special Judge had tried what was ordinarily a Sessions case as a warrant case. A I R (Vol 31) 1944 Sind 1 : I L R (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——S. 3 (2) — **Construction — Significance of words "at date of commencement of this Ordinance".**

The significance of the inclusion of the words "on the date of the commencement of this Ordinance" in sub-s. (2) of S. 3 and their omission in sub-s. (1) is to prevent any possible prejudice to convicted persons arising out of anything that has been done under the repealed Ordinance by way of appeal or revision or by lapse of time which might otherwise bar the right of appeal, if the right of appeal were not conferred as against a sentence passed on the date of the commencement of this Ordinance. The right of appeal or review under the repealed Ordinance would have been taken away on the repeal of that Ordinance. Rights of appeal under the Criminal P. C. are conferred by this new Ordinance XIX which takes its place. But for the purpose of confirmation and continuance of a conviction and sentence under the sub-s. (1), the material date is the date when the sentence is passed, and the conviction recorded, the date the judgment bears and not the date of the commencement of the Ordinance. This is the date from which the sentence would run if the Appellate Court confirmed the conviction and sentence. AIR (Vol 31) 1944 Sind 1 : I L R (1943) Kar 449 : 45 Cr L J 471 : 212 Ind Cas 56 (FB).

——Ss. 3 (2), 4 — **Conviction and sentence passed under Ordinance II of 1942 — Powers of High Court.**

It cannot be contended that Ordinance XIX of 1943 gives power only to the persons convicted under Ordinance II of 1942 to bring their cases before the Court. The High Court has its ordinary powers of revision and under the inherent jurisdiction of the Court conferred to it in S. 561-A, Criminal P. C., it has powers "to make such orders as may be necessary to give effect to any order under this Code, or to

prevent abuse of the process of any Court or otherwise to secure the ends of justice" and hence it has got power to order re-trial of the accused. This is also clear from Ss. 3 (2) and 4 of the Ordinance XIX of 1943. A I R (Vol 30) 1943 Cal 594 : 45 Cr L J 224: 210 Ind Cas 337 (SB).

——S. 3 (2) — Sentence, explanation of.

Per Khundkar, J., Sen, J., dissenting. — The word "sentence" in S. 3, is ill-judged and out of place. What the Legislature apparently intended to give life to and to continue was really the penalty or punishment be it fine or imprisonment, which is now in process of being endured by persons who have been visited with such penalty or punishment under Ordinance (II of 1942).

Per Sen, J.—A sentence is but a punishment inflicted by a Court. Even if the word punishment is substituted for the word 'sentence' in S. 3 (1), its effect would be that the punishment is given effect to as if it were the punishment inflicted by a validly constituted Court. This means that the punishment is being converted into a valid sentence of a valid Court. A I R (Vol 30) 1943 Cal 489 : 78 C L J 281 : 47 C W N 757 : 45 Cr L J 37 : 208 Ind Cas 605 (SB).

——S. 3 (2) — Scope — Validation of — Conviction— Indemnity for acts done — Sentence should not be considered on merits in appeal.

Per Derbyshire, C. J, and Khundkar, J.; Sen, J. Contra—The Special Criminal Courts (Repeal) Ordinance XIX of 1943 does not validate the proceedings of the Special Court. It puts an end to the Courts and gives an indemnity for acts done therein and thereunder. It merely says that a sentence passed by a Special Judge shall have effect and shall continue to have effect. From this it does not follow that the antecedent conviction on which the sentence was based is also valid. Whether the conviction is valid is a matter of implication or inference from the words of S. 3 (1). The Federal Court and the Calcutta High Court have held that the convictions are void so that in British India outside Bengal and parts of Assam as from June 4, 1943, (date of the Federal Court judgment) persons convicted under the Special Criminal Courts Ordinance were entitled to have their convictions quashed, whilst in Bengal the same position prevailed as from April 21, 1943, (date of the Calcutta High Court judgment). To take away retrospectively these rights from those convicted persons would require legislation in the clearest possible terms — implication or inference is not enough. The amending Ordinance cannot be said to have intended that many persons convicted by the Special Courts before June 5, 1943, should have illusory rights of appeal and revision, whereas those being tried on June 5, 1943, should be given their full and legal rights under the Criminal P. C. The meaning and purpose of S. 3 were that sentences already passed should continue to have effect as if they had been passed by a valid Court, until under right therein given to those convicted by the Special Courts, those sentences could be reviewed or dealt with in appeal under the provisions of the Code of Criminal P. C., when they should be dealt with according to law. It is the duty of the proper Court which has appellate or revisional jurisdiction in the areas in which these sentences were passed to have those convictions brought up before it and quashed and further to direct that the persons concerned be dealt with according to law in the ordinary Courts according to the ordinary process of law with this exception that where the sentence passed by the Special Courts has been substantially served, the Court should direct that no further proceedings be taken. Where subsequent trials under the Code are held and result in convictions, it would be the duty of the Judges passing sentence to have regard to the sentences passed and already served or suffered under the Special Courts, convictions and pass such new sentences as, in effect, give to the convicted persons credit for the sentences served or suffered under the Special Courts' convictions. A I R (Vol 30) 1943 Cal 489 : 47 C W N 757 : 45 Cr L J 37 : 78 C L J 281 : 208 Ind Cas 605 (SB).

——S. 3 (2)—Interpretation.

Per Khundkar, J. — The interpretation of S. 3 calls for the application of two well-known rules of construction. The first is that a statute must be construed so that the intentions of the Legislature may not be treated as entirely vain. Courts will presume that legislation was intended to be intra vires, and will not hold it to be ultra vires unless the invalidity is clear beyond doubt. The Court will lean against a construction which is opposed to the intention of the Legislature as it appears from the statute, and if the words are sufficiently flexible, will adopt some other construction by which the intention will be better effectuated. The second is that it is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers ..... and this exposition is ex visceribus actus. AIR (Vol 30) 1943 Cal 489 : 47 CWN 757 : 45 Cr L J 37 : 78 C L J 281 : 208 Ind Cas 605 (SB).

——S. 3 (2) — Powers of Court of appeal.

The Appellate Court, acting under S. 3 (2), is entitled to examine the totality of proceedings before Special Judge and to pronounce such judgment as to the sentences imposed by the Special Judge as after the examination of those proceedings it thinks just. It is, there, the duty of the Court to consider not only points of law but the sufficiency of the evidence to justify the sentences imposed. A I R (Vol 30) 1943 Pat 446 : 22 Pat 714 : 24 P L T 424 : 10 B R 469 : 45 Cr L J 557 : 212 Ind Cas 197 (DB).

——S. 3 (3)—Scope.

Although Ordinance II of 1942 did not contain any provision for confirmation of a sentence of death passed by a Special Judge, Ordinance XIX of 1943 can be invoked for that purpose. A I R (Vol 30) 1943 Pat 413 : 10 B R 464 : 45 Cr L J 577 : 212 Ind Cas 186 (DB).

——S. 3 (3) — Review Judge — Alteration of sentence by—Effect — Review Judge going beyond his power — Effect.

No doubt when any sentence passed by any of the Special Courts has been altered in the course of review the sentence as altered by the Review Judge in the proper exercise of his power is to be regarded as the sentence passed by the original Court. The sentence must be altered by the Review Judge in the proper exercise of his power. Where the Review Judge has gone beyond his power, sub-s. (3) cannot be applied so as to give to the sentences passed by him the same effect as the sentence of the original Court. A I R (Vol 30) 1943 Pat 413 : 10 B R 464 : 45 Cr. L J 577 : 212 Ind Cas 186 (DB).

——S. 4.

——S. 4—Pending proceedings, what are.

Where a person has been acquitted at a trial held by a Special Court in which some other accused have been convicted, the case so far as the former is concerned cannot be treated as a pending case within the meaning of S. 4, Ordinance 19 of 1943 if the proceedings of convicted persons had been submitted for review under S. 8 of Ordinance II of 1942 and the review had not concluded before the promulgation of Ordinance 19 of 1943. The person acquitted can plead the bar of S. 403, Criminal P. C. so long as the acquittal remains in force. AIR (Vol 32) 1945 Sind 33 : I L R (1944) Kar 430 : 46 Cr L J 422 : 218 Ind Cas 204 (DB).

other issues should be permitted to go back on it in the absence of the other side and base his case on matters which he has agreed not to touch. Even in an ordinary civil case resting on a plaint, no relief can be given on averment essential to the claim which are not included in the plaint unless an amendment is allowed, and no amendment will be allowed without fresh notices to the other side. Parties are entitled to assume that matters will be litigated on the strength of the averments contained in the petition or plaint and that fresh statements of fact material to the issue will not be introduced without affording the other side an opportunity of meeting, and if need be contesting the new facts. A I R (Vol 33) 1946 Nag 60 : I L R (1946) Nag 1 : 1946 N L J 81 (FB).

——S. 17 — Revision under — Discretion of Court — Right to make full investigation.

No one can demand a divorce as of right nor yet a declaration of nullity. Marriage is an institution with which the state is vitally concerned, and any breaking up of the marriage tie cannot be left to the choice of the individual. The Court always has a discretion in such matters and can of its own motion make as full and complete an investigation as it can. AIR (Vol 33) 1946 Nag 60 : I L R (1946) Nag 1 : 1946 N L J 81 (FB).

——S. 17 — Petition under — Principles of English Law—If applicable.

The Indian Divorce Act, and so far as may be, the principles of the English Law, are to be applied in petitions for dissolution or nullity under the Special Marriage Act. A I R (Vol 33) 1946 Nag 60 : ILR (1946) Nag 1 : 1946 N L J 81 (FB).

——S. 17—Bride below 21 years.

Bride below 21 — No consent of her father—Marriage should be dissolved. AIR (Vol 16) 1929 Cal 631: 119 Ind Cas 369 : 56 Cal 628 (SB).

——S. 17—The omission in the application prescribed in the Sch. 2, as to statement of actual age of the parties and whether or not, each party is of the age of 21, is pointed out and brought to notice, and necessary amendments suggested. AIR (Vol 16) 1929 Cal 631 : 119 Ind Cas 369 : 56 Cal 628 (SB).

——S. 22.

— S. 22—"Severance from such family"—Meaning and effect of the words.

Severance referred to in S. 22 of the Special Marriage Act has reference to the undivided nature of the family and the section simply means that a person who marries under the Special Marriage Act will be deemed to have separated from the joint Hindu family and will no longer be a member of an undivided family. It has no reference to succession. 1950 A W R 580 : 1950 A L J 464.

——S. 24.

——S. 24—Retrospective effect.

Section 24 which was inserted in the Act of 1872 the Amending of 1923 has no retrospective effect and does not apply to persons who solemnised their marriage under the Special Marriage Act before its amendment in 1923. A I R (Vol 22) 1935 Mad 653 : 1935 M W N 579 : 69 M L J 81 : 42 L W 228 : 58 M 1004 : 158 Ind Cas 77 (DB).

SPECIAL MARRIAGE (AMENDMENT) ACT (30 of 1923)

— Retrospective effect.

Special Marriage Amendment Act, 1923, has no retrospective effect and S. 24 added by it to Special Marriage Act, 1872, does not apply to persons who solemnised their marriage under the Special Marriage Act before the amendment in 1923. AIR (Vol 22) 1935 Mad 653 : 1935 M W N 579 : 69 M L J 81 : 42 L W 228 : 58 M 1004 : 158 Ind Cas 77 (DB).

——S. 24.

— S. 24—'Who marries', meaning of.

The words "who marries" in S. 24 are synonymous with "who shall marry hereafter" which means from the date of the enactment which brought that section into being and cannot mean "who has married under the Act hereby amended. AIR (Vol 21) 1934 Pat 427 : 15 P L T 380 : 1 B R 202 : 153 Ind Cas 520 (DB).

——S. 24 — Retrospective effect—Interpretation of statutes — Enactments of substantive law — When have retrospective effect.

It is a fundamental principle that enactments of substantive law cannot be considered as retrospective unless the contrary intention is clearly to be found in the Act itself, although matters of adjective law or procedure may properly be deemed retrospective even if the intention to make them retrospective be not expressly found in the legislation itself. Sections 22 to 26 added by the Special Marriage (Amendment) Act, 1923, do not have retrospective effect and do not, therefore, affect the rights of the offsprings of a marriage contracted in 1910 under the Act of 1872. AIR (Vol 21) 1934 Pat 427 : 15 P L T 380 : 1 B R 202 : 153 Ind Cas 520 (DB).

SPECIAL POWERS ORDINANCE (10 of 1932)

——S. 17.

——S. 17—Ordinance in force on date when prosecution is begun but not in force on date of conviction —Conviction, legality of.

The provisions of S. 6, General Clauses Act, are not applicable to a temporary statute, which expires automatically on a given date, but applies only to statutes which are "repealed by another enactment, and, therefore, proceedings which are pending under an Ordinance on the date of its expiry could not be continued in the absence of a clear statutory provision to this effect. Consequently, where a prosecution is begun when the Ordinance is in force but it is not in force on date of conviction, conviction is illegal and ultra vires. A I R (Vol 22) 1935 Lah 188 : 15 L 782 : 37 P L R 19 : 36 Cr L J 735 : 155 Ind Cas 447.

——S. 17—Read with S. 21, United Provinces Emergency Powers Ordinance (II of 1932) Criminal Law Amendment Act (XIV of 1908), S. 17 (2) — Charges under — Stay of proceedings before leading evidence —Expiry of Ordinances by lapse of time — Whether trial can be continued - General Clauses Act (X of 1897 as amended), Ss. 6, 90, whether applicable.

The charges against the accused were, (1) that he disobeyed an order of the District Magistrate by writing a letter and hence, was guilty of an offence under S. 17 of Ordinance X of 1932 read with S. 21, Ordinance II of 1932, and S. 80 (2), Ordinance X of 1932; and (2) that he assisted in the management of an unlawful association and encouraged disobedience of orders of lawful authority by writing the letter and thereby committed an offence under S. 17, sub-s. 2, Criminal Law Amendment Act. The accused was called upon to enter upon his defence but he went up in revision to the Sessions Judge who declined to interfere. He then applied in revision to the High Court and the proceedings were stayed. By this time, both the Ordinances had expired:

Held, that by virtue of S. 6, General Clauses Act, the trial could not be continued under the first charge. Although Act XXIII of 1932 has, to some extent, taken the place of the expired Ordinances, the Legislature never meant that trials for offences committed under provisions of law other than those mentioned in S. 20 of Act XXIII of 1932 should be continued. AIR (Vol 20) 1933 All 669 : 34 Cr L J 1030 : 1933 A L J 875 : 55 A 961 : 145 Ind Cas 680 (FB).

——S. 48.

——S. 48 (2) — Trial by Special Judge — Question, whether offence was committed in furtherance of

movement prejudicial to public safety — Duty of Judge to refer to Government—High Court's power to refer—Ordinance, validity of — Criminal trial — Appellate Court, powers of.

Ordinance X of 1932 is not invalid and ineffective on the ground that it contravenes the provisions of the Govt. of India Act which vests original criminal jurisdiction in the Calcutta High Court within the limits of the town of Calcutta.

It is within the powers of the Indian Legislature to alter and amend the Letters Patent and consequently, within the ordinance making power of the Governor General under the Govt. of India Act.

Where the question whether the offence with which the accused is charged 'was committed in furtherance of a movement prejudicial to the public safety or peace' is raised before the Court of a Special Judge under Ordinance X of 1932, he is bound to refer the question to the Local Govt. under S. 48 (2) of the Ordinance. He cannot refuse to refer merely on the ground that this course would be futile in view of the declaration contained in the order directing the form of the trial.

If the Special Judge refuses to refer, the High Court in revision cannot make the reference. The proposition that the Court of Appeal has all the powers of the original trial Court is not in all its universality true in the Criminal Law. AIR (Vol 20) 1933 Cal 364 : 34 Cr L J 320 : 37 C W N 481 : 60 C 814 : 142 Ind Cas 310 (DB).

——S. 77.

——S. 77—Validity.

Section 77 is not invalid though it reproduces S. 63 of Ordinance II of 1932. AIR (Vol 20) 1933 Cal 278 : 34 Cr L J 316 : 142 Ind Cas 225 (SB).

——S. 80.

—— S. 80—Notification under Ordinance II of 1932 vesting Magistrate with powers of Special Magistrate —Whether operates as notification under Ordinance X.

A notification under Ordinance II of 1932 investing a Magistrate with the powers of a Special Magistrate operates by virtue of S. 80, Ordinance X of 1932, as a notification under the corresponding provision of Ordinance X of 1932 and by the later Ordinance, the powers vested under the older Ordinance are given to the Officer in question. AIR (Vol 20) 1933 Cal 679 : 37 C W N 509 : 35 Cr L J 480 : 147 Ind Cas 827 (DB).

——S. 80—Construction.

The expression 'anything done in pursuance of any provision in S. 80 covers and was intended to cover the case of penalties inflicted under Ordinance II and the other expiring Ordinance referred to in Ordinance X. AIR (Vol 20) 1933 Cal 280 : 37 C W N 363 : 34 Cr L J 291 (2) : 60 C 742 : 142 Ind Cas 204 (DB).

SPECIAL TRIBUNAL

See (1) Civil P. C. S. 9.
(2) Special Criminal Courts Ordinance.

SPECIFIC MOVEABLE

See Limitation Act, Art. 49.

SPECIFIC PERFORMANCE.

See also (1) Contract Act, S. 55.
(2) Specific Relief Act, Ss. 12-30.

1. Essentials.
1A. Extension of time.
See N. 7 and 8.
2. Laches.
3. Lease.
4. Minor.
5. Mortgage.
6. Principles.
7. Reliefs.
8. Sale.
9. Suit for.
10. Title.
11. When refused.
See also N. 2.
12. Miscellaneous.

1. Essentials.

——Bankruptcy—Assignee—Adoption of contract.

The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of the adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself. A I R (Vol 17) 1930 Cal 113 : 50 C L J 208 : 57 Cal 170 : 123 Ind Cas 250 (DB).

—— Condition precedent—Fulfilment of.

Where an agreement to grant a prospecting license and lease to the plaintiff was entered into by the Manager of an infant's estate under the Court of Wards, but it was found that it was not the intention of the parties that this agreement was to be considered a concluded contract until the draft license and lease had been submitted to and sanctioned by the Board of Revenue.

Held, that the plaintiff could not sue for a decree for specific performance of the contract. AIR (Vol 12) 1925 Pat 259 : 3 Pat 968 : 84 Ind Cas 178 (DB).

——Mutuality.

A contract to be specifically enforced by the Court must as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. AIR (Vol 11) 1924 Pat 81 : 4 PLT 553 : 2 Pat L R Civ 181 : 78 Ind Cas 483 (DB).

——Tender of price.

Plaintiff sold to defendants land on the 29th March 1916 on condition that if the vender repaid the purchase-money within three years the land was to be re-conveyed. The vendor asked the defendants, on the 24th July 1918, to re-convey the land on receipt of the purchase amount, but did not actually tender the amount.

Held, that the vendor was entitled to specific performance even though there had been no actual tender by him of the money to the defendants. In suits for specific performance, the strict law as to tender is not applicable. AIR (Vol 10) 1923 Bom 15 : 24 Bom L R 434 : 67 Ind Cas 865 (DB).

——Condition precedent.

If the happening of a certain event is a condition precedent to the specific performance of a contract, it must be fulfilled before the person under obligation is compelled to perform his part of the contract. A I R (Vol 8) 1921 P C 77 : 39 M L J 329 : (1920) M W N 653 : 22 Bom L R 1332 : 29 M L T 1 : 57 Ind Cas 626.

1A. Extension of time.
See N 7 and 8.

2. Laches.

——Suit for—Averment as to plaintiff's readiness to perform the contract in accordance with the decision of the Court—Sufficiency—Long lapse of time in enforcing agreement—If and when fatal to plaintiff's suit.

In a suit for specific performance the plaintiff has, no doubt, to allege that he is ready and willing to perform his part of the contract. But it cannot be said that an averment that the plaintiff had no objection to perform the contract in accordance with the decision of the Court is not a sufficient averment of his readiness and willingness to perform his part of the contract.

Mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there

must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. From long delay alone without anything further, an abandonment of rights could not be presumed. A I R (Vol 36) 1949 Mad 265 : 61 L W 601 : 1948 M W N 624 : (1948) 2 M L J 271 (DB).

——If claim is one of the nature of a specific relief, it may be dismissed upon the ground of delay or laches on the part of the plaintiff. The burden of proving delay is on the defendant. AIR (Vol 16) 1929 All 767.

——Mere delay.

In a suit for specific performance, delay on the part of the plaintiff is no defence unless it amounts to a waiver or his abandonment of the contract or to laches on his part. AIR (Vol 12) 1925 Nag 58: 82 Ind Cas 105.

——Where vendor took too much time in answering defendant's requisitions.

Held, he was not entitled to specific relief but he was entitled to costs of agreement of sale and forfeiture of vendee's earnest money. AIR (Vol 11) 1924 Bom 357 : 48 Bom 368 : 26 Bom L R 105: 84 Ind Cas 947.

——Delay.

The general rule is that when a substantial defect is ascertained, the purchaser must exercise his right of repudiation or of seeking the aid of the Court for specific performance without undue delay. A I R (Vol 11) 1924 Bom 119 : 48 Bom 259 : 25 Bom L R 1037 : 77 Ind Cas 275 (DB).

——A compromise decree provided for the pulling down of the plaintiff's wall and for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the two months. Nothing was done by either party until the defendant took out the execution against plaintiff for pulling down the wall as per terms of the decree. There was no evidence at all of any intervening acts of the parties after the date of the decree. There was a lapse of time of just over one year from the date fixed by the compromise for the performance of the acts.

Held, that time was the essence of the contract; the defendant was out of Court because he was a year out of time, and no waiver or a new agreement had been shown to have taken place. But supposing time was not of essence of the contract the defendant could not even then, after an unexplained delay of one year obtain specific performance of this agreement. AIR (Vol 10) 1923 Bom 441 : 47 Bom 607 : 25 Bom L R 328 : 79 Ind Cas 226 (DB).

——An unexplained delay for one year or even less is sufficient to negative the rights of a party to obtain specific performance. This is only an instance of the principle that the Court will not grant relief to the person who has slept upon his rights. A I R (Vol 10) 1923 Bom 441 : 47 Bom 607 : 25 Bom L R 328 : 79 Ind Cas 226 (DB).

— Prejudice to the other side.

Mere delay, which is short by the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant. AIR (Vol 10) 1923 Lah 694 : 75 Ind Cas 743.

——Prejudice to defendant—Tender.

In a suit for specific performance the strict law as to tender is not applicable. In the absence of anything to show an abandonment or a sleeping over rights to the detriment of third parties, delay short of the period of limitation does not matter in suits for specific performance. To operate as a bar to relief, delay must be of such a character as either to prejudice the defendant or lead him to the belief that plaintiff has waived his rights. AIR (Vol 10) 1923 Sind 50 : 16 S L R 278 : 77 Ind Cas 897 (DB).

——The Rights of Equity are rights which are given to people who are vigilant and not to those who sleep, and unless there can be established some reason which threw upon the defendant the entire blame for the delay, a lapse of time would be fatal to any action for specific performance of the contract. AIR (Vol 9) 1922 P C 249 : 24 Bom L R 682: 30 Mad L T 28 : 48 I A 214 : 48 Cal 832 : 4 U B R 30 : 1921 M W N 396 : 63 Ind Cas 914.

——Right to enforce contract — Extinguished — Its use to resist.

If the defendant's right to enforce a contract has been extinguished by time, he cannot use the right to resist plaintiff's claim. (1909) N L R 70: 2 Ind Cas 244.

3. Lease.

——Sale of mortgaged property to mortgagee and lease back to mortgagor under separate lease deed—Provision in lease for payment of rent on fixed dates and for forfeiture on default — Contemporaneous agreement for sale of property to lessee for the same consideration subject to the conditions that it should stand cancelled in case of default in payment of rent under the lease deed on the due dates—Default in payment – Acceptance of rent after due dates—Termination of lease—Enforceability of agreement for sale.

The suit property along with other properties which belonged to X's family had been mortgaged to Y's family in 1921 and 1929. It was sold to the manager of Y's family on 7th January 1937, in full discharge of the debts. Two days later, on 9th January 1937, two further documents were brought into existence between the parties. One was a lease executed by the vendee as lessor and the vendor as lessee in respect of the property sold and it provided that the lease was to be upto 30th April 1943, and that the lessee should pay the lease amount on specified dates and in case of default the lessee was to forfeit his lease forthwith and that the lessor was entitled to re-enter on the properties. The other document executed by the parties on the same day was a registered agreement whereby the vendee agreed to convey the properties to the vendor on payment of the same consideration as that which formed the consideration for the prior sale, on any day before 30th April 1943, and subject to the condition that if the lessee was in arrear as to the lease amounts the agreement shall stand cancelled forthwith. It was also stated in the agreement that time was the essence of the agreement. The lessee defaulted in the payment of the lease amounts but paid them subsequently which were accepted by the lessor. But when default was committed in respect of the fifth instalment, the member of the lessor's branch to whom the suit property had in the meanwhile been allotted at a partition, gave notice to the lessee terminating the lease and also declared that the agreement to repurchase had also become cancelled. There was a default in regard to the sixth instalment also and the lessor sent notices demanding payment of the amounts due as damages. The previous notice terminating the lease was also referred to. Sometime later the lessee paid certain sum and made an endorsement on the lease of such payment and also stated that a certain amount still remained due. A suit was filed by the lessee prior to 30th April 1943, for specific performance of the registered agreement of the 9th of January 1937.

Held (Mahajan and Mukherjea JJ., dissenting). The lessee secured the privilege of re-purchase only subject to the conditions set forth in the agreement. Such condition though relating only to payment of money, cannot be regarded as penalty and Courts will not afford relief against a forfeiture for their breach. As the privilege was conferred upon payment of money at a stated period, it was lost as the

money was not paid accordingly. The acceptance of payments after the notice terminating the lease and intimating the cancellation of the agreement to repurchase could not in the circumstances of the case, operate in any event as a revival of the agreement. 1940 F C R 537 : AIR (Vol 37) 1950 F C 38 : 1950 S C J 1 : (1950) 1 M L J 683.

——Agreement to execute lease—Term to commence at a future date—Contract if enforceable—Agreement with provision for pucca contract to be drawn in due course—Enforcement.

Where all the essential terms, of a lease have been agreed upon and reduced to writing there is a concluded contract notwithstanding a term in the agreement "Pucca lease will be drawn up in due course." Such an agreement can be specifically enforced as a completed contract. 225 Ind Cas 264 : AIR (Vol 34) 1947 Sind 6.

——Agreement to renew.

(Coutts-Trotter, C. J., and V. S. Rao, J.) — A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal is a contract which is capable of specific performance. Such a contract is not void for uncertainty (Krishnan, J., d ffering). 102 Ind Cas 246 : 50 Mad 595 : 25 M L W 525 : 1927 M W N 318 : 38 M L T 233 : AIR (Vol 14) 1927 Mad 513 : 52 M L J 443 (DB).

——In the absence of a date fixed, from which the lease is to be granted, specific performance of an agreement to grant a lease cannot be ordered. 84 Ind Cas 178 : 3 Pat 968 : AIR (Vol 12) 1925 Pat 259 (DB).

——Where the lessor failed to execute the lease on proper stamp and the same was not therefore registered a suit by the lessee for specific performance against the lessor by compelling him to execute a properly stamped document, and for damages is maintainable. 84 Ind Cus 670 : AIR (Vol 10) 1923 Nag 73.

——Agreement to grant lease "hereafter"—Whether putting of execution of the deed is refusal to perform contract.

After the conclusion of an agreement to grant a permanent lease "hereafter" the prospective lessor asked for postponement of the grant of lease which was agreed to, held that the postponement did not amount to a refusal to perform, nor a rescission of the contract. 23 Ind Cas 360 : AIR (Vol 1) 1914 Cal 155 (DB).

——Unregistered lease—Admissibility in evidence—Indivisible contract.

A compulsorily registrable lease which is unregistered is admissible in evidence in a suit to enforce specific perfermance of the contract which must be deemed to have preceded the execution of the lease. It is not an inflexible rule that every contract to grant a leave is inadmissible and ought not to be specifically performed in respect of a portion only. (1910) 12 C L J 464 : 8 Ind Cas 794 (DB).

4. Minor.

——Minor—Contract by natural guardian—Transferee from minors—Enforcement.

The defendant purchased the properties from three minors and their mother subject to an agreement to convey the properties in favour of the plaintiff and his two brothers. In a suit for specific performance the defendant contended that he was not liable to perform the contract inasmuch as there could be no decree for specific performance against the minors who had sold to him.

Held, that the agreement of sale in favour of plaintiff could not be specifically enforced as against the minors and that consequently it was not enforceable against the defendant-transferee. 1946 M W N 463 : 229 Ind Cas 501 : AIR (Vol 34) 1947 Mad 94 : 59 L W 397 : (1946) 2 M L J 103.

——Specific performance—Suit for—Maintainability of—Compromise on behalf of minor entered by guardian without leave of Court—Compromise incorporated in decree of Court—Decree is binding on minor unless set aside by separate suit—Suit for specific performance based on compromise decree—Compromise decree cannot be attacked in defence.

A suit for specific performance of a contract entered into by a guardian brought against a minor would be defeated as the minor who has the option of repudiating the contract can in his own defence to the suit plead that he is not bound by the contract and so avoid its effect. But this reason cannot apply where there is a decree of the Court which had incorporated the contract. Although a minor is not bound by a compromise decree on the ground that his guardian ad litem had not obtained leave of the Court to compromise, the decree is not void, and unless and until it is set aside by a proceeding attacking it in a direct manner it is binding on the minor. The decree cannot be attacked collaterally. The doctrine of mutuality does not apply in such a case. Therefore in a suit for specific performance based upon the compromise decree the defendants cannot attack the decree on the ground that leave of the Court was not obtained by the guardian while entering into the compromise on behalf of the minor. AIR (Vol 33) 1946 Cal 438: 51 CWN 26: 224 Ind Cas 570 (DB).

——Contract by guardian—Benefit to minors.

One Budha, as guardian of three minors executed an agreement to sell minors' property to the plaintiff, and received Rs. 100 as earnest money. He applied to the Court and got permission to effect the sale. A draft of the sale deed was prepared by the plaintiff but it was not approved of by Budha and therefore he sold the same property to one G after getting Court's permission to that effect, on the ground that plaintiff had committed a breach of the conditions of the contract of sale. The plaintiff then brought the present suit or specific performance of the contract in terms of the draft. It was found that the sale to G was more beneficial to the minors both in regard to the purchase money and in regard to the conditions of sale than the contract of sale with plaintiff.

Held, that there was no completed contract of which specific performance could legally be claimed by the plaintiff, and further that even if there had been a completed contract, the Court would not enforce it specifically against the minors unless it was more beneficial than the sale to G. 79 Ind Cas 201 : 4 Lah 408 : AIR (Vol 11) 1924 Lah 181 (DB).

——Contract by guardian.

Specific performance of a contract by minor's guardian for the sale of immovable property which at the time was for the benefit of the estate, can be decreed notwithstanding there is an offer of better price subsequent to the contract. 82 Ind Cas 926 : 20 M L W 559 : 35 M L T 110 : 1924 M W N 878 : AIR (Vol 11) 1924 Mad 863 : 47 M L J 683.

——Joint Hindu family—Cases where contract can be enforced.

There is no general rule that no decree for specific performance can be passed against minors. Where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolves by inheritance on heirs, some or all of whom are minors, decree for specific performance can be made. Where a Hindu who is a member of a joint family enters into contract to sell his own share and dies and the property descends by survivorship to other members of the family some or all of whom

may be minors, it can be enforced against the undivided sons of the deceased. Where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is, exhypothesi not manager, not being member of the family but is merely their guardian, enters into a contract on behalf of some or all of the minors that contract cannot be specifically enforced even though it may be for purposes of necessity. Where a contract is by manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors even when some of the survivors are minors. A I R (Vol 11) 1924 Mad 680 : 46 M L J 575: 20 M L W 103 : 34 M L T 350: 1924 M W N 482: 47 Mad 692 : 80 Ind Cas 658 (DB).

——Contract by a guardian.

Specific performance will not be granted where de facto guardian has entered into a contract with a third party for the sale of the minor's property. To direct the contract to be carried into effect as against the minors is to sanction a plain breach of trust on the part of de facto guardian. AIR (Vol 11) 1924 Pat 81 : 4 P L T 553 : 2 Pat L R Civ 181: 78 Ind Cas 483 (DB).

——Joint Hindu family.

Where the manager of a joint Hindu family including minors, enters into a contract on behalf of the family, he does not do so as guardian for the minors but as Manager of the family and the contract can be specifically enforced against the whole family, including even the minors. The suit for specific performance will not be dismissed on the ground that the contract lacks mutually having been made by or on behalf of minors who are not competent to contract. A I R (Vol 9) 1922 Nag 193 : 18 N L R 67 : 68 Ind Cas 346.

——Central Pro. Court of Wards Act (24 of 1899), S. 16 (2) (b)—Contract by guardian—No benefit to minor.

The words "for the preservation and benefit of such property" in S. 16 (2) of the Court of Wards Act should be interpreted in the light of the usual powers of guardians to bind the estates of minors.

A decree for specific performance of a contract for sale made by a guardian should not be passed against a minor unless the Court is certain that the agreement and its enforcement are both for the benefit of the minor. AIR (Vol 5) 1918 Nag 198: 45 Ind Cas 192.

5. Mortgage.

——Agreement to mortgage—Enforcement — Compensation.

A contract to mortgage certain property would not confer a right to claim specific performances. It must either be shown that to compensate in money would not be adequate relief or that he had actually advanced the money on the proposed mortgage. A I R (Vol 37) 1950 Kut 86.

——Essentials for granting specific performance.

An agreement for a mortgage was made between the parties, the purpose of which was to arrange the terms upon which the respondent was to grant, for the true amount of the indebtedness, whatever this might be, a mortgage of property, which had formerly been the subject of an agreement for sale and partnership between the parties. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by solicitors on behalf of the respondent, and the mortgage itself was actually engrossed and the stamp paid for by the respondent.

Held, that the property being identified and the terms of the loan being fixed, the document constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms, that there was a valid agreement charging the property with whatever sum was actually due, together with interest, and that a proper mortgage ought to be executed to carry out those terms, for nowhere was the binding effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative unless this was first done, and the fact that the action was begun before the account was settled does not deprive the plaintiffs of all right to relief. AIR (Vol 15) 1928 P C 80 : 54 M L J 325 : 7 Pat 305 : 26 A L J 124: 55 I A 107: 30 Bom L R 305 : 47 C L J 302 : 1928 M W N 154 : 32 C W N 565 : 27 M L W 740 : 107 Ind Cas 337.

——Agreement to lend money.

A suit for specific performance of an agreement to lend money on a mortgage does not lie. The remedy of the mortgagor is to sue for damages where a portion of the consideration of the mortgage is not paid. AIR (Vol 12) 1925 Mad 62 : 47 M L J 435: 20 MLW 548 : 47 Mad 698 : 20 M L W 17 : 10 Ind Cas 5.

6. Principles.

——Specific performance cannot be refused to a purchaser merely on the ground that another person offered a higher price after the contract was concluded. AIR (Vol 14) 1927 Cal 889: 104 Ind Cas 527 (DB).

——Readiness and willingness of plaintiff—Proof of —Discretion of Court.

To succeed in a suit for specific performance of a contract or for damages for the breach thereof, the plaintiff must prove his readiness and willingness to perform his part of the contract. 'Readiness and willingness' used in such a connexion imply not only the disposition but the capacity to perform the contract. The plaintiff is absolved from showing that he is ready and willing to perform his part of the contract if the defendant has repudiated the contract before the suit for specific performance is brought. The claim for a decree for specific performance of contract is not a matter of right. The Court has to consider the whole of the surrounding circumstances and the position of the parties and then to consider whether in the exercise of its discretion, no doubt to be exercised on well known principles, the Court should grant such relief or grant damages in lieu thereof. AIR (Vol 13) 1926 Cal 181 : 88 Ind Cas 737 (DB).

—— Discretion—Limits of—Completed contract.

The Court may refuse to enforce specific performance of a contract at suit of a party who has innocently made a representation to the other in cases where the party misled would have no right to rescind the contract. But the position is entirely different where a party comes to Court and seeks relief on completed transactions. There is no longer any discretion in the Court to refuse to give the plaintiff the appropriate relief unless it is established that at law he is not entitled to the relief. A I R (Vol 13) 1926 Pat 539 : 96 Ind Cas 468 (DB).

— Discretion.

Where the lower Court has decided that in the exercise of its discretion it would not grant a decree for specific performance the Appellate Court should be slow to interfere with the exercise of such a discretion. AIR (Vol 11) 1924 Bom 119: 77 Ind Cas 275: 48 Bom 259 : 25 Bom L R 1037 (DB).

——Keeping alive contract after — Breach by promisor—Right of promisor to ask for specific performance.

If the promisee keeps the contract alive for his own purpose, he also keeps it alive for the benefit of his opponent; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised' notwithstanding his previous repudiation

of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

But the right held to be kept open under the above doctrine is a purely legal right implied in the "continuance" of the contract, which is referred to in the last sentence of S. 39 of the Indian Contract Act. It seems doubtful whether such a right exists in a case falling under the provisions of S. 54 of the Indian Contract Act, which expressly enacts that the promisor cannot, after a breach on his part, "claim the performance of the reciprocal promise." But assuming that it does after a suit has been filed for specific performance, the question, whether a decree should be granted or refused, is one purely for the Court in the exercise of its jurisdiction on judicial principles, and the domain of strict law is superseded by the domain of discretion and equity. A I R (Vol 11) 1924 Bom 119 : 77 Ind Cas 275: 48 Bom 259 : 25 Bom L R 1037 (DB).

——The general rule of equity is that if a thing is agreed upon to be done though there is a penalty annexed to secure its performance, yet the very thing itself must be done. A I R (Vol 11) 1924 Lah 151: 76 Ind Cas 91 : 4 Lah 327 : 5 L L J 462 (DB).

——There is no law which compels a vendor to insist on specific performance. A I R (Vol 11) 1924 Rang 232 : 79 Ind Cas 750 : 2 Rang 45 (DB).

——Specfic Relief Act—Applicability.

In localities where the Specific Relief Act is not in force, the cases of specific performance are governed by rules of justice, equity and good conscience. The jurisdiction to grant specific performance is independent of the Specific Relief Act. A I R (Vol 4) 1917 Mad 1007 : 63 Ind Cas 114 : 13 L W 591 (DB).

7. Reliefs.

——Time for payment—Extension of.

A decree for specific performance directed the payment by the plaintiff of the purchase money into Court within three weeks from the date of judgment. The plaintiff however, committed default and applied for extension of time after the expiry of the time allowed by the decree.

Held, the Court had the power to enlarge the time; and the power can be exercised on sufficient cause shown even if the application is made after the date fixed by the decree.

Per Thiruvenkatachariar, J. — The words "in the same case" in the last sentence of S. 35, Specific Relief Act (1 of 1877) refer to Clause E. (1930) 59 M L J 351 (DB).

——Faiture to pay balance of price—Damages.

Plaintiff's property was under mortgage in favour of a bank. He agreed to sell it to defendants on payment of a certain sum as earnest-money. The important clauses of the agreement were :

"3. That the vendee will arrange with the Manager, Bank of Upper India, to get transferred from the said vendor's accounts to the said vendee's accounts the balance of the price, being rupees three lakhs and twenty-three thousand, to which the vendors give their free consent."

By Cl. 5 the vendors confirmed this sale finally and agreed to release and free the said villages from all encumbrances, except in case of litigation as provided in Cl. 4."

The transfer mentioned in Cl. 3 did not take place and plaintiffs then sued for specific performance.

Held, that the proper decree would be to the effect that the defendant in the suit do pay to the plaintiffs a sum by way of damages, made up of the balance of account of purchase money with interest and costs. AIR (Vol 15) 1928 PC 51 : 108 Ind Cas 350 : OWN 245 : 1929 M W N 17.

——Election of.

Per Macleod, C. J.—It is not desirable in a suit for specific performance that the plaintiff should be allowed, when seeking alternative reliefs, to let his alternative choice be determined by fluctuations in the market. A I R (Vol 13) 1926 Bom 189 : 98 Ind 358 : 28 Bom L R 126 (DB).

—— Damages when can be allowed.

Per Macleod, C J. — If a party sues for specific performance and in the alternative for damages, the alternative claim is only good in the event of the Court holding that it is not a case for decreeing specific performance. The Court has a discretion to decree specific performance, and if the plaintiff will not take that to refuse him damages; and the Court cannot be deprived of its discretion by the plaintiff electing, either before or after the hearing commences, not to ask for specifice performance. A I R (Vol 13) 1926 Bom 189 : 98 Ind Cas 358 : 28 Bom LR 126 (DB).

——Measure of damages.

In a suit for specific performance of a contract for sale of immovable property, or in the alternative for damages, the measure of damages, if there is a breach and specific performance is not decreed, is not necessarily the same as in a suit for damages for breach of contract. In such a suit if the plaintiff disregards the breach and asks the Court to compel the defendant to fulfil his contract, the Court may say it will not compel the defendant to convey, but will order him to restore any advantages he has secured under the contract and pay such damages as it may think fit. AIR (Vol 13) 1926 Bom 189: 98 Ind Cas 358: 28 Bom L R 126 (DB).

——Possession.

Possession also can be claimed in a suit for specific performance where possession is a relief consequent on a decree for specific performance. A I R (Vol 13) 1926 Mad 1117 : 51 M L J 418 : 98 Ind Cas 39.

——Time for payment—Extension of.

As an order for specific performance of a contract for transfer of immovable property is in the nature of a preliminary decree and as the Court does retain power to make any stipulation it thinks fit with reference to the performance that power to extend time vests in the Court which actually passes the order for specific performance although it is an Appellate Court.

In considering whether time should be granted it has to be remembered that the delay need not be explained so minutely in case of the sort as in a case, for instance, under the Limitation Act, where it is sought to excuse a bar of limitation. Delay in such a case should be looked at more leniently than in a case of limitation. A I R (Vol 13) 1926 Mad 144 : 49 M L J 152 : 90 Ind Cas 605 : 22 M L W 366.

——Agreement to lend money.

A suit for specific performance of an agreement to lend money on a mortgage does not lie. The remedy of the mortgagor is to sue for damages where a portion of the consideration of the mortgage is not paid. AIR (Vol 12) 1925 Mad 62 : 47 M 698 : 80 Ind Cas 5.

——Price to be fixed by a third party—Inadequacy.

Where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration and this inadequacy of consideration would, of course, be strengthened as a defence, if any circumstances arose which threw a doubt on the accuracy with which the valuation was made. If the undervalue were such as to convince the Court that the valuers had acted under fraud or mistake the contract would be incapable of enforcement in equity; but it is otherwise if the undervalue did not so convince the Court. 78 Ind Cas 1037 : 46 All 211 : 22 A L J 76 : 5 L R A Civ 63: AIR (Vol 11) 1924 All 360 (DB).

——Abandonment of relief as to specific performance.

Where the plaintiff expressly makes an alternative prayer in the plaint for damages, not only as a substitute for specific performance but also coupled with a prayer in the alternative for rescission of the contract plaintiff may give up claim for specific performance and still claim damages. 77 Ind Cas 275 : 48 Bom 259 : 25 Bom L R 1037 : AIR (Vol 11) 1924 Bom 119 (DB).

— Damages, not prayed.

Court can award damages in a suit for specific performance though not specifically prayed for. It ought to award damages when it thinks that damages should be awarded. This principle applies even in cases where specific performance is decreed. 83 Ind Cas 1047 : 5 Lah 509 : 6 L L J 286 : AIR (Vol 11) 1924 Lah 713 (DB).

——Time for payments — Extension of—Rescission of contract.

Where plaintiff was given a decree for specific performance of a contract to sell on condition of his paying a certain amount to defendant within a specified time.

Held, the decree is in the nature of a preliminary decree, the Original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extention of the time. The vendor may either file a fresh suit for rescission of the contract or may in the same suit apply to the Court to rescined the contract. The contract is not determined by mere failure of the plaintiff to pay the amount within the specified time. Though certain persons entitled to the benefit of the contract refused to join the plaintiffs in the suit and have been joined by them as defendants, the decree for specific performance can be granted. 72 Ind Cas 868 : 17 M L W 216 : 1923 M W N 1: 46 Mad 148 : AIR (Vol 10) 1923 Mad 284 : 44 M L J 107 (DB).

——Extension of time.

Under a contract of sale the defendant agreed to sell to the plaintiff certain immovable properties, but in spite of the fact the contract fixed a certain time there was considerable delay on both sides in taking steps for the completion—the parties doing the thing in a leisurely way. The defendant however suddenly sent a notice to the plaintiff asking him to complete the contract in four days threatening to forfeit the deposit on default.

Held, in a suit for specific performance.

(1) The parties can by a special contract stipulate that time should be the essence of the contract.

(2) That considering the circumstance of this case the defendant's notice was unreasonable, that time was not the essence of the contract that the parties were not prejudiced by the delay and that specific performance can be decreed.

General principles as to jurisdiction in equity mentioned. 69 Ind Cas 13 : 24 Bom L R 203 : AIR (Vol 9) 1922 Bom 14 (DB).

——Suit for—Prayer for possession.

A suit for specific performance may also ask for possessien to be given to the plaintiff. 22 C L J 383 : 16 Ind Cas 988 : AIR (Vol 2) 1915 Cal 825 (DB).

8. Sale.

(a) General
(b) Time of Contract

(a) General.

——Agreement to re-sell—If unenforceable because of want of mutuality.

Where an option is given to the vendor to have a re-sale of the property on payment of certain price, on making a request to the vendee for the same, as soon as the vendee makes the request to the vendee to sell him back the property, the contract becomes binding as much on the vendee as on the vendor and is therefore mutual and is enforceable. In fact the contract of resale is an undertaking by the purchaser of which the sale by the vendor forms the consideration. The vendor by executing the sale deed has already performed the part assigned to him in the transaction. Having taken the benefit of the performance of that part by the vendor, the vendee cannot be allowed to resile from his undertaking. ILR (1950) All 32 (DB).

——Agreement to sell by three persons — One of them not competent to contract—Specific performance against others—If can be enforced.

Where three persons agree to sell a certain property which belongs to them as tenants in common and one of them has no powers to enter into the agreement, the purchaser is entitled to have specific performance of the agreement against the other two in respect of the two one-third shares belonging to them. (1950) 54 C W N 770 (PC).

— Suit for—Parties—Suit for specific performance of agreement to sell—Sons of executants of agreement. If necessary parties. See (1949) 2 M L J 568 : AIR (Vol 37) 1950 Mad 91.

——Agreement to sell by Hindu father—Suit for specific performance — Inability of the father to convey the shares of his sons — If a ground for refusing relief to plaintiff.

Where a person seus for specific performance of an agreement to sell executed by a Hindu father and another and simply impleads them alone without making the sons parties, the question of the inability o the father to convey the shares of his sons cannot be pleaded in defence as a ground for refusing specific performance where the purchaser is willing to take such title as the father has. 62 L W 572 : AIR (Vol 37) 1950 Mad 90 : 1949 MWN 573 : (1949) 2 M L J 342 (DB).

——Suit for specific performance of prior contract of sale—Defence of bona fide purchase by later purchaser—Onus.

It lies upon the party seeking to defeat a prior contract for sale of land to prove that he is a purchaser for value bona fide and without notice of the previous contract. The initial burden is upon the purchaser. It may be that very little evidence on the part of the purchaser is sufficient to discharge the onus in a particular case.

Where there is evidence that the subsequent purchaser had actual notice of the prior agreement to sell he cannot be held to be a bona fide purchaser for value without notice. 62 L W 377 : 1949 M W N 384 : AIR (Vol 36) 1949 Mad 762 : (1949) 1 MLJ 557.

——Suit for—Specific performance becoming impossible owing to acquisition of property under Land Acquisition Act—Relief against compensation money—If tenable.

The plaintiff sued for specific performance of a contract of sale of certain immovable property. The defendant contended that the suit was not maintainable as proceedings under the Land Acquisition Act had been started in respect of the property. Even though warned in this manner, the plaintiff did not choose to amend his plaint and ask for damages either simpliciter or even in the alternative. The suit went on and the proceedings for acquisition also went on, and the suit terminated against th plaintiff. The plaintiff appealed. The respondent raised a preliminary objection that inasmuch as the land acquisition proceedings had long since terminated, there was no possibility of specific performance and the appeal was liable to be dismissed on that ground alone. The plaintiff on the other hand contended that he was entitled to the compensation money lying with the Collector and relied on S. 73 (2) of the T. P. Act and S. 91 of the Trust Act.

Held also that an amendment of the plaint could not be allowed at this late stage. Specific performance as it became impossible owing to the compulsory acquisition of the property, and that the plaintiff was not entitled to the compensation money into which the property was converted because the contract of sale created no right or interest in that property in his favour, and that neither S. 73 (2) of the T. P. Act nor S. 91 of the Trusts Act applied to the case.

Held, also that an amendment of the plaint could not be permitted as it was late. ILR (1947) Nag 328: 1947 N L J 253 : AIR (Vol 34) 1947 Nag 254 (DB).

— There is no obligation on the part of the vendor of property who had delivered to the purchaser an unregistered document of sale to execute any further deeds of sale if in the face of the fact that the purchaser could have enforced his rights to secure registration by proper proceedings he fails to do so. See under S. 12, Specific Relief Act. 108 Ind Cas 782 : AIR (Vol 15) 1928 Mad 344.

——Fresh sale-deed.

A fresh deed can be ordered to be executed in a suit for specific performance of a contract to sell if the deed already executed is for any reason, removed from the vendee's control before its registration by loss or fraudulent suppression on the part of the vendor. AIR (Vol 13) 1926 Lah 30 : 89 Ind Cas 414 (DB)

——If an offer to sell property to a person is not accepted by the latter in his life-time, his legal representative cannot claim to have a right to accept the offer and sue for specific performance. A I R (Vol 12) 1925 Bom 431 27 Bom L R 249 : 92 Ind Cas 16 (DB).

——An agreement for sale with condition that it is subject to the approval of the solicitor is perfectly valid and enforcible agreement. AIR (Vol 12) 1925 Cal 324 : 78 Ind Cas 962 (DB).

——Oral completed contract — Reducing of terms into writing with an additional term — Claim on original contract.

Plaintiff and defendant entered into an oral contract for the sale of immovable property, and the earnest money was paid. Afterwards a kabala was drawn up which contained the terms of the contract but an additional term which was material to the contract was also inserted in the kabala. The defendant signed the kabala in ignorance of the additional condition as the kabala was in English and defendant did not know English. There was no agreement that the contract between the parties was not to be complete till formal kabala had been drawn up.

Held, on the defendant's acceptance of the offer, and the payment of earnest money there was a valid and binding contract created between the parties. The kabala did not constitute the contract between the parties, but was only intended as evidence of the contract that had already been entered into, and consequently the insertion of the additional condition in the kabala could not be taken as binding on the defendant. The kabala though vitiated by the material alteration did not prevent the plaintiffs from basing their claim on the parol agreement, and enforcing the original contract. A I R (Vol 12) 1925 Sind 342 : 86 Ind Cas 895.

——Right to repudiate.

The title which the vendor must show must be a title to require to join in the conveyance : he has no right to say that some other person is willing to enter into a contract. and to force the title of that other person on the purchaser.

When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of from any other person, the purchaser, as soon as he finds that to be the case, may say, "I will have nothing to do with it," and he may repudiate the contract.

This right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose. AIR (Vol 11) 1924 Bom 252 : 25 Bom L R 610 : 87 Ind Cas 230.

——No distinction can be drawn between a contract for purchase and a contract for sale. AIR (Vol 11) 1924 Pat 81 : 4 P L T 553 : 2 Pat L R Civ 181 : 78 Ind Cas 483 (DB).

——Where there has been part performance.

Defendant agreed to sell to the plaintiff two pieces of lands and a house. The agreement was reduced to writing on a plain paper. Plaintiff was put in possession of the lands : the house was conveyed by the defendant's passing a deed of sale on a stamped paper, but the sale deed was not registered, nor any sale-deed of the lands was ever passed. Agreement to sell also was not brought on record. In a suit by plaintiff for specific performance of the agreement by ordering the defendant to execute a sale deed in respect of the lands and to deliver up possession of the house.

Held, that as the agreement had been partly performed by placing the plaintiff in possession of two pieces of lands the plaintiff was entitled to call upon the defendant to execute a deed of sale of the lands and the house and to the delivery of possession of the house. AIR (Vol 8) 1921 Bom 401 : 45 Bom 1170: 23 Bom L R 506 : 62 Ind Cas 637 (DB).

——Contract of sale—Suit for—Possession—Whether can be prayed for.

In a suit for specific performance of contract of sale, a claim for delivery of possession may be made unless it is contrary to the contract. AIR (Vol 7) 1920 Pat 89 : 5 Pat L J 314 : 1 Pat L T 325 : 2 U P L R Pat 108 : (1920) Pat HCC 266 : 56 Ind Cas 322 (DB).

——Contract to sell—Pleading and proof—Variation —Effect.

The mere fact that the contract prayed is different from that set up in the plaint will not entail a dismissal of a suit for specific performance thereof. AIR (Vol 3) 1916 Mad 1072: 31 Ind Cas 1 (DB).

——Decree, form of.

A decree for specific performance of a contract to sell should direct the person in whom the property vests to execute a conveyance. AIR (Vol 1) 1914 Mad 462 : 26 M L J 518 : 23 Ind Cas 560 (DB).

——Contract to re-sell to the vendor—Rule of construction of Indian contracts.

Where the purchaser of a piece of land enters into an agreement to re-sell that plot of land to the vendor in case the vendor builds a house on it within a stipulated period and afterwards refuses to abide by it, the vendor is entitled to a decree for specific performance of the contract. The contracts of the people of India ought to be liberally construed. (1912) 15 C L J 332 : 14 Ind Cas 820 (DB).

(b) Time of contract.

——Contract for the sale of "protected land" under the U. P. Regulation of Agricultural Credit Act (XIV of 1940).

'Protected land' cannot according to the U. P. Regulation of Agricultural Credit Act be alienated without the permission of the Sub-Divisional Officer. So when a proprietor of "protected land" agrees to

sell it without obtaining the necessary permission and after obtaining such permission does not execute the sale deed within the time allowed and sells it to a different person, the party to whom it was originally agreed to be sold cannot obtain specific performance of the cantract to sell to him. AIR (Vol 37) 1950 All 692.

——**Right to claim — Non-payment of full purchase money — Effect — Readiness and willingness to perform contract—Duty of plaintiff to allege and prove.**

Ordinarily, non-payment of the full purchase-money is not a ground for denying a plaintiff's claim for specific performance of a contract of sale. Where time is not of the essence of the contract, courts would relieve against such failure if there is nothing inequitable, in the circumstances, to interfere with and modify the legal right. But it is the duty of the plaintiff to allege and if denied, to prove that he has been always continuously ready and willing to perform the contract on his part. AIR (Vol 35) 1948 Cal 147 : 82 C L J 273.

——**Sale — Where no time is fixed.**

On a consideration of the terms of an original contract of sale and its subsequent variations it was found that no time was fixed for completion of the sale under the varied contract, and that it must be implied that it was to be completed in a reasonable time which had clearly elapsed by the date of the institution of the suit by the vendor which was brought without delay.

Held, that the vendor was entitled to specific performance of the contract of sale. AIR (Vol 17) 1930 P C 165 : 32 Bom L R 798 : 34 C W N 681 : 123 Ind Cas 712.

——**Where no time for completion is fixed.**

The plaintiffs claimed specific performance alleging a contract of sale, the defendants who were subsequent purchasers from the plaintiff's vendor denying it and alleging that there was not even negotiation for a contract. There was no dispute as to the subject-matter of the alleged contract. The plaintiffs were actually put into possession of the property which was the subject-matter of the contract the price was arranged and earnest money was paid. The defendants had ample notice of the plaintiff's claim; in fact, the purchase was not completed by them until after the institution of the plaintiff's suit.

Held, that though the time for the completion of the plaintiff's contract was not specifically fixed it would be the duty of the parties to complete it within a reasonable time and the plaintiff was entitled to succeed. AIR (Vol 16) 1929 P C 195: 56 M L J 785: 30 M L W 34 : 116 Ind Cas 388.

——**Whether time is essence—Intention of parties.**

Equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. AIR (Vol 11) 1924 Lah 151 : 4 Lah 327 : 5 L L J 462 : 76 Ind Cas 91 (DB).

——**Cause of action.**

The cause of action for a suit for specific performance of contract for sale by a person who is in possession of the property in pursuance of an unregistered kobala dates from the time when he becomes aware of a subsequent sale by his vendor. AIR (Vol 15) 1928 Cal 754 : 116 Ind Cas 370 (DB).

——**Contract Act, S. 55—Contract for sale of land—Time for performance — Extention of—Subsequent fixing of time limit—Default.**

On the 7th February, 1914, an agreement for the sale of certain lands was entered into and the purchase money was to be paid and the sale completed about the end of April. The vendee being unable to find the money the time for completing the sale was from time to time extended until on 14th December 1916 the vendor gave a notice calling upon him to pay the purchase money within a week. The vendee failing to comply therewith the vendor cancelled the contract. The vendee brought a suit for specific performance and contended that reasonable time was not given to him in making time the essence of the contract and that his previous conduct was not relevant in judging the reasonableness of the time.

Held, that the contention failed. AIR (Vol 7) 1920 Mad 447 : 27 M L T 131: 11 L W 473 : (1920) MWN 290 : 57 Ind Cas 485 (DB).

——**Contract for the sale of land — Time not of the essence.**

In the case of a contract for the sale of land time is not of the essence unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not disentitle a party to a relief unless the delay has been gross. Cases examined. A I R (Vol 2) 1915 P C 83 : 40 Bom 289 : 43 I A 26 : 30 M L J 186 : 3 L W 239: 19 M L T 184: 14 A L J 225: (1916) 1 M W N 229: 18 Bom L R 163: 23 C L J 358: 20 C W N 744 : 32 Ind Cas 246.

——**Vendor and vendee — Agreement to sell — Payment by instalments—Default—Forfeiture on default —Penalty.**

An agreement to sell provided that payment be made by instalments and on default the contract be forfeited and determined at the option of the vendor, time being agreed to be the essence of the contract. On default being made the vendor by notice cancelled the contract. The purchaser sued thereupon for specific performance and relief from forfeiture. It was held that specific performance cannot be decreed but the stipulation for forfeiture being penalty, the vendee should be relieved against it. AIR (Vol 2) 1915 P C 94 : 33 Ind Cas 323.

9. Suit for.

——**Scope of suit — Suit based on written document —Prayer in respect of property not covered by deed —If can be allowed.**

A plaintiff suing for specific performance of a written and registered contract, taking his stand on a registered deed, cannot be allowed to go outside the terms of that document and ask for specific performance in respect of property not covered by the deed. The Court will not go outside the ambit of the written agreement. 1948 A M L J 1.

——Suit for — Necessary parties. AIR (Vol 32) 1945 Cal 355 : I L R (1945) 2 Cal 375.

——**Readiness and willingness—Plea of.**

In a suit for specific performance the plaintiff has to allege and if the fact is traversed he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. The failure to make good the averment brings with it the inevitable dismissal of suit. AIR (Vol 17) 1930 Pat 121 (DB).

——**When lies.**

An action for specific performance is appropriate only to the enforcement of obligations of an executory as distinguished from an executed contract. For this purpose an executory contract is an agreement which is not intended between the parties to be the final instrument regulating their mutual relations under their contract; an executed contract on the contrary, is a contract in which all has been already done to settle finally the relative position of the parties. AIR (Vol 15) 1928 Lah 535: 110 Ind Cas 316.

——Where time is fixed—Notice.

Where A agrees to sell certain property to B, and the deed of sale is to be completed within a certain time, the question whether B gave notice to A intimating his willingness to fulfil the contract does not arise. If B establishes that he was in fact willing to fulfil the contract throughout the period fixed he will be entitled to sue for specific performance. AIR (Vol 13) 1926 Nag 493 : 96 Ind Cas 949.

——Plaintiff's bankruptcy—Effect of.

The principle of mutuality applicable to suits for specific performance of contract, before the institution of the suit does not apply to the parties after the suit has been decreed and the money has been deposited by the purchaser before he becomes a bankrupt. Where a plaintiff in a suit for specific performance becomes bankrupt before the institution of the suit he cannot specifically enforce the contract but if he becomes bankrupt after the suit has been decreed and the purchase-money is deposited by him the case is otherwise. AIR (Vol 12) 1925 Cal 324: 78 Ind Cas 962 (DB).

——Agreement to lend.

A suit for specific performance of an agreement to lend money on a mortgage does not lie. The remedy of the mortgagor is to sue for damages where a portion of the consideration of the mortgage is not paid. AIR (Vol 12) 1925 Mad 62: 47 MLJ 435: 20 MLW 548: 47 Mad 698: 20 MLW 17: 80 Ind Cas 5.

——Where time is the essence.

Where the licensee, under a prospecting license, is given an option to have a mining lease concluded within a certain time and he does not exercise the option within that time, specific performance of the agreement to grant the lease cannot be decreed. AIR (Vol 12) 1925 Pat 259: 3 Pat 968: 84 Ind Cas 178 (DB).

——Repudiation.

If a plaintiff repudiates his obligation under a contract, this debars him from claiming specific performance of the contract by the other party. AIR (Vol 11) 1924 Bom 119: 48 Bom 258: 25 Bom L R 1037: 77 Ind Cas 275 (DB).

——Repudiation.

If A agrees to convey land to B at a future date and before that date conveys the land to C, A commits an anticipatory breach of his agreement, B can repudiate it. It is immaterial that A might, by repurchasing the land before the date fixed, recapacitate himself to perform his contract with B. AIR (Vol 11) 1924 Bom 119: 48 Bom 259: 25 Bom L R 1037: 77 Ind Cas 275 (DB).

——Implied contract—Executed consideration.

The defendant bought in auction the right to collect fees or tolls for slaughtering cattle in the slaughter house of the plaintiff corporation who brought a suit for the balance money due from him. The suit was dismissed by the lower Court on the ground that no written contract was executed as required by S. 45 of the Old District Municipalities Act, IV of 1884, (Madras).

Held, that the plaintiff Municipality is entitled to decree, as sued for, on the footing that defendant has enjoyed the right of collecting the tolls for the whole year contracted for and is liable as on an implied contract. AIR (Vol 11) 1924 Mad 162: 18 MLW 130: 1923 MWN 872: 45 MLJ 164: 72 Ind Cas 703.

——When lies.

A suit for specific performance lies when the document essential for the completion of the contract has not been executed, and if there is valid enforceable contract, either party is entitled to call upon the other to complete the transaction by the execution and the registration of the document of title. AIR (Vol 10) 1923 Cal 524 : 38 C L J 177 : 72 Ind Cas 98 (DB).

——A suit by the vendor for specific performance of an agreement to resell by the vendee does not lie after the pre-emptor has recovered possession from the vendee, even though the pre-emptor may be aware of the agreement prior to pre-emption suit. AIR (Vol 10) 1923 Nag 26: 18 NLR 202: 68 Ind Cas 498.

10. Title.

——Title of a vendee relates back to the date of agreement.

Title of the vendee in the case of a decree for specific performance relates back to the date of the agreement on which the suit is based and the decree cannot be rendered nugatory by intermediate conveyances.

Vendor contracted to sell a certain property to the vendee and mortgaged the same afterwards. After the mortgage was executed, the vendee got a decree for specific performance. Held, the mortgage was not binding on the vendee. AIR (Vol 13) 1926 Nag 95: 89 Ind Cas 14.

——Right to repudiate.

The title which the vendor must show must be a title to require to join in the conveyance; he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser.

When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of from any other person, the purchaser as soon as he finds that to be the case, may say, "I will have nothing to do with it" and he may repudiate the contract.

The right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performances. But the right must be exercised, if it is to be exercised, at all, as soon as the defect is ascertained. If, after ascertaining the defect the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose. AIR (Vol 11) 1924 Bom 252: 25 Bom L R 610: 87 Ind Cas 230.

——Flaw in.

When the plaintiff in a suit for specific performance of a contract to sell, gets a decree and then discovers that the defendant cannot give him a good title his proper course is to apply for a review or to file another suit to set aside the decree. AIR (Vol 10) 1923 Bom 26: 46 Bom 990: 24 Bom L R 496: 67 Ind Cas 667 (DB).

11. When refused.

See also N. 2.

——Grant of—Fraud and trickness of party— If ground for refusal—Damages, if can be granted.

A Court of Equity would refuse specific performance not only for fraud but also for trickness for he who comes into enquity Court must come with clean hands. Damages also should not be granted in cases where the Court of Equity would not have granted specific performance. AIR (Vol 34) 1947 Nag 254: ILR 1947 Nag 328: 1947 NLJ 253 (DB).

——Bankruptcy.

Specific performance of a contract by a bankrupt to buy property is not ordinarily granted against the trustee in bankruptcy of a vendee without his consent. AIR (Vol 17) 1930 Cal 113: 50 CLJ 208: 57 Cal 170: 123 Ind Cas 250 (DB).

——Obligations in future.

In a case of specific performance by a purchaser the Court will not direct a conveyance unless the plaintiff will pay what is due. The Court can decree that and the Court will therefore in that case give relief; but if that which the plaintiff is to give on a bill for specific performance be something to be done at a future time and which the Court cannot enforce,

the understood rule has always been that the Court in that case will never give relief. AIR (Vol 17) 1930 Pat 121 (DB).

——Evidence of contract suspicious.

Where specific performance of a contract to sell was claimed on the strength of a letter but it was found that the evidence of authenticity of the letter was unconvincing and there was no explanation suggested why, if such a letter had been in existence, the defendant was never called upon to execute a conveyance or deed of release in respect of the village and it was further found that for nearly 12 years the defendant collected the rents and paid the outgoings in respect of the property and appropriated the balance as his own profit.

Held, that there was grave reason for doubting the genuineness of the letter and that in any event such promise as there was in it, not being supported by any consideration, the claim for specific performance was rightly held to fail by the lower appellate Court. AIR (Vol 15) 1928 P C 75: 54 MLJ 462: 24 NLR 59: 47 CLJ 418: 30 Bom L R 821: 27 MLW 807: 108 Ind Cas 11.

——Agreement to re-convey.

Agreement to re-convey which purports to limit the purchaser's interest in the immovable property conveyed under the sale deed requires registration and if unregistered it cannot be made the foundation of a suit for specific performance. AIR (Vol 13) 1926 Bom 131: 27 Bom L R 1465: 92 Ind Gas 527 (DB).

——Refusal to register.

Where the executant of a document at the time of registration thereof, refused, the remedy of the vendee is only by suit under S. 77, Registration Act and not by a suit for specific performance against the vendor. (7 A. L. J. 887; 12 C. L. J. 464; 44 I. C. 361, Diss.) AIR (Vol 13) 1926 Mad 530: 50 MLJ 674: 49 Mad 302: 23 MLW 277: 100 Ind Cas 385 (DB).

——Where defendant has no title.

Defendant contracted to sell a house to plaintiff and also received earnest money but later on he refused to sell it, saying that the house really belonged to his wife and she refused to sell it.

Held, that the contract could not be specifically enforced but that the plaintiff was entitled to recover damages for breach of contract entered into with him by the defendant and that the measure of such damages was difference between the market value of the property and the contractual price. AIR (Vol 11) 1924 All 167: 21 ALJ 428: 4 LRA Civ 540: 75 Ind Cas 460 (DB).

——Where plaintiff will get no advantage.

Although plaintiff was entitled to specific performance it was refused as its grant would not have given him appreciable advantage and would have compelled him to defend pre-emption suits by defendants, the portion in question being situated between two other portions belonging to defendants themselves. AIR (Vol 11) 1924 Lah 163: 73 Ind Cas 1013.

——No Court of equity will grant specific performance where a trustee has entered into a contract for a lease which is in excess of his power or has entered into a covenant for renewal which is ultra vires. AIR (Vol 10) 1923 Cal 130: 36 CLJ 48: 27 CWN 159: 69 Ind Cas 701 (DB).

——Equity.

Even where time is essence of the contract and a party has failed to perform his part of the contract a Court of Equity may decree specific performance of justice so demands; but where the parties have expressly provided that the rule was not to apply to them the court will refuse relief except where they have expressly or by necessary implication waived the previous provisions. (1916) 33 Ind Cas 323 (PC).

——A suit for specific performance may be dismissed, without attacking any necessary implication that the refund of purchase money should also be refused. (1913) 17 CWN 100: 15 Ind Cas 268 (DB).

12. Miscellaneous

——If can be resisted by a defaulting party on the ground that contract was to become void on default by a party. See AIR (Vol 36) 1949 Mad 302: (1948) 2 MLJ 356.

——Bankruptcy.

The effect of a company going into liquidation while a contract entered into by the company before liquidation is subsisting is the same as when a party to a contract becomes bankrupt or insolvent. The bankruptcy or insolvency of a party may not alone necessarily result in such incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages, because it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorized to do so. (English case law discussed.) AIR (Vol 17) 1930 Cal 113: 50 CLJ 208: 57 Cal 170: 123 Ind Cas 250 (DB).

——Sp. Ref. Act—Applicability.

A contract can be specifically enforced with variation under certain circumstances only which are given in detail in the Specific Relief Act. AIR (Vol 12) 1925 Cal 1160: 85 Ind Cas 667 (DB).

——Cause of action.

The words on 'demand' indicate that the cause of action arises only after request. AIR (Vol 11) 1924 Mad 680: 46 MLJ 575: 20 MLW 103: 34 MLT 330: 1924 MWN 482: 47 Mad 692: 80 Ind Cas 658 (DB).

——Son of a Hindu party raising questions of his liability for father's obligations—Whether Court can go into.

If in a suit against a Hindu for specific performance of an agreement, his son raises any question as to his liability to fulfil his father's obligations, the Court will go into and decide such questions. AIR (Vol 1) 1914 Mad 634: 26 MLJ 218: 23 Ind Cas 621 (DB).

SPECIFIC PERFORMANCE OF CONTRACT.

See (1) Contract Act, S. 55.
(2) Specific performance.
(3) Specific Relief Act, Ss. 12 to 29.

SPECIFIC RELIEF.

See (1) Specific performance.
(2) Specific Relief Act.

SPECIFIC RELIEF ACT (1 of 1877)

——Specific performance—Prior contract in plaintiff's favour—Defendants contending that they purchased property from owner — Defendants must prove that they had no notice.

Where in an action for specific performance of the contract for sale of immovable property, the prior contract is established in plaintiffs' favour then the defendants who claim as subsequent transferees from the owner must prove that they are bona fide purchasers and that they had no notice of the contract in favour of the plaintiff. AIR (Vol 21) 1934 Pat 518: 15 P L T 469 : 1 B R 628 : 156 Ind Cas 558 (DB).

——Act embodies adjective and not substantive law.

The Specific Relief Act embodies what, in essence, is adjective law and the substantive law must be looked for elsewhere. AIR (Vol 30) 1943 Cal 417 : 47 C W N 557 : 77 C L J 216 : ILR (1943) 2 Cal 605: 208 Ind Cas 473 (FB).

——Scope of Act.

It is very necessary that orders made under the Specific Relief Act should specify with exactitude and clarity the specific act which the person holding a public office is being commanded to do. AIR (Vol 23) 1936 P C 269 : 2 B R 765 : 1936 A W R 848 : 1936 A L J 1204 : 41 C W N 33 : 64 M L J 194 : 60 B 900:

99 Bom L R 18 : (1937) 1 M L J200 : 45 L W 126 : 63 I A 408 : 164 Ind Cas 18.

——Invalid contract—Part of the contract within competence.

Contract may be invalidated either by the illegality of the object or the consideration itself or by the incapacity of the promisor to enter into such contract. In cases of inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But in cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. 122 Ind Cas 872 : 1936 A L J 45 : AIR (Vol 17) 1930 All 1 (FB).

—— Part of consideration not binding.

Where the amount of consideration which is found not binding upon the plaintiff is large, the Courts will not be justified in allowing the vendees to retain a portion of the property purchased by them. In such cases the proper course will be to give a decree to the vendor for possession of the property sold and give a charge to the vendees for the amount found binding upon the plaintiff. 106 Ind Cas 370 : 39 M L T 607 : AIR (Vol 15) 1928 Mad 168 (DB).

——Applicability —Scheduled Districts Act (XIV of 1874).

The Sonthal Perghanas, being a scheduled district within the meaning of Act, XIV of 1874, Specific Relief Act, does not 'propio vigore' extend to that area, but a prayer for the specific performance of a contract can be granted on principles of justice, equity and good conscience. 2 Pat L J 379 : 1 Pat L W 738 : 40 Ind Cas 174 : A I R (Vol 4) 1917 Pat 367 (DB).

——S. 1.

——Ss. 1 and 42 — Applicability—Khasi and Jantia Hills.

The Specific Relief Act does not extend to the Khasi and Jaintia Hills which form part of a Scheduled District. A suit for a mere declaration of title to a certain property in that territory without seeking consequential relief of possession and paying ad valorem court-fee thereon, is therefore maintainable. ILR (1950) 2 Assam 140 : AIR (Vol 37) 1950 Assam 214 (DB).

——S. 1—Specific performance—Remedy of—Nature of—Sonthal Parganas.

The remedy by way of specific performance is an ancient remedy and is to be administered as part of the law of justice, equity and good conscience. The mere fact that the restrictions imposed by the Specific Relief Act do not apply in the Sonthal Parganas does not affect the law that the remedy is applicable as part of the law of justice, equity and good conscience. Consequently, the Courts of the Sonthal Parganas have jurisdiction to grant the remedy by way of specific performance. AIR (Vol 22) 1935 Pat 1 : 16 P L T 83 : 14 Pat 249 : 1 B R 636 : 156 Ind Cas 618 (DB).

——S. 1—Santal Parganas.

Though it is doubtful whether a Court in the Santal Parganas can refuse to grant a declaratory decree in a suit, the value of which exceeds Rs. 1,000, simply because no consequential relief is prayed for, yet in a case asking not for a declaration of title only but also for consequential relief, such Court has jurisdiction. 60 Ind Cas 849 : 2 P L T 345 : 6 P L J 85 : 1921 P H C C 66 : AIR (Vol 8) 1921 Pat 1 (FB).

——S. 3.

——S. 3—Word "trustee"—Meaning of.

The word "trustee" in S. 3 includes every person holding expressly, by implication, or constructively a fiduciary character. AIR (Vol 32) 1945 Mad 281 : (1945) 1 M L J 460 : 1945 M W N 349 : I L R (1946) Mad 174 : 58 L W 248 (DB).

—— Ss. 3, Ill. (g) and (h) and 27 (h), Ill. 3—Notice—Purchaser of immoveable property—Vendor not in possession—Duty to inquire of rights of occupant—Failure to inquire—Effect of.

A purchaser of immoveable property of which the vendor is not in possession is bound, when he knows that another is in possession, to make an inquiry as to the nature of the interest of the person in occupation, and if he fails to make any inquiry he is deemed to have notice of any prior agreement between him and the vendor for a sale in favour of the occupant and of all equities which he may have against the vendor. The effect of confession, of omission to make an inquiry is that the purchaser becomes a trustee to the extent, of the interest of the person in occupation. The inquiry must be of the rights of the occupant on the date of the purchase. (1947) 52 Mys H C R 205 (FB).

——S. 8.

— S. 8—Suit for ejectment—Defence to such suit.

Equity regards all that as done which ought to have been done, and if the defendant, in an action of ejectment, had an enforceable right to enforce specific performance of a contract entered into, entitling him to remain in occupation of the land, it would furnish a complete defence to the action commenced by the plaintiff on the strength of his legal title. To invite the application of this doctrine, it is necessary to prove in the first place that there was a valid contract in pursuance of which possession was taken and the agreement is also of such a description that it was capable of being specifically enforced at a time when the subsequent suit for ejectment came to be determined. AIR (Vol 27) 1940 Cal 254 : 71 C L J 144 : 44 C W N 357 : 189 Ind Cas 249.

——S. 8—Encroachment—Compensation.

Where a trespasser, bona fide believing that he has title is allowed to construct buildings on a land and the owner allows this without taking steps against this, then, in equity, the Courts should allow compensation rather than order demolition, (1940) 42 P L R 324 (DB).

——S. 8 — Possessory title — Dispossession — Right to sue.

Plaintiffs had possession over a piece of land, which they used as their courtyard, and on which they had cattle troughs and a platform. Defendants unlawfully removed the cattle troughs and the platform and took possession of the land by building over it :

Held, that the plaintiffs had sufficient possessory title to maintain an action for possession of the land and removal of the buildings, even if it be assumed that the constructions not being of a permanent character, the licence was not coupled with a grant. AIR (Vol 22) 1935 All 123 : 4 A W R 1277 : 1935 A L J 123 : 159 Ind Cas 44 (DB).

——S. 8—Who may sue.

Where certain property was gifted to a school under the managership of A and A was directed to hold the same on behalf of the school :

Held, that A was entitled to maintain a suit for ejectment of a trespasser. AIR (Vol 18) 1931 All 450: 133 Ind Cas 790 (DB).

——S. 8—Defence.

That the plaintiff is as much a trespasser as the defendant is a good defence on the merits in an action in ejectment. A I R (Vol 18) 1931 Cal 76 : 58 C 561 : 52 CLJ 357 : 129 Ind Cas 860 (DB).

——S. 8—Exchange.

On the completion of the transaction of exchange right to property becomes vested in the parties, and the party should then sue for recovery of possession,

and not for specific performance of the contract of exchange. A I R (Vol 16) 1929 All 63 : 113 Ind Cas 753.

——S. 8—Specific performance—Assignment of property to be afterwards acquired — Property subsequently acquired—Relief for recovery of property—Not specific performance.

Where a person executes a document purporting to assign property to be afterwards acquired by him that property passed on its acquisition in equity to the Assignee provided the transfer is not forbidden by law. The relief for the recovery of property on the basis of such a document is not a relief for specific performance of a contract. A I R (Vol 12) 1925 Oudh 120: 27 O C 175: 11 O L J 619: 82 Ind Cas 333 (DB).

——Ss. 8 and 9—Suit for possession based on title—Title not proved—Deft. trespasser.

When a plaintiff sues for possession on the basis of title and fails to establish it he cannot be granted a decree under the first para of S. 9. 15 All 384, overruled.

Obiter—Previous possession may afford evidence of title and where the defendant is a purchaser and the plaintiff has been in continuous and peaceful possession he would be entitled to retain such possession against defendant. (1910) 33 All 174 : 7 A L J 1078 : 7 Ind Cas 495 (FB).

——S. 8—Plaintiffs title—Flaw in the titles of both plaintiff and defendant—Rival purchasers of same property under different decrees.

In a suit for possession, the plaintiff must establish his title to the property in question. Hence, when the plaintiff's suit to obtain possession of a property which their predecessors in title had purchased in execution of a decree for sale passed on a prior mortgage, and the defendants resisted the plaintiffs' claim on the ground that they were the representatives of another purchaser of the same property sold in execution of a subsequent decree passed upon a subsequent mortgage, the prior mortgagee not being a party to the suit upon the subsequent mortgage and the subsequent mortgagees not having been impleaded in the first mortgagee's suit.

Held, that the plaintiff's title was not of such a character as to justify a court in ousting the defendants. (1904) 1 ALJ 90 (93) (DB).

——S. 8—Agreement to renew Kanom—Specific performance—Subsequent purchaser with notice, rights of purchaser to eject.

Where there is only an agreement to renew a kanom for mortgage for 12 years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanom renewed under the agreement notwithstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement. (1901) 13 MLJ 217 : 27 M 202 (205) (DB).

—S. 9.

1. Applicability and scope.
2. Appeal.
3. Claim for mesne profits.
4. Constructive possession.
See also N. 11.
5. Co-owners.
6. Dispossession under order of court.
7. Immovable property.
8. 'Is dispossessed without his consent.'
9. Joint possession.
10. Jurisdiction and Power of Court.
11. Landlord and tenant.
12. Limitation.
13. Nature of possession to be established.
14. 'Otherwise than in due course of law.'
See also N. 11.
15. Parties to suit.
16. Revision
17. Res judicata.
See also N. 20.
18. Scope of inquiry.
19. Suit on title, decree if can be given.
20. Suit on title not barred.
21. S. 139 of Chota Nagpur Tenancy Act.
22. Other illustrative cases.

1. Applicability and scope.

——S. 9—Suit under—Relevant allegations—Possession and title—Preference.

In a suit under S. 9 of the Specific Relief Act, the only allegations that are relevant are those of a person's previous possession and his dispossession by the defendant. The title of the parties is not relevant and indeed it is specifically provided that the section does not bar any person from recovering possession of the property on the basis of his title. The result therefore, of this provision in S. 9 is that even if the defendant has a better title than the plaintiff, he cannot resist the plaintiff's suit for recovery of possession if the plaintiff proves the allegation made by him. AIR (Vol 37) 1950 All 407 (DB).

——S. 9—Scope an object.

All that the Court can do under S. 9 is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under S. 9, the question of the title of the respective parties is not adjudicated upon and therefore, it would be wrong to pass any order regarding the structures on the land.

Section 9 cannot be invoked unless the defendants have deprived the plaintiffs of actual physical possession. This section has nothing to do with questions of title. It is intended for the purpose of maintaining the possession of persons who are in actual physical possession of land and for discouraging persons from attempting to take physical possession of land from another by force. A I R (Vol 27) 1940 Cal 464 : 44 CWN 895 : 191 Ind Cas 803.

——S. 9—Suit under—Nature and scope.

In a suit under S. 9, the plaint must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiffs to be put into possession by the defendants such decree being based on previous possession and dispossession merely and not on title. AIR (Vol 27) 1940 Rang 91: ILR (1940) Rang 237 : 187 Ind Cas 875.

——S. 9—It is settled law that possessory title is good against everybody except the true owner and in case of wrongful ouster, the plaintiff is entitled to succeed upon the strength of previous possession, if the defendant fails to prove a better title. (1937) 1937 ALJ 1189.

——S. 9—Section 9 is a special additional remedy which is available in certain circumstances but it in no way precludes the successful assertion of a possessory title in the ordinary way in a proper case even though the suit is brought beyond the six months contemplated by that section. AIR (Vol 24) 1937 Nag 281 : 173 Ind Cas 680.

——S. 9—Action for recovery of property by owner—Suit, if lies under the Act.

The action of an owner of land for recovery of possession against a person wrongfully in possession is not an action under the Specific Relief Act and the

granting of relief is not discretionary in the Court. There can be no plainer action at law than an action of an owner for the recovery of his property. The relief is not equitable but is a legal right which the owner must be granted if he makes out his title. AIR (Vol 24) 1937 Rang 198 : 169 Ind Cas 389.

——S. 9—The public ferry remains in the possession of the public authorities and all that is let is a right to collect the tolls of that public ferry. Such a right to collect tolls is in no way immovable property and such lessee cannot recover possession under S. 9. AIR (Vol 23) 1936 All 856 : 1936 ALJ 1122 : 1936 AWR 923 : ILR (1937) All 193 : 166 Ind Cas 221 (2) (DB).

——S. 9—Possession with applicant—Distribution of land among villagers—Applicant out of possession—Applicant returning to possession — Complaint for criminal trespass is not the proper remedy — There being bona fide claim, the proper remedy is by way of a suit under S. 9. AIR (Vol 23) 1936 Rang 116: 37 Cr L J 527 : 161 Ind Cas 993.

——S. 9—Review.

A decision passed "forthwith" in a suit order S. 9 is not open to review by S. 9 itself. AIR (Vol 3) 1916 Mad 708 : 2 L W 1067 : 31 Ind Cas 307.

——S. 9—Suit for recovery of possession brought within six months from date of dispossession—Pleadings.

Where the defendants dispossessed the plaintiff without his consent of immoveable property otherwise than in due course of law and the plaintiff brought a suit within six months from the date of such dispossession to recover possession of the propety from which he had been ousted, it was held, that the plaintiff was entitled to be replaced in possession under S. 9, even though that section was not expressly pleaded. 1907 AWN 244 : 4 ALJ 601 (602).

2. Appeal.

——S. 9—Order in execution of decree—C. P. Code, S. 47.

No appeal lies from an order passed in execution of a decree in a suit under S. 9 of the Specific Relief Act. A I R (Vol 34) 1947 Nag 53 : I L R (1946) Nag 640 : 225 Ind Cas 499 : 1946 N L J 531.

——S. 9—Suit under — Nature of — Appointment of Receiver—Appeal.

Under S. 9, a suit for possession and mesne profits will not lie nor can the Court pass a decree for mesne profits prior to the suit. Nor can an order for mesne profits during the pendency of the suit be made under this section, nor can a Receiver be appointed. This section provides a special and comparatively summary remedy for a person dispossessed without his consent, and the section relates only to possession. An order in a suit for possession under S. 9 for appointment of a Receiver for collection of mesne profits is without jurisdiction. It is an order under O. 40, R. 1, Civil P. C. and is appealable. A I R (Vol 24) 1937 Sind 161 : 31 Sind L R 28 : 170 Ind Cas 12 (DB).

——S. 9—No appeal lies from an order made in execution of a decree passed under S. 9. A I R (Vol 19) 1932 Lah 416 : 33 P L R 463 : 13 L 798 : 140 Ind Cas 48.

——S. 9—No appeal lies from an order made in execution proceedings in a suit under S. 9. AIR (Vol 15) 1928 Lah 539 : 108 Ind Cas 385.

——S. 9 — An order passed in execution of a decree under S. 9 is not appealable. AIR (Vol 10) 1923 Lah 105 : 68 Ind Cas 760.

——S. 9 — Regular suit — Wrongly dealt with as under S. 9—Appeal—Procedure.

Where a suit based upon title is wrongly dealt with by the trial Court as a suit under S. 9 of Specific Relief Act the decision is appealable and the Appellate Court should send it back to the trial Court to be dealt with as a suit upon title, and not dismiss the suit in toto. A I R (Vol 5) 1918 All 241 : 40 All 637 : 16 A L J 611 : 46 Ind Cas 925 (DB).

——S. 9 — Decree under—Execution proceedings—Order not appealable.

No appeal lies against an order passed in execution of a decree made under S. 9 of the Specific Relief Act, as the term suit in the section includes an execution proceeding on the basis of the decree. A I R (Vol 5) 1918 Cal 925 : 45 Cal 519 : 26 C L J 325 : 22 C W N 446 : 42 Ind Cas 711 (DB).

——S. 9—Order in execution of decree under S. 9.

No appeal lies against an order made in execution of a decree passed under S. 9 as such decree is not itself appealable. AIR (Vol 4) 1917 Lah 21: 4 P W R 1917 : 21 P L R 1917 : 39 Ind Cas 375.

——S. 9—Execution—Order in—Limitation.

An order passed in execution of a decree under S. 9 is not appealable having regard to the provisions of S. 9 of the Specific Relief Act. A I R (Vol 2) 1915 Lah 100 : 45 P L R 1015 : 201 P W R 1915 : 28 Ind Cas 282.

——S. 9—Suit for possession and for damages if lies—Appeal against decree in such suit whether allowed.

A claim for damages ought not to be joined with a claim for possession under S. 9 of the Specific Relief Act. Where such a claim is joined and a decree is passed in the suit an appeal lies from such a decree. (1911) 8 A L J 910 : 11 Ind Cas 38.

——S. 9—Appeal from order passed under.

An order passed in execution of a decree passed under S. 9 is not appealable. (1902) 13 M L J 214 : 26 M 438 (440) (DB).

3. Claim for mesne profits.

——S. 9 — In a suit for possession under S. 9, mesne profits cannot be awarded. A I R (Vol 14) 1927 Mad 722 : 102 Ind Cas 661.

——S. 9 — A person who has secured a decree under S. 9 of the Specific Relief Act is entitled to recover mesne profits as against a person in possession other than the true owner and it is for the person in possession to prove that he has superior right to possession and to appropriate the profits. AIR (Vol 14) 1927 Nag 9 : 97 Ind Cas 1028.

——S. 9—A claim for mesne profits cannot be joined with a claim, under S. 9.

But where such a decree has been passed, so much of the decree as relates to possession should be allowed to stand. A I R (Vol 14) 1927 Rang 142 : 101 Ind Cas 630 : 5 Rang 123 : 6 Bur L J 58.

——S. 9—Claim for mesne profits if can be made in a suit under.

A claim for mesne profits ought not to be made in a suit under S. 9 of the Specific Relief Act, because the question of title (considered apart from possession) could not be directly decided in that suit and a relief which depends on title (such as a claim for mesne profits) could not be given therein. A I R (Vol 3) 1916 Mad 328 : 30 M L J 326 : 2 L W 157 : (1915) M W N 170 : 28 Ind Cas 1 (DB).

——S. 9—The mere fact that mesne profits cannot be recovered in a suit under S. 9 does not prevent the Court from granting restoration of possession. A I R (Vol 2) 1915 Mad 80 : 16 M L T 190: 25 Ind Cas 802.

——S. 9 — Plaintiff restored to possession — Subsequent suit by plaintiff for mesne profits—Burden of proof—Civil Procedure Code, S. 43.

One Lachmi Narain died possessed of certain immoveable property. He left him surviving a widow Muktha Kunwar. Narain Das obtained possession of some portion of the said immoveable property, as he alleged, under a lease from Mukhta Kunwar, and held possession at any rate for some months, down to the 27th November 1877. After the death of

Mukhta Kunwar one Sheo Kunwar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process dispossessed Narain Das. Narain Das thereupon instituted a suit under S 9, and having obtained a decree in that suit was restored to possession. He then instituted a suit against Sheo Kunwar to recover mesne profits for the time during which he was out of possession. As to this suit it was

Held (1) that the suit was not liable to be defeated by reason o S. 43 of the Code of Civil Procedure and (2) that the other issues that arose in the suit were whether the defendant was the true owner of the property, the burden of proving which was on him ; and, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant. 1902 A W N 139: 24 A 501 (503) (DB).

4. Constructive possession.

See also N. 11.

——S. 9—Mortgagee in possession.

A mortgagee in possession through tenants is entitled to invoke the aid of S. 9 on his tenants being ejected from possession by others. (6 C W N 616 ; 16 C P L R 154, not Foll. A I R (Vol 13) 1926 Nag 290 : 94 Ind Cas 70 : 22 N L R 30.

——S. 9—Suit for possession—Scope of—Enquiry.

Not only physical but constructive possession is sufficient to sustain a suit for possession under S. 9 of the Specific Relief Act. Constructive possession goes with title. A I R (Vol 5) 1918 Nag 105 : 48 Ind Cas 415.

——S. 9—Dispossession of tenant if dispossession of landlord—Attornment by tenants to stranger.

The dispossession of tenant by a trespasser is the dispossession of his landlord and entitles the landlord to a relief under S. 9 though a mere attornment by a tenant in actual possession to another person coupled with a refusal to pay rent to the proprietor does not amount to the dispossession of the proprietor under S. 9. A I R (Vol 3) 1916 Oudh 19 : 18 O C 353 : 3 O L J 588 : 32 Ind Cas 202 (DB).

——S. 9—Symbolical possession.

Where the plaintiff in a possessory suit is not able to prove his title and alleges that symbolical possession only was with him, the suit must be dismissed and the defendant's title should not be investigated by the Court. (1913) 21 Ind Cas 118 (DB) (Cal).

——S. 9—Suit by licensee—Maintainability.

A licensee of land if dispossessed by a trespasser is entitled to maintain a suit under S. 9 of Specific Relief Act. (1913) 15 O C 317 : 17 Ind Cas 469.

——S. 9—Right to rents.

Possession by receipt of rents may be disturbed and the person dispossessed might sue under S. 9 of the Specific Relief Act. Property in the actual possession of a tenant is capable of possession by the landlord. 33 Mad 452 : (1910) M W N 112 : 7 M L T 311 : 20 M L J 301: 5 Ind Cas 630 (DB).

——S 9.—Landlord and tenant.

Section 9 does not apply only to cases where there has been actual bodily dispossession of the plaintiff; it also applies where the complete ouster of the tenants is the ouster of the landlord to whom rent is paid and the latter can bring a suit under the section. (1909) 13 C W N 303 : 1 Ind Cas 150 (DB).

— S. 9 — Applicability of section — Collusion between person in actual possession and the trespasser —Effect of.

Section 9 contemplates the case of a person who, being in physical possession of a property, is dispossessed. So where plaintiff was in constructive possession of a plot of land through his tenant and the latter was dispossessed.

Held, that the plaintiff had no right to maintain a suit under S. 9.

Held further, that the plaintiff was not entitled to bring a suit even where subsequent to such dispossession the tenant in collusion with person who dispossessed refused to bring a suit. (1902) 6 C W N 616 (617) (DB): But see 13 CWN 303 (304): 1 Ind Cas 150.

——S. 9 — Possession through tenants — Ouster of tenants—Tenants not made parties—Jurisdiction.

Section 9 is not confined in its application to cases in which the plaintiff has been deprived of actual bodily possession.

Held that in this case the complete ouster of the tenant in actual occupation of the land amounted to the ouster of his immediate landlord to whom rent used to be paid. In a suit under the section instituted by the immediate landlord of the dispossessed tenants, who were not made parties to the suit, the Court made a decree in the plaintiff's favour.

Held that the non-joinder of the tenants did not affect the jurisdiction of the Court and the High Court would not interfere. (1897) 13 CWN 303 (304): 1 Ind Cas 150 (DB) : But see 6 C W N 616 (617).

5. Co-owners.

——S. 9—Dispossession by co-owner.

Where a co-owner in physical possession of property jointly with other co-owners is dispossessed by the latter he can institute a suit for recovery under S. 9 of the Specific Relief Act. A I R (Vol 13) 1926 Nag 148 : 8 N L J 182 : 93 Ind Cas 657.

——S. 9—Suit by a co-owner.

S. 9 of the Specific Relief Act includes the case of a co-owner of property seeking to be restored to possession jointly with a trespasser, of property from which the latter has ousted his co-owners along with him, even though those other co-owners do not claim possession of their shares; such co-owners not joining in the suit are not necessary parties to it A I R (Vol 9) 1922 Nag 115 : 18 N L R 71 : 5 N L J 151 : 65 Ind Cas 351.

——S. 9 — Dispossession — Suit on the strength of possessory title.

Where the co-sharer has been cultivating one field and another co-sharer other fields, one sharer cannot dispossess the other against his will from the field of which he has possession. Though the dispossessed co-sharer might have sued under S. 9 of the Sp. Rel. Act he is not bound to do so and he can rely upon his possessory title even after the period of 6 months has expired. A I R (Vol 6) 1919 Lah 237 : 104 P R 1919 : 53 Ind Cas 569.

——S. 9—Possession.

S. 9 of the Sp. Rel. Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter. AIR (Vol 4) 1917 Nag 31 : 44 Ind Cas 557.

——S. 9—Joint possession—Suit for.

A man in joint possession in immovable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole. Such joint possession can be restored by the procedure under the section if the plff. had been dispossessed in the manner and within the time mentioned in the section. AIR (Vol 3) 1916 Cal 562 : 19 C W N 1117 : 28 Ind Cas 570 (DB).

— S. 9—'Possession'—Explained —Dispossession as to whole—Whether co-sharer entitled to sue for possession of his share.

S. 9 of the Sp. Rel. Act refers to exclusive possession and a Court cannot grant joint possession, so that a party entitled to half a share cannot sue for possession, thereof when the dispossession is as to the whole. A I R (Vol 1) 1914 Cal 496 : 19 C L J 117 : 19 C W N 120 : 23 Ind Cas 618 (DB).

——S. 9—Possession of defined parcels—Possession through tenant.

A suit under S. 9 is maintainable by one co-owner in possession of specific portions of survey numbers. A landlord whose tenant has been dispossessed can bring a suit against a third party, S. 9 being applicable to constructive possession. (1911) 5 S L R 42 : 12 Ind Cas 190 (DB).

6. Dispossession under order of court.

——S. 9 — Suit under — Property in custodia legis under order under S. 145 of the Cr. P. Code — Allegation of dispossession even prior thereto — Maintainability of suit, if affected by attachment in proceedings under S. 145, Cr. P. Code.

The plaintiff claimed that he was a co-owner with the defendants of certain properties which the defendants leased to him and so was entitled to exclusive enjoyment. His possession was disturbed whereupon he filed a petition under S. 145 of the Cr. P. Code, but the Magistrate who was unable to say who was in possession, attached the property and put it in the possession of the local Tahsildar and directed the parties to file a civil suit. Instead of a regular suit, the plaintiff filed a suit under S. 9 of the Specific Relief Act within six months of the date when, according to him, he was dispossessed by the defendants. That suit was allowed. In revision

Held, that the mere order of attachment under S. 145 of the Cr. P. Code, was not sufficient to deprive the plaintiff of the right to relief in a suit under S. 9 of the Specific Relief Act, when the plaintiff relies upon his dispossession on a date prior to the proceedings under S. 145, which up to the time of his filing suit had left him out of possession. A I R (Vol 37) 1950 Mad 753 : 1950 M W N 19 : (1950) 1 M L J 13.

——S 9 and Cr. P. Code (V of 1898), S. 145 — Proceedings under S. 9 of the Specific Relief Act — If a proceeding under due process of law—S. 145, Cr. P. Code, if affects right of suit under S. 9, Specific Relief Act.

There is no reason to confine the due process of law mentioned in S. 145, Cr. P. Code, to a civil suit based upon title and to exclude a proceeding under S. 9 of the Specific Relief Act from the purview of the expression "evicted in due course of law". A proceeding under S. 9 of the Specific Relief Act is as much a proceeding under the due course of law as a title suit or any other proceeding.

A person cannot be deprived of the right of seeking a remedy under S. 9 of the Specific Relief Act on account of the proceedings having been instituted under S. 145, Cr. P. Code before the limitation for instituting a suit under S. 9 of the Specific Relief Act had expired. AIR (Vol 36) 1949 A 203 : 1948 O W N 366 : 1948 A W R (H C) 363 : 1948 A L W 364 : 50 Cr L J 237.

——S. 9—Date of dispossession—Dispossession from Sir and Khudkasht—If dispossession from village.

The possession of the village share is correlated to the possession of Sir and Khudkasht fields and the landlord would be deemed to have been dispossessed from the share when he or his tenant were dispossessed from the Sir and Khudkasht fields. A I R (Vol 36) 1949 Nag 126:I L R (1948) Nag 422:1948 N L J 337.

——S. 9 — Proceedings under S. 147, Criminal P. C., in respect of pathway by defendants — Plaintiffs putting up fence pending proceedings — Order in favour of defendants—Removal of fence—Suit under S. 9 by plaintiffs :

Held, suit was not maintainable and that the act of defendants in passing over the lands did not amount to dispossession within meaning of S. 9, Specific Relief Act. A I R (Vol 22) 1935 Cal 454 : 39 C W N 394 : 61 C L J 307 : 156 Ind Cas 924.

——S. 9—Where a person has been dispossessed by he Court and an objection preferred by him under O. 21, R. 100, Civil P. C. has been dismissed, he is not entitled to institute a suit under S. 9. A I R (Vol 19) 1932 All 703 : 1932 A L J 812 : 139 Ind Cas 366 (DB).

——S. 9—Order under S. 145, Cr. P. Code.

An order under S. 145, Cr. P. Code is no bar to suit under S. 9, Specific Relief Act, where the dispossession had taken place long before the order, confirming the status quo was passed under S. 145, Cr. P. Code. A I R (Vol 16) 1929 Rang 21 : 6 Rang 667 : 114 Ind Cas 643.

——S. 9—Decree for possession, under.

There is nothing in R. 97 of O. 21, R. 90 which prevents its being applicable to a decree for possession under S. 9 of the Specific Relief Act. A I R (Vol 13) 1926 Mad 353 : 23 M L W 157:1926 M W N 163 : 92 Ind Cas 61.

——S. 9 — Suit under — Cr. P. Code, S. 145 (4)—Order of attachment.

Prior to a suit under S. 9 of the Speific Relief Act in proceedings under S. 145 of the Cr. P. Code, the properties were attached and an order had been made adverse to the plff.

Held, that the suit was not maintainable.

Per Huda, J. But for an intervening attachment under S. 145 (4) of the Cr. P. Code, a mere order under S. 145 is not sufficient to deprive the plff. of his right to relief in a suit under S. 9 of the Sp. Rel. Act. A I R (Vol 5) 1918 Cal 137 : 22 C W N 931 : 43 Ind Cas 153 (DB).

——S. 9 — Possession—Possession through tenant—Eviction of tenant — Relinquishment by tenant.

A plaintiff is dispossessed within the meaning of S. 9 when his tenant is evicted from the land by the defendant. (1910) 12 C L J 483 (485):15 C W N 294: 7 Ind Cas 924 (DB).

——S 9—Order under S. 145, Cr. P. C.

An order under S. 145, Cr. P. C., dispossesses the unsuccessful party "in due course of law" and a suit by him under S. 9, Specific Relief Act, on the ground of dispossession by reason of the order is not sustainble. (1908) 7 C L J 547 : 12 C W N 696 (699) (DB).

7. Immovable property.

——S. 9 — 'Standing crops', whether movable or immovable property — Suit under S. 9 — Power of Court to go into question of title.

In a suit under S. 9, the sole question before the Court is one of possession. The Court cannot go into the question of title. As the Specific Relief Act does not contain any definition of immovable property or movable property, the expression "immovable property" in the said Act must be given the meaning which is given to it by S. 3 (25), General Clauses Act and standing crops must, therefore, be held to be immovable property for the purposes of a suit under S. 9 of the Specific Relief Act. A I R (Vol 22) 1935 Mad 134 : 1934 M W N 1375 : 40 L W 922 : 153 Ind Cas 332.

——S. 9—Immovable property, what is.

The right of a landlord to recover rent from his tenant is "immovable property". A I R (Vol 16) 1929 Bom 467 : 53 Bom 773 : 31 Bom L R 1242 (DB).

——S. 9—Hereditary archakarship is not immovable property.

Hereditary archakars are only servants of the temple subject to the disciplinary jurisdiction of the trustee. They have a right of suit if they are improperly prevented from performing the duties of their office or dismissed without good and proper reasons. The trustee is entitled to the possession of the trust property and an archakar or any other servant of the temple has possession on behalf of the trustee or by his leave or license implied or express. A Court has no jurisdiction to entertain a suit under Section 9 of the Specific Relief Act by a servant against a master. Under Hindu Law hereditary priesthood is treated

as immovable property. But this fact would not make hereditary archakarship or any other office immovable property under Section 9 of the Specific Relief Act. AIR (Vol 9) 1922 Mad 183 : 1922 M W N 422 : 16 M L W 931 : 68 Ind Cas 183.

——S. 9 — Incorporeal rights.

S. 9 takes out of the operation of the Act rights classed as "incorporeal rights" though they are 'immovable property'. A I R (Vol 4) 1917 Cal 681 : 20 C W N 1158 : 34 Ind Cas 450 (DB).

——S. 9—The right to collect rent is immoveable property within the meaning of the Section. (1904) 28 M 238 (239).

——S. 9—Incorporeal right.

A hat possession of which consisted in the collection of tools or rents from those who sold goods there and from which the plaintiff was dispossessed by a rival collecting tolls or rents, is not immovable property within the meaning of S. 9; and a suit to recover possession of it summarily does not lie. (1902) 29 C 614 (618) (DB).

8. 'Is dispossessed without his consent'

——S. 9 — Dispossession in due course of law — Decree.

Though a suit is not brought under S. 9, the plaintiff may be granted possession, if he is found to be dispossessed without his consent and otherwise than in due course of law. (1910) 5 Ind Cas 482 (All).

——S. 9—Tenant holding over — Dispossession of tenant suo motu not in due course of law.

A tenant holding over is indeed a tenant on sufferance; but it is not competent for the landlord to suo motu dispossess such a tenant without his consent. And such a dispossession is not one 'in due course of law' within the meaning of S. 9. The phrase 'in due course of law' in S. 9 means the regular, normal process and effect of the Law operating on a matter which has been laid before it for adjudication. In other words, it refers to the process and operation of the law involved by the ordinary method of a civil suit. (1904) 7 Bom L R 12 : 29 B. 213 (216, 217) (DB).

9. Joint possession.

——S. 9—Suit under S. 9 — Each party claiming exclusive possession—Neither claiming joint possession —Court if can pass decree for exclusive possession.

Where, in a suit under S. 9, neither side contends that within the six months preceding the suit either had been in joint possession but each claims to be in exclusive possession, the Court is right in not going into the question of joint possession and in placing that party in exclusive possession which, on the facts before it, considers to have been in possession at the date of the dispossession. AIR (Vol 28) 1941 Nag 130 : 1941 N L J 115 : I L R (1942) Nag 322 : 193 Ind Cas 805.

——S. 9 — Person in joint possession dispossessed—Suit.

The words of S. 9 do not refer to exclusive possession. A person in joint possession of immovable property is as much in possession of that property as a person who is in exclusive possession and if the person who was in joint possession is dispossessed, there is no reason why he should not be entitled to bring a suit under the section to be restored to that possession which he enjoyed before he was dispossessed. AIR (Vol 27) 1940 All 261 : 1940 A L J 174 : 1940 A W R 126 : 1940 R D 75 : I L R (1940) All 225 : 189 Ind Cas 92 (DB).

——S. 9 — Joint possession cannot be decreed under S. 9. (1909) 29 M L J 760 : 31 Ind Cas 720 (DB).

10. Jurisdiction and power of court.

——S. 9—Dispossession from occupancy-holding—Suit for possession — Maintainability — Jurisdiction of Civil Court.

It a suit was barred by the provisions of the Ten. Act, it would be immaterial whether a civil suit is brought under S. 9, Specific Relief Act or under S. 9, Civil P. C. The suit would be barred in either case.

Where the plaintiff sued for possession under S. 9, Specific Relief Act, for possession of an agricultural holding alleging that the defendants had forcibly trespassed upon the land and dispossessed the plaintiff and there was no admission that the defendants were sub-tenants :

Held, that the suit was cognisable by the Civil Court. A I R (Vol 18) 1931 All 663 : 53 A 532 : 132 Ind Cas 801.

——S. 9 — Applicability and scope of—Suit for possession—House built on land, if can be removed.

An order allowing the plaintiff to remove the house built on land by defts. is beyond the jurisdiction of the Court under S. 9 of the Sp. R. I. Act, and the Court cannot do more than make an order with respect to possession of land. AIR (Vol 2) 1915 Cal 687 : 28 Ind Cas 473 (DB).

——S. 9 — Suit under — Material irregularities — Retrial.

Where in a suit for possession under S. 9 the court misunderstood the pltff's. position and ignored material evidence, and did not distinguish between possession and use or occupation held that all these constituted material irregularity so as to necessitate a retrial. 28 P W R 1912: 14 P L R 1912 : 13 Ind Cas 6 (DB).

——S. 9—Applicability and scope of.

Where the property or the subject-matter of dispute was in existence at the date of institution of the suit and there was nothing to indicate that it had ceased to exist when the judgment was delivered.

Held, that the court had jurisdiction, though after judgment both parties intimated that the subject matter had been washed away and could not be found in the locality. (1909) 13 C W N 305 : 1 Ind Cas 152 (DB).

——S. 9—Dispossession—Possessory suit if lies at the landlord's instance—Total diluviation of land during suit if ousts Court's jurisdiction—Quaere.

Whether a person who holds possession of land through tenants, and is dispossessed, is precluded from instituting a suit under S. 9, Quaere. Whether the total diluviation of the land in the course of a suit under S 9, ousts the jurisdiction of the Court. (1909) 13 C W 305 (307) : 1 Ind Cas 152 (DB).

11. Landlord and tenant.

(a) General.
(b) Adhiars.
(c) Where landlord can sue.
(d) Where landlord cannot sue.

(a) General.

——S. 9 — Landlord's right to sue under when his tenant is dispossessed.

Where a tenant is dispossessed his landlord who is in possession through his tenant is entitled to sue under S. 9 of the Specific Relief Act. 1950 A W R 242 : 1950 A L J 288 (DB).

——S. 9 - Status of parties—Effect of decree.

An under-raiyat holding occupancy rights for his life was ejected by the landlord. The under-raiyat brought a suit under S. 9, Specific Relief Act, asserting that he held permanent heritable occupancy rights. The Court, though it decreed the suit, was not concerned with the exact status of the parties. The landlord did not thereupon bring a suit for declaration under S. 42, Specific Relief Act.

Held, that the landlord was not bound to bring a declaration suit under S. 42 and the possession of the under-raiyat was not adverse against him since the decision of the suit under S. 9, Specific Relief Act, as the question whether the occupancy rights held by the under-raiyat were heritable or not did not really arise in that suit. AIR (Vol 17) 1930 Pat 562 (DB).

——S. 9.—Invalid lease.

It is unreasonable to permit an under-raiyat to be interfered with by a trespasser apart altogether from S. 9 merely because the lease from his landlord for a longer term than the law permits. The fact that a person is in possession paying rent to his landlords is a sufficient interest in the property to enable him to recover it against the defendants, the defendants showing no title whatever, still less a better title. AIR (Vol 16) 1929 Cal 384 : 118 Ind Cas 852 (DB).

——S. 9—Termination of lease.

Where a tenant is dispossessed of land by a person other than landlord and the tenancy has either been terminated or surrendered, the landlord is a person claiming possession of the land through the tenant within the meaning of S. 9. AIR (Vol 15) 1928 Nag 313 : 24 N L R 112 : 112 Ind Cas 120 (DB).

——S. 9—Tenant holding over.

In India the common law right of re-entry by the landlord does not exist and even where the landlord has obtained possession of the premises after the tenancy has been validly terminated while the tenant was holding over, it is open to the tenant to institute a suit within six months of dispossession under S. 9 of the Specific Relief Act. AIR (Vol 12) 1925 Sind 275 : 87 Ind Cas 1002.

——S. 9—Dispossession in due course of law—Ejectment by landlord.

A third person who dispossesses the landlord between one tenant's quitting and another tenant's coming in can be ejected under S. 9 of the Act. AIR (Vol 4) 1917 L B 41 : 9 Bur L T 172 : 37 Ind Cas 20.

——S. 9—Tenant's suit.

S. 9 of the Sp. Relief Act is not applicable to a suit by a tenant against the landlord for recovery of possession. (1911) 14 O C 60 : 9 Ind Cas 761 (DB).

——S. 9 and Bengal Tenancy Act (VIII of 1885), S. 87—"Dispossession in due course of law."

With reference to S. 87 of the B. T. Act, it is the vacancy created by voluntary release of the tenure and not by death of the tenant that empowers a landlord to make re-entry in the tenure and to get the tenant declared unprotected. If the landlord proceeds under S. 87, he takes the possession of the land at his own risk and responsibility and consequently affords him no ground to recover possession under S. 9 of the Specific Relief Act. (1910) 11 C L J 433 : 6 Ind Cas 553 (DB).

——S. 9—C. P. C. (1882), S. 332 — Dispossession in due course of law.

S. 9 does not apply to case where tenants were ejected in execution of decree for khas possession against the landlords; they were dispossessed in due course of law. The remedy is provided for in S. 332 C. P. C. (1910) 14 C W N 793 : 5 Ind Cas 793 (DB).

(b) Adhiars.

——S. 9 — Possession of adhiar — If protected.

An adhiar is very largely a tenant for the purpose of the Specific Relief Act. A I R (Vol 3) 1916 Cal 621 (2) : 19 C W N 1205 : 31 Ind Cas 579 (D B).

——S. 9 — Constructive possession — Land cultivated by Adhiars — Whether landlord is in possession.

Obiter dictum : Adhiars are tenants. When the landlord is in possession through tenants, he is in possession of the benefits to arise out of the land. When deprived of these he can sue under S. 9. (1909) 6 A L J 697 : 10 Cr L J 291 : 3 Ind Cas 466 (D B).

(c) Where landlord can sue.

——S. 9 — Landlord's right to sue — Tenant dispossessed from property in his possession.

There is a conflict of authority as to the landlord's right to maintain a suit under S. 9 of the Specific Relief Act in respect of the property which was in actual possession of tenants and from which the tenants were dispossessed. There can however be no objection to a suit filed by the landlord and the tenants together. A I R (Vol 36) 1949 Nag 126 : I L R 1948 Nag 422 : 1948 N L J 337.

——S. 9 — Where a tenant in exclusive possession is dispossessed, proper remedy for the tenant is to file a suit for possession and for the landlord if he desires to sue immediately on the possessory right to sue in the name of the tenant but if the tenant refuses to join or there is an injury to reversion the landlord is entitled to sue in his own name. A I R (Vol 16) 1929 Bom 467 : 53 Bom 773 : 31 Bom L R 1042 (D B).

——S. 9 — Quaere : Whether, when tenant is dispossessed his landlord can maintain a suit under S. 9 for recovery of possession. A I R (Vol 13) 1926 Nag 472 : 96 Ind Cas 251.

——S. 9 — Landlord and tenant.

Dispossession of a tenant is dispossession of a landlord, and the landlord can bring a possessory suit under S. 9 of the Specific Relief Act. (1911) 15 C W N 715 : 10 Ind Cas 455 (D B).

——S. 9 — Dispossession of tenant — Right of landlord to sue under S. 9.

The right to receive rent is immovable property, within S. 9, therefore, the dispossession of a tenant entitles the landlord to sue under S. 9. 9 M L T 205 : (1910) M W N 838 : 8 Ind Cas 844.

——S. 9 — Dispossession.

A landlord holding possession through a tenant can bring a suit under S. 9 to recover possession of land taken possession of by a third party. (1910) 15 C W N 294 : 12 C L J 483 : 7 Ind Cas 924 (D B).

——S. 9 — Landlord's right of suit.

The decision in 13 C W N 303 is in direct conflict with that in 6 C W N 616. Semble : approving of the former. When a landlord is deprived of the possession of the benefits arising out the land demised by reason of the dispossesion of the tenant, he should be entitled to obtain recovery under S. 9. (1909) 10 C L J 30 (32, 33) : 13 C W N 835 : 3 Ind Cas 466 (D B).

——S. 9 — A landlord can bring a suit under S. 9 on the dispossession of his tenant by a third person. (1904) 28 M 238 (239) (D B).

(d) Where landlord cannot sue.

——S. 9 — Who may sue.

A suit under S. 9 must be brought by the tenant in possession. A suit by a landlord alone to which the tenants are not parties is not maintainable. A I R (Vol 21) 1934 Mad 558 : 1934 M W N 443 : 40 L W 277 : 151 Ind Cas 990.

——S. 9 — Where a tenant is dispossessed of a certain land by a person other than his landlord, the landlord cannot sue under the Specific Relief Act, S. 9, for its actual possession. A I R 1926 Nag 290, Overruled. A I R (Vol 15) 1928 Nag 313 : 24 N L R 112 : 112 Ind Cas 120 (D B).

——S. 9 — Landlord cannot sue.

When a landlord creates a tenancy under him which entitles the tenant to the exclusive use of the property the landlord cannot have any right to actual possession so long as the tenant is entitled to possession, and therefore the landlord cannot maintain a suit under S. 9 against a trespasser for immediate possession. A I R (Vol 13) 1926 Mad 18 : 22 M L W 448 : 1925 M W N 763 : 50 M L J 102 : 92 Ind Cas 20.

12. Limitation.

——S. 9—Defendant joined on his application after one year.

Where in a suit under S. 9, Specific Relief Act, a person is added one year after the date of the suit as defendant on his own application and a decree is

passed against him, he cannot avoid the decree by taking advantage of S. 22, Limitation Act. A I R (Vol 15) 1928 Bom 526 : 30 Bom L R 1405 : 112 Ind Cas 786 (D B).

——S. 9 — A suit by the Secretary of State for India, whether it be under S. 9 of the Specific Relief Act or otherwise, is governed by Art. 149 and not Art. 3 of the Limitation Act. A I R (Vol 12) 1925 Sind 275 : 87 Ind Cas 1002.

——S. 9 — Prior peaceable possession furnishes a good title as against a mere trespasser. If a true title may be defeated by twelve years adverse possession by a trespasser, there is nothing shocking to the sense of justice in a legislative rule that the period of limitation for a suit by a mere trespasser or squatterer to recover possession should be six months from the date of his dispossession. A I R (Vol 9) 1922 Cal 198 : 50 Cal 23 : 74 Ind Cas 283 (D B).

——S. 9—Non-occupancy ryot, suit by, for recovery of possession — Specific Relief Act, S. 9.

Held, by F. B. (Prinsep J. dissentiente) : that the remedy in S. 9 of the Specific Relief Act is not the only remedy which the legislature has provided for a non-occupancy raiyat who has been dispossessed otherwise than in due course of law. 7 C W N 218 Overruled.

The period of limitation applicable to the case of a non-occupancy ryot who has been dispossessed from his holding otherwise than in execution of a decree is either 6 or 12 years as provided in Art. 120 or Art. 142 of the Limitation Act. (1904) 8 C W N 446 : 31 C 647 (653, 654) (F B).

——S. 9 — Suit by non-occupancy ryot for possession — Specific Relief Act, S. 9 — Bengal Tenancy Act, S. 89.

The limitation applicable to a suit to recover possession by non-occupancy ryot who has been dispossessed from his holding by his landlord otherwise than in due course of law is 6 months from the date of dispossession. (1902) 7 C W N 218 (220).

13. Nature of possession to be established.

——S. 9 —Applicability — Trespasser dispossessed by another — Remedy of former—Suit to eject latter — Competency—Possessory title.

There can be no doubt that possession is a good title against all but the true owner and entitles the possessor to maintain an action in ejectment against all persons, except the true owner, who might dispossess him. He can therefore avail himself of the remedy under S. 9, Specific Relief Act against another trespasser. AIR (Vol 37) 1950 Pat 222 : 31 P L T 100 (DB).

——S. 9—Possession—Wrongful — Displacing of apparent title.

A possession on the part of one party which is not shown to have commenced in wrong can only be disturbed by distinct proof of superior title in another party. When the apparent title is with the plaintiff, it is incumbent upon the defendant in order to displace this apparent title in the plaintiff and to establish a beneficial title in himself, to show by satisfactory evidence that the funds out of which the disputed property was purchased and developed were his own funds. A I R (Vol 32) 1945 Sind 57 : I L R (1945) Kar 40 (DB).

——S. 9—Inquiry — Question of title — Significance of decree.

In a suit under S. 9, an inquiry into the nature of possession is often necessary, and, when necessary, the best way to ascertain the nature of possession is to inquire into the question of title. It is true that the trial Court is not concerned with the determination of title, but it is certainly competent to go into the question of title in order to ascertain the nature of a party's possession. The significance of a decree for possession obtained in a suit filed under S. 9 is that it cannot be said and is not said that the decree is no evidence of title. It proves possession and possession is evidence of title. A I R (Vol 32) 1945 Sind 57 : I L R (1945) Kar 40 (DB).

——S. 9—Possession completed by section.

The remedy by a possessory suit provided in S. 9 is a special remedy under the statute, the principle under-lying it being that in a summary proceeding, the order of which is not appealable, the condition of possession before the inroad made upon a property without any process of law should be restored. A Court, in a suit under S. 9, has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his co-sharers were ousted. Such a possession is not contemplated by S. 9. A I R (Vol 27) 1940 Pat 193 : 5 C L T 92 : 6 B R 872 : 189 Ind Cas 878 (DB).

——S. 9—"Juridical possession"—Transfer of occupancy fields contrary to law — Transferee in peaceful possession — Dispossession — Whether can sue

Section 9 says nothing about juridical possession but merely says that a person dispossessed without his consent of immovable property otherwise than in due course of law may recover possession thereof notwithstanding any other title that may be set up in such suit.

It may be that where a trespasser has obtained possession for a short time and that possession has not been acquiesced in, he is not entitled to maintain such a suit, but where a person has obtained possession peacefully and has remained in undisturbed possession for a reasonable time, then he is certainly entiled under S. 9 to maintain a suit. Possession is good against all the world except the person who can show a good title and the possession required by S. 9, cannot mean merely possession under a valid title, it must include possession that is at least excusable. So where a person transfers his occupancy field by an unregistered deed, and contrary to the provisions of the C. P. Tenancy Act, and thereafter the transferee remains in undisturbed possession for 3 or 4 years, but is subsequently dispossessed, he can bring a suit under S. 9 for recovery of possession. A I R (Vol 24) 1937 Nag 326: 20 N L J 189 : 173 Ind Cas 746.

——S. 9—Essence of.

The essence of possessory title is peaceful entry. Where a person enters into a peaceful possession of land, although he has no title to it and claims it as his own, and is forcibly ousted out of possession by another person who has no better title to the land, he can sue such other person, because although he might not have any legal title, he had at least possessory title and had commenced to prescribe for a legal title. A I R (Vol 24) 1937 Nag 281 : 173 Ind Cas 680.

——S. 9—Dispossession – Remedy open.

If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If, however, he is dispossessed and does not sue for possession under S. 9, he can only succeed on the strength of his own title. A I R (Vol 22) 1935 Cal 646 : 40 C W N 81 : 158 Ind Cas 445 (DB).

——S. 9—Possession.

It is an established principle of law that a person in possession cannot be dispossessed by any other person unless that other person establishes his title to property. AIR (Vol 20) 1933 Oudh 473: 10 O W N 1017 : 17 R D 939 : 146 Ind Cas 1023.

——S. 9—Where in a suit for possession of land, neither the plaintiff nor the defendant was able to prove his title but the plaintiff proved that he was in possession for four years when he was dispossessed :

Held, that the plaintiff was entitled to a decree for possession. AIR (Vol 19) 1932 Mad 32: (1931) M W N 487 : 35 L W 142 : 135 Ind Cas 910.

——S. 9—Possession contemplated.

Possession contemplated by S. 9 is not confined to actual physical possession. AIR (Vol 16) 1929 Bom 467 : 53 Bom 773 : 31 Bom L R 1042 (DB).

——S. 9—Section 9 requires legal possession and the owner who re-enters without delay has in law never lost possession. AIR (Vol 15) 1928 Pat 124 : 6 Pat 794 : 29 Cr L J 99 : 9 A I Cr R 258 : 106 Ind Cas 691 (DB).

——S. 9—Suit on—Distinction.

Possessory title is good against everybody except the true owner and, in the case of a wrongful ouster a plaintiff is entitled to succeed upon the strength of previous possession, if the defendant fails to prove a better title.

In a suit for possession if the plaintiff proves that he was in peaceful possession at the time of dispossession by the defendant, the defendant can only resist the claim for possession on proving title in himself. If he fails to prove title the plaintiff is entitled to a decree on the basis of his possessory title notwithstanding the fact that the plaintiff did not frame his suit as a suit, under S. 9, Specific Relief Act, and did not sue the defendant within a period of six months from the date of his dispossession. A distinction is to be drawn in cases under S. 9, Specific Relief Act and cases in which Courts grant the plaintiff a decree in suits filed after six months of the date of dispossession on the basis of the plaintiff's possessory title. Title is no defence in a suit under S. 9, Specific Relief Act but affords a conclusive defence in other suits. AIR (Vol 14) 1927 All 669 : 25 A L J 857 : 103 Ind Cas 428 (DB).

——S. 9—As between two persons who are unable to make out a valid title where a person is in possession and has been in possession for several years and is suddenly dispossessed by another who has no better title than the person whom he dispossesses the former is entitled to be restored to possession. A I R (Vol 14) 1927 Pat 1: 5 Pat 765 : 98 Ind Cas 779 (DB).

——S. 9—Suit apart from section.

Lawful possession of land is sufficient evidence of right as owner against a person who has no title. A suit for recovery of possession of State Waste land, based on a possessory title, acquired by occuption and clearing will lie as against a trespasser, independently of S. 9 of the Specific Relief Act. 3 U B R 125, Diss. A I R (Vol 14) 1927 Rang 234 : 6 Bur L J 96 : 104 Ind Cas 361.

——S. 9—Plaintiff who had been in possession but who was dispossessed is entitled to get back possession on the strength of his possessory title unless the defendant can show an equal or better right. In the former case the plaintiff would be entitled to joint possession and in the latter case he would have no right to retain possession. 1922 M W N 439 : 15 M L W 430 : 66 Ind Cas 237 (DB).

——S. 9 Constructive possession — Possession of Thakur Bari of a temple — What is.

Plaintiff appointed a pujari of a Thakur Bari, defrayed the expenses of worship, repaired the building and had the key of the door of the Thakurghar with him:

Held, that the possession of the plaintiff was such physical possession as to attract the operation of S. 9 of the Specific Relief Act, notwithstanding that the Thakur Bari, as a residence of deity, was open to the public. AIR (Vol 5) 1918 Cal 847 (2) : 44 Ind Cas 497 (DB).

——S. 9 — Regular suit — Suit on possessory title — Defences to.

"In a suit based upon possessory title the defendant may have grounds for opposing the claim not open to him in suit brought by the real owner." A I R (Vol 4) 1917 Mad 533: (1916) 1 M W N 110 : 33 Ind Cas 167 (DB).

——S. 9 - Trespass — Dominion, acts of — Exclusive dominion.

In a suit under S. 9 the sole point for determintion will be, whether the plaintiffs were in possession of the disputed property within six months previous to the institution of the suit and whether they had been deprived of such possession by the defendant otherwise than in due course of law. It is immaterial, if the plaintiffs were in possession, that such possession was without title. Question of title is not determined in suit under S. 9. What the plaintiff has to prove is possession of the disputed property and not mere isolated acts of trespass over that property.

In order to entitle the plaintiff to succeed on the ground of possession he must prove, firstly, that he exercised acts which amounted to acts of dominion; the nature of these acts of dominion varies with the nature of the property; Acts of dominion exercised over a part only is evidence of possession of whole; secondly, that the act of dominion was exclusive. If the occupation by the plaintiff as indicated by those acts, has been peaceable and uninterrupted, and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession. (1910) 12 C L J 605 (608) : 7 Ind Cas 700 (DB).

——S. 9—Regular suit — Based on prior possession alone.

A person who has been dispossessed can, as against a trespasser, succeed on proof of prior possession alone without showing title, though he does not sue, within 6 months from the date of dispossession. (1909) 12 O C 129 : 2 Ind Cas 599 (DB).

——S. 9—Possession — Meaning of.

The possession of the plaintiff must under S. 9 of the Act have been a juridical possession; where a person has in his own right and not merely as representative of another, such control over immovable property as to be able to exclude another from it, and has the intention of exercising such power of exclusion he has possession within the meaning of S. 9 of the Specific Relief Act. A servant or manager who exercises control on behalf of his master cannot be said to be in juridical possession. (1909) 3 S L R 149 : 4 Ind Cas 359 (DB).

——S. 9—Prior possession—Title.

Prior possession is a ground on which as prima facie evidence of title, a plaintiff may recover possession in the absence of title set up by the defendant even though his suit does not fall within S. 9. But it must be found not only that the plaintiff's prior possession was within twelve years of suit but also that it was a juridical possession of the property claimed. If the possession is joint it cannot be held juridical possession of the whole as against the person with whom it is jointly held. All that can be recovered on such joint possession will be joint possession and not exclusive possession for, as against the joint possession the prior enjoyment would be prima facie evidence of a joint title. (1903) 5 Bom L R 225 (228, 229) (DB).

——S. 9—Suit by a person in possession for a declaration of ownership—Evidence Act, S. 110—Burden of proof—Effect of plaintiff's possession.

The plaintiffs sued the Government for a declaration that a certain piece of land belonged to them, and that they might be confirmed in their possession, alleging that they had purchased the site for Rs. 20 in 1888 from one D, whose father had mortgaged it for Rs. 20 to the plaintiff's father.

Held, that the possession of the plaintiffs being peaceable and obtained without ousting any one it was of such a character as to attract the presump-

tion described in S. 110 of the Evidence Act, and was good against the whole world except the person who could show a better title, and that as the Government had failed to establish their title to the land, the plaintiffs were lawfully entitled to its possession.

Per Jenkins, C. J.—To say that possession is not such within the meaning of S. 110 of the Evidence Act unless it is possession according to title would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law. In the case of a village site Government cannot rely on any general presumption, and that as against the party in possession it must show title.

Per Ranade J.—Under S. 110, Evidence Act possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under S. 9 brought within six months from dispossession. Where this period is exceeded before a suit is brought and is less than the limitation law requires, he must make out a prima facie title. And S. 110 refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such prima facie title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the prima facie title is made out and plaintiff comes to court and asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.

Held, by Whitworth J. (dissentiente) that the possession of the plaintiffs was not of such a character as under S. 110, Evidence Act, to put on the defendant the burden of proving that the plaintiffs are not the owners of the site ; that the possession alleged to have been exercised before the sale consisted merely of such acts as are permitted to any villagers in respect to an open space in a village, so long as no one is prejudiced by them and which would be permitted to an influential person, such as the patel of the village even if they were somewhat prejudicial to public convenience ; that the actual possession taken after the execution of the deed of sale in 1888 was a merely wrongful act ; and that therefore the plaintiffs were not relieved of the burden of proving their title which they had not proved. (1900) 2 Bom L R 1111 : 25 B 287 (299, 301, 302) (FB).

——S. 9—Suit for — Previous suit by defendant—Dismissal—Subsequent trespass—Title.

A plaintiff who is unable to prove his title to properties may yet recover possession of them from a defendant who had brought a suit against the plaintiff for these very properties and failed and subsequently trespassed upon them. (1900) 5 C W N 234 (239) (DB).

14. 'Otherwise than in due course of law.'

See also N 11.

——S. 9 — 'Othewise than in due course of law', meaning of.

The words 'otherwise than in due course of law' in S. 9 are not synonymous with the word "illegally". The phrase means: "in the regular, normal process and effect of law operating on a matter which has been laid before a Court, civil or criminal, for adjudication." It would ordinarily exclude self-help. AIR (Vol 22) 1935 Cal 454 : 39 C W N 394 : 61 CLJ 307 : 156 Ind Cas 924.

——S. 9—'Dispossession in due course of law.'

A dispossession by a legal process or under provision of law which ought not to have been applied is not a dispossession in due course of law within S. 9 of the Act. (1913) 18 Ind Cas 727 (DB) (Cal).

——S. 9—Ouster of tenant in execution—Tenant's remedy—C. P. C. (1882), S. 332.

Where in execution ot a decree for khas possession obtained against the landlord, the plaintiffs who were tenants were dispossessed.

Held : That the plaintiffs were not dispossessed otherwise than in due course of law within the meaning of S. 9. (1910) 14 C W N 403 : 5 Ind Cas 793 (793) (DB).

15. Parties to suit.

——S. 9—Persons dispossessed if should be co-plaintiffs.

It is not necessary that all dispossessed persons must be co-plaintiffs in a suit in ejectment against a trespasser. It is enough if they are parties either as plaintiffs or as defendants. (1912) 13 Ind Cas 125 (DB) (Cal).

16. Revision.

——S. 9 — Decision of suit under — Revision — N. W. F. P. Courts Regulation, S. 34.

The remedy by way of revision petition whether it be under S. 115, C. P. Code, or S. 34, N. W. F. P. Courts Regulation, 1931 is, conspicuous by its absence from S. 9 of the Specific Relief Act. It, therefore, naturally follows that if the legislature intended to bar the remedy by way of revision petition, it should have specifically mentioned it along with "appeal" and "review." Its very absence shows that the legislature did not want to restrict the High Court's power of supervison over the Courts trying suits under S. 9 of the Specific Relief Act. It, therefore, a revision petition filed against a decision of a suit under that section satisfies the conditions laid down in S. 34, N. W. F. P. Courts Regulation, it cannot be rejected merely because another remedy is open to the aggrieved party by way of suit. A I R (Vol 37) 1950 Pesh 9.

——S. 9 and C. P. Code (V of 1908), S. 115—Decree in suit under S. 9—Revision—New point as to maintainability of suit—If can be allowed to be raised.

In a revision against a decree in a suit under S. 9 of the Specific Relief Act, the petitioner will not be allowed to raise a new point that the suit was not maintainable as he was a co-owner having a half share in the suit property because he has a remedy by way of suit for the establishment of his title and for partition on the basis of that title, if he establishes it. AIR (Vol 36) 1949 Mad 224 : (1948) 2 MLJ 453 : 1948 M W N 748.

——S. 9—Decree in suit under—Remedy of aggrieved party—Revision—Interference by High Court — C. P. Code, S. 115.

The Specific Relief Act has provided a remedy for a person who is aggrieved by the decree passed in a suit under S. 9 of that Act. His remedy is by way of a suit based on title. It is well established that the High Court does not, except in a very extreme case, interfere by way of revision, where a separate remedy is available to the applicant. AIR (Vol 36) 1949 Nag 126 : ILR (1948) Nag 422 : 1948 NLJ 337.

——S. 9—Since no appeal or review lies from an action under section 9 of Specific Relief Act, the revision would lie if there has been grave abuse of jurisdiction or material illegality or irregularity.

The High Court would not ordinarily interfere in revision. 1946 A M L J 30.

——S. 9—Suit by trespasser, if competent—Revision.

There is nothing in S. 9 to prevent a trespasser from bringing a suit in Civil Courts and ask for a summary remedy as provided under that section. Even in the case of tenancy land, where no relationship of landlord or tenant is alleged or admitted by the plaintiff, there is no bar to the maintainability of the suit under S. 9 and to such a case, S. 108 (10). Oudh Rent Act does not apply.

Although the Judicial Commissioner's Court is not precluded from interfering with orders under S. 9 in revision, such interference should be confined to cases of very exceptional nature. AIR (Vol 29) 1942 Oudh 179 : 1941 O W N 1237 : 1941 R D 1043: 1941 A W R 1062 : 197 Ind Cas 554.

——S. 9—Decision under — Revision — Civil P. C., S. 115.

Under S. 115, Civil P. C., the High Court can interfere in revision with a decision of the lower Court under S. 9, Specific Relief Act. AIR (Vol 25) 1938 All 685: 1938 ALJ 864 : 1938 A W R 588 : 178 Ind Cas 709 (DB).

——S. 9—High Court would not ordinarily interfere in revision in a case under S. 9 Specific Relief Act, but where there has been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of S. 9, the High Court would entertain an application for revision. AIR (Vol 24) 1937 Nag 326 : 20 N L J 189 : 173 Ind Cas 746.

——S. 9—High Court would not ordinarily interfere in revision in a case under S. 9, Specific Relief Act, but where there has been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of S. 9, the High Court would entertain an application for revision. A I R (Vol 24) 1937 Nag 326 : 20 NLJ 189 : 173 Ind Cas 746.

——S. 9—Order under S. 9—Remedy is by way of a regular suit—No revision under S. 115, Civil P. C., will be entertained. AIR (Vol 24) 1937 Oudh 183 : 1936 O W N 1228 : 13 Luck 18 : 165 Ind 908.

——S. 9—Suit under—Remedy of defendant — Revision.

When a suit under S. 9 is decreed, the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. The question of whether the decisions of the trial Court are right or not, are questions of fact and law and they may be right or wrong, but the decisions in themselves are not direct questions of jurisdiction or any of the similar questions that would render the case open to revision under S. 115, Civil P. C. AIR (Vol 21) 1934 All 541: 150 Ind Cas 738.

——S. 9—Order under—Revision.

The High Court will not ordinarily interfere in revision with an order under S. 9 as there is a remedy by way of suit, but if the case is a clear one, the High Court may interfere without driving the parties to a regular suit. AIR (Vol 21) 1934 Mad 558 : 1934 MWN 443 : 40 L W 227 : 151 Ind Cas 990.

——S. 9—Decrees and Orders under S. 9 are intended to be final as far as possible and applications for revision though not barred, are not lightly to be entertained. AIR (Vol 19) 1932 Oudh 39 : 8 O W N 1341 : 135 Ind Cas 890.

——S. 9—Applicability—Revision.

The plaintiff took a mortgage of an occupancy holding from the defendant, which, being subsequent to 1901, was void, the defendant, alleging that the plaintiff was a sub-tentant, sued for ejectment, of the plaintiff in the Revenue Court and in pursuance of a decree obtained in that suit, the plaintiff was ejected. The plaintiff instituted a suit under S. 9, Specific Relief Act, contending that he was dispossessed otherwise than in due course of law, and obtained a decree. The defendant applied to the High Court in revision :

Held, (i) that the application for revision was maintainable as the applicant had no further remedy;

(ii) that the dispossession was one in due course of law and the Civil Court had no jurisdiction to entertain the suit under S. 9. AIR (Vol 18) 1931 All 205 : 15 R D 185 : 53 A 414 : 129 Ind Cas 559.

17. Res judicata.

See also N. 20.

——S. 9—Scope and effect.

Section 9 does not preclude a party to a suit under that section from subsequently proving his title by long possession only. The failure of the plaintiff in that suit is conclusive that he was not in possession within six months of the suit but nothing more. AIR (Vol 32) 1945 Mad 265: (1945) 1 MLJ 206: 1945 MW N 283 (2): 58 LW 522.

——Section 9—Where it was decided in a suit under S. 9, Specific Relief Act, that the plaintiff was not in possession of a certain property from a certain date, the question covered by that finding cannot be reagitated between the parties and is res judicata in a suit for possession on declaration of plaintiff's title. AIR (Vol 15) 1928 Cal 758: 114 Ind Cas 82 (DB).

18. Scope of inquiry.

——S. 9—Scope of enquiry in suits under.

Section 9 of the Specific Relief Act does not in any way contemplate an enquiry into title. When trying suits under that section the Court should strictly confine itself to evidence of possession and possession only. As no appeal is provided, questions of title are not to be agitated in such a suit. 1946 AMLJ 30.

——S. 9—Plaintiff alleging himself to be a tenant suing defendant as a trespasser—Court finding that plaintiff was in possession as required by S. 9 but holding that suit was not cognisable in Civil Court as parties were co-tenants.

Held, plaintiff was entitled to a decree for possession under S. 9 and the Court was not called upon to go into the question of title. (1935) ALJ 813: 1935 R D 384.

——S. 9—Question of title.

In suits under S. 9, questions of title are irrelevant. AIR (Vol 18) 1931 Cal 483: 58 C 29: 132 Ind Cas 906.

——S. 9—Suit on—Not governed by S. 9.

A suit lies for possession on the basis of possessory title and is not barred by S. 9 by its being brought more than 6 months after dispossession. There is a difference between a suit based on possessory title and a suit under S. 9 of the Specific Relief Act. In the former the Court awards the claim only when it finds that the plaintiff had peaceful possession before dispossession, the plaintiff's previous possession being in law sufficient proof of his title. In the latter, the Court can only go into the question of dispossession within six months before the suit and cannot inquire into the defendant's title. AIR (Vol 10) 1923 Rang 54: 11 LBR 415: 1 Bur LJ 165: 70 Ind Cas 9.

——S. 9—Only possession and dispossession is to be proved by plff. under S. 9, Sp. Rel. Act and not title. AIR (Vol 5) 1918 Cal 252: 48 Ind Cas 433 (DB).

——S. 9—Suit for possession.

Mere previous possession is sufficient in a suit under the section. AIR (Vol 4) 1917 Cal 469: 20 CWN 773: 36 Ind Cas 890 (FB).

——S. 9—Decision in a suit under section.

In a suit expressly brought under the section, neither the Court nor the deft. has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on ground of title. AIR (Vol 4) 1917 Oudh 46: 20 O C 237: 41 Ind Cas 974.

——S. 9—Deft's right to set up title.

In a suit under S. 9, the deft. will not be allowed to plead or to prove title in himself as he would be entitled to do in suits apart from S. 9 of this Act. In the latter class of cases, the deft. will be allowed to plead and prove title but if he fails to do so plff. can get a decree even though he is able to prove nothing more than possession by himself of the property in suit up-to-date of ejectment by the deft. AIR (Vol 2) 1915 All 244: 29 Ind Cas 210.

——S. 9—In a suit under S. 9 the court can only enquire whether the plff. was in actual peaceable occupation and was forcibly dispossessed within six months before suit. AIR (Vol 1) 1914 Mad 382: (1914) MWN 95: 22 Ind Cas 279 (DB).

——S. 9—Jurisdiction—Enquiry into title, C. P. C., S. 115.

The court has no jurisdiction to go into the question of title in a possessory suit under S. 9 of the Sp. Rel. Act and an order against the plff. found to be in possession within six months on the ground of want of title is without jurisdiction and is revisable under S. 115 of C. P. C. (1913) 17 CWN 501; 18 Ind Cas 298 (DB).

——S. 9—The only point to be determined in a suit under S. 9 of the Act is whether the plff. was dispossessed and whether the suit is brought within six months from the date of dispossession but if there was no possession of the plffs. and therefore no dispossession, the suit must be dismissed. (1912) 13 Ind Cas 541 (DB) (Cal).

——S. 9—Evidence of title—Evidence as to nature of—Possession—Estoppel.

In a suit under S. 9 the Court can inquire into the question of title in order to ascertain the nature of possession disturbed. The admission of the execution of the deed acknowledging possession as a servant does not estop the executant from denying his possession as servant and proving his possession as owner, when he did not obtain possession by that deed. (1910) 4 SLR 80: 8 Ind Cas 215 (DB).

——S. 9—Non-occupancy right—Suit by, for recovery of possession—Issues in a suit under S. 9.

Per Prinsep, J.—Possession within the prescribed period and dispossession without the consent of plaintiff and otherwise than in due course of law are the only issues for determination in a suit under S. 9. (1904) 31 C 647: 8 CWN 446 (450) (FB).

——S. 9—Suit for possession on the ground of prior possession—Distinction between.

In a mere suit to recover possession not falling under S. 9 the court awards the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant had no title and is a wrong doer, the plaintiff's previous possession being in law sufficient proof of his title; in the latter, the Ccurt can only go into the question of dispossession within six months before suit and cannot enquire into the defendant's title. (1903) 5 Bom L R 264 (266, 267) (DB).

——S. 9—Claim of title set up in defence—Suit treated by lower court partly as summary suit under S. 9 and partly as a suit based on title—Rights of parties to have question of title tried and decided—Practice.

Plaintiff sued in ejectment on the footing of title. The defendant set up title in himself. The lower court held that the plaintiff has failed to prove a title by purchase, but that as regards some land, S. 9 applied, as he had been forcibly dispossessed otherwise than by due course of law within six months prior to the suit. Held as the suit was based on title, and not on S. 9 and as the defendant set up title in himself, the issue concerning title should have been tried. The suit ought not to have been treated partly as a suit under S. 9 and partly as based on plaintiff's title. 16 A. 384 not foll. (1901) 11 MLJ 408: 25 M 448 (451) (DB).

19. Suit on title, decree if can be given.

——S. 9—Decree on basis of possession.

Where the plaintiff bases his suit on title, the Court cannot grant a decree for possession under S. 9 Specific Relief Act even if the plaintiff has been dispossessed within six months of the date of suit. AIR (Vol 29) 1942 Pesh 8: 193 Ind Cas 290.

——S. 9—Suit for recovery of possession—Peaceful possession—When sufficient against trespasser.

So far as the Calcutta High Court is concerned, mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under S. 9 although peaceful possession for a long period of time, may, under certain circumstances, give rise to an inference of title in the plaintiff as against a trespasser and entitle him to obtain a decree for recovery of possession against such a trespasser who has no right to possession whatsoever. AIR (Vol 21) 1934 Cal 561: 38 CWN 435: 61 C 419: 150 Ind Cas 723 (DB).

——S. 9—Suit based on.

If a plaintiff in a suit for possession claims a decree on the basis of title and further claims a decree for damages, the suit does not come within the purview of S. 9, Specific Relief Act, and if the plaintiff fails to prove his title, either possessory or as a rightful owner, he cannot be granted a decree for possession even though the suit may have been brought within six months of the date of dispossession. AIR (Vol 14) 1927 All 669: 103 Ind Cas 428: 25 ALJ 857 (DB).

——S. 9—Suit based on title—Conversion of.

Where a plaintiff sues for possession on the basis of a title and fails to establish his title suit for possession based on title cannot be converted into a suit for possession under S. 9 of the Specific Relief Act and a decree for possession cannot be granted to him under the latter provision. AIR (Vol 12) 1925 All 69: 46 All 903: 82 Ind Cas 324 (DB).

——S 9—Decree under S. 9—Probative value.

A judgment in a case under S. 9 of the Specific Relief Act does not come under S. 41 nor under S. 42, of the Evidence Act and it is relevant only under S. 13 and Ss. 40 and 43 as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a Judgment or decree, or in order either to found a further claim or to determine whether cognizance should or should not be taken of a suit, or whether a trial should or should not be held.

The use to which the decree may be made in subsequent suit is only to show that a right to possession was asserted and it was denied, and a suit was instituted and it failed. The legislature did not intend to give the proceedings under S. 9 the character of finality which is essential to invest the decision with a character which will make it operative as res judicata. AIR (Vol 12) 1935 Cal 1046: 85 Ind Cas 979 (DB).

——S. 9—Dispossession in course of law.

Plaintiffs Nos. 1 and 2 were in possession of the property in suit through their burgadars, the plaintiffs Nos. 3 and 4. But in a suit brought by the deft. against the plffs. Nos. 1 and 2 the latter falsely stated that they were not in possession that suit was decreed and in execution the plaintiffs Nos. 3 and 4 were dispossessed. The plaintiffs then brought this suit for possession under S. 9. Held that the dispossession of the plaintiff was in due course of law was as contemplated by S. 9. (1911) 15 CWN 956: 11 Ind Cas 740 (DB).

——Ss. 8, 9—Suit for ejectment based on title—Decree cannot be given on basis of previous posses-

sion—Question of title not determined—Possessory action — Sections 8 and 9 mutually exclusive — Practice.

Where a plaintiff sues for possession on the basis of title and fails to establish his title, he cannot be granted a decree for possession under the 1st paragraph of S. 9. Ss. 8 and 9 give alternative remedies and are mutually exclusive. In a suit under S. 9 no question of title is to be determined. The object of section 9 is clearly to enable a person dispossessed to recover possession merely by proving previous and wrongful dispossession without proving title. But he cannot combine the remedies provided for by both sections in one and the same suit. 15 A. 384 overruled. (1910) 7 ALJ 1078, (1085): 33 All 174: 7 Ind Cas 495 (FB).

——S. 9—No authority of true owner—Plea of jus tertii—Suit for possession after six months.

Possession is a good title against all but the true owner. Prior possession for any time short of the statutory period will entitle the holder to a decree for recovery of possession in a suit brought more than six months after dispossession, provided the defendant is a trespasser and cannot establish any title to the disputed land. A trespasser or a wrong doer cannot plead jus tertii unless he can show that the act complained of was done by the authority of true owner.

The effect of S. 9 is only that if a summary suit be brought within the time prescribed by that section, the plaintiff therein who has been dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorised or claiming under him; but a decree in such a suit will not have the force of res judicata on the question of title. 26 C. 572 diss. from. (1902) 13 MLJ 146: 26 M 514 (516, 517) (DB).

20. Suit on title not barred.

——S. 9—Dispossession of immoveable property—Rights to collect cow-dung and grass from land interfered with and party thrown out of land.

Where not only the rights of the plaintiffs to collect cow-dung and grass from the land in dispute are interfered with but the plaintiffs are also forcibly thrown out of the land, it would certainly amount to their "dispossession from the land in dispute and they would be" entitled to file a suit under S. 9 of the Specific Relief Act. AIR (Vol 38) 1951 Ajmer 88 (1).

——S. 9—Right to sue— Persons dispossessed in possession on behalf of another.

The proper persons to institute a suit under S. 9, Specific Relief Act, are the persons who were actually dispossessed from the property. Even if they were in possession on behalf of the plaintiff, still the plaintiff could only institute the suit if the persons actually dispossessed are not willing to sue. AIR (Vol 37) 1950 Pesh 9.

——S. 9—Remedy open—Person having only possessory title ousted— Suit in ejectment on basis of possessory title more than six months after dispossession—Maintainability.

Even independently of S. 9 person who has been ousted by a trespasser from the possession of immovable property to which he had merely a possessory title is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of his dispossession. AIR (Vol 22) 1935 Oudh 268: 1935 R D 108: 1935 OWN 230: 10 Luck 659: 154 Ind Cas 570.

——S. 9—Possessory title.

A person with established possession can bring a suit on the basis only of prior possession against a person interfering with that possession. AIR (Vol 16) 1929 All 428 : 116 Ind Cas 816.

——S. 9—Lien for dower debt.

The lien of a Muhammadan widow over property, on account of a dower debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession: (7 All. 353, not Foll.)

Nor (apart from S. 9 of the Specific Relief Act) can the widow rely on the title arising from mere prior possession. Title based on mere prior possession is only available against some one other than the rightful owner. The heir is the rightful owner and the widow, only having a right of lien, has no title. AIR (Vol 14) 1927 All 534: 25 ALJ 806: 103 Ind Cas 363 (DB).

——S. 9—Suit on possessory title.

Even independently of S. 9 of the Specific Relief Act, a person who has been ousted by a trespasser from the possession of immovable property, to which he had merely a possessory title, is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of dispossession. AIR (Vol 14) 1927 All 526: 49 All 191: 25 ALJ 281: 99 Ind Cas 568 (DB).

——S. 9—Remedy apart from section.

If a person claiming to have taken the land as his share, when the estate was divided amongst the heirs is in peaceful possession and is dispossessed by a person who is a mere trespasser, a suit for possession is maintainable as based on title apart from S. 9, Specific Relief Act. AIR (Vol 14) 1927 Rang 203: 5 Rang 154: 102 Ind Cas 696 (DB).

——S. 9—Suit on.

Except under the Specific Relief Act, S. 9 a suit for ejectment even against a trespasser cannot be maintained merely on previous possession: 14 CWN 141. Dissented. AIR (Vol 12) 1925 Cal 1225: 89 Ind Cas 180 (DB).

——S. 9—Where mortgage is invalid.

A person who has contracted a usufructuary mortgage over an occupancy holding, in contravention of the provisions of the law, will not receive the assistance of the Courts in a suit for recovery of possession based upon title such title being ex-hypothesi invalid. The plaintiff however can undoubtedly sue to be put back in possession under Section 9 of the Specific Relief Act, without pleading his title at all. AIR (Vol 10) 1923 All 81: 20 ALJ 972 (DB).

——S. 9—S. 56, Spe. Rel. Act.

A person in possession against whom a decree under Section 9 of the Specific Relief Act has been passed in favour of another person, can bring a suit to establish his title to the land and for an injunction restraining the other person from executing his decree. Section 56 of the Act is no bar thereto. AIR (Vol 9) 1922 Bom 216: 24 Bom L R 768: 68 Ind Cas 490.

——S. 9—The effect of an order under S. 144, Cr. P. Code, is not to disturb either title or possession though it may prevent the exercise of rights which a person in possession would otherwise be entitled to exercise during the continuance of the said order. If a person so prevented by an order under S. 144, Cr. P. Code, is dispossessed he can sue under S. 9 of the Sp. Rel. Act. (1921) 64 Ind Cal 572 (Cal).

——S. 9—Suit for possession of land and crops—Decree—Removal of crops before execution—Subsequent suit for damages.

Plaintiff obtained a decree under S. 9 of the Sp. Rel. Act, for possession of certain lands with crops. The crops had been removed in the meantime before execution. The plff. brought a suit for recovery of the price of the crops.

Held, that the defts. could not by cutting and removing the crops annul the effect of the possessory decree, and that they were liable though they denied plff's title. AIR (Vol 5) 1918 All 12: 41 All 108: 16 ALJ 924: 48 Ind Cas 422 (DB).

——S. 9—Suit for mesne profits.

A suit for possession under S. 9 of the Sp. Rel. Act is no bar to a subsequent suit for mesne profits as the causes of action are different. AIR (Vol 4) 1917 Nag 19: 46 Ind Cas 885.

——S. 9—S. 9 of the Sp. Rel. Act is no bar to a suit for possession against a trespasser instituted beyond 6 months after dispossession by a person who has been in peaceful possession of his land even for a period short of the statutory period of 12 years. AIR (Vol 4) 1917 Pat 546 : 1 Pat L W 327: 2 Pat L J 280: (1917) Pat HCC 164: 39 Ind Cas 458 (DB).

——S. 9—A person not suing under the section when first dispossessed, can, after the summary relief under the section is barred by time file a regular suit for ejectment under S. 110, Evidence Act. As soon as he proves dispossession, the deft. must prove his title. AIR (Vol 3) 1916 Pat 172: 2 Pat L J 61: 3 Pat L W 258: 38 Ind Cas 797 (DB).

——S. 9—No one though entitled to sue under S. 9 of the Sp. Rel. Act is bound to do so and he can always bring a regular suit founded on title either in addition to or instead of the suit under that section. AIR (Vol 1) 1914 L B 11: 7 Bur L T 10: 7 LBR 88: 23 Ind Cas 367.

——S. 9—Regular suit—Plff's failure to prove title —Relief under S. 9 if can be granted.

A person who sues for possession on the basis of his title cannot get a decree for possession under the first para. of S. 9. (1911) 8 ALJ 404: 10 I C 145.

——S. 9—Possessory suit—Effect of order of a Criminal Court—Revision.

The existence of an order passed under S. 145 of the Code of Criminal Procedure is no bar to the institution of a suit under S. 9 of the Specific Relief Act, for recovery of possession of the same land. When a suit under S. 9 is decreed the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. 1908 AWN 142: 5 ALJ 297: 30 A 331 (333) (DB).

——S. 9—Suit by tenant of judgment-debtor against auction-purchaser—Delivery of possession — Civil Procedure Code, Ss. 318, 319.

Where on obtaining delivery of possession of immoveable property under S. 318. of the Code of Civil Procedure the auction purchaser dispossessed a tenant of the judgment-debtor.

Held—That the auction-purchaser not having proceeded under S. 319 of the Code, the dispossession was not in due course of law and a suit under S. 9 Specific Relief Act, was maintainable. (1908) 12 CWN 694 (696): 1 Ind Cas 430 (DB).

21. S. 139 of Chota Nagpur Tenancy Act.

——S. 9—Suit by tenant against landlord.

A suit under S. 9 by a tenant to recover possession of land from which he has been unlawfully ejected is not barred by the provisions of the Chota Nagpur Tenancy Act, S 139. (1911) 13 CLJ 250: 15 CWN 387: 9 Ind Cas 478 (DB).

22. Other illustrative cases.

——S. 9—Court-fee in revision.

On an application for revision arising out of suit under S. 9, Specific Relief Act, court-fee payable is the same as has been paid on the plaint. AIR(Vol 28) 1941 Rang 126 : 1941 Rang L R 54 : 194 Ind Cas 70.

——S. 9 Possessory decree in favour of plaintiff — Defendants trespassing and reaping crops — Two suits by plaintiffs, one on possessory decree and the other for title—Proper procedure.

The plaintiffs had got a decree in a possessory suit under S.9. Afterwards, the defendants trespassed and reaped the crops. The plaintiffs filed two suits, one for profits based on possessory decree and the other a title suit. The two suits were tried together and it was agreed that the decision of the suit for profits should depend upon the decision of the title suit, which was dismissed for want of title:

Held, that the proper procedure to adopt was to decide the suit regarding the crops purely on the question of removal and on the basis of possessory title AIR (Vol 23) 1936 Mad 650 (650, 651) : 168 Ind Cas 464.

——S. 9—Continuing wrong—Criminal trespass.

The continuance in possession of a trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares to make a claim to it. There is a fresh cause of action each time he is resisted, and the persons entering subsequently with the permission of the first trespassers and resisting the entry of the owner are equally guilty. AIR (Vol 15) 1928 Pat 124 : 6 Pat 794 : 29 Cr L J 99 : 9 A I Cr 258 : 106 Ind Cas 691 (DB).

——S. 9—Cause of action.

The question, whether there is a cause of action or not, does not depend on the admission of the defendant. Where the plaint discloses a cause of action, and there is no finding that there is no cause of action, the plaintiff is entitled to a decree on the admission of the defence. AIR (Vol 8) 1921 Pat 280 : 1921 P H C C 297 : 65 Ind Cas 644.

——Ss. 9, 39—Suit on basis of former possession apart from title—Concurrent suit for cancellation of deed of gift under which defendant claimed—Cause of action.

Where a plaintiff field a suit for recovery of possession of immoveable property under S. 9, and while such suit was pending filed a second suit asking for cancellation of a deed of gift under which the defendant claimed title, it was held that this was not a splitting up of a cause of action and that the second suit was unobjectionable in point of law. 1904 AWN 7 : 26 A 236 (237, 238) (DB).

—S. 10.

——S. 10, Ill. (b) — Scope—Pledgor and pledgee — Rights of—Sale or repledge by pledgee—Right of pawnor—Suit for redemption—Tender.

Illus. (b) to S. 10 Specific Relief Act, is based upon the well-known rule that where a pledgee sells or repledges the articles pledged the pawnor is not entitled to maintain an action of conversion or detinue without payment or tender of the amount due in respect of the pledge. An action for redemption of the pledge on payment of whatever is due maintainable even though the amount due was not previously tendered or paid. (1948) 53 Mys HCR 73 (DB).

——S. 10—Suit for recovery of account papers — Darpatni mehal—Alternate relief for damages below Rs. 500 — Suit, if triable by Small Cause Court —Second appeal.

Where the plaintiff, a patnidar, sued the defendant who was the darpatnidar for recovery of theka and other papers of the darpatini mehal on the basis of a contract contained in registered kabuliyat and failing such recovery, claimed Rs. 100 as compensation:

Held, that it was not an ordinary money suit of value of Rs. 100 but a suit for specific performance of a contract within the meaning of S. 10, Specific Relif Act, and that consequently, the suit was not cognizable by a Small Cause Court and that second appeal lay to the High Court. AIR (Vol 19) 1932 Cal 481 : 59 C 352 : 138 Ind Cas 640.

——S. 10—Corpse.

Suit for possession of a corpse will not lie under S. 10 or S. 11 as a corpse cannot be regarded as mov-

able property. AIR (Vol 17) 1930 Rang 143 : 7 Rang 603 : 121 Ind Cas 775 (DB).

——S. 11.

——S. 11—Scope.

Under a contract in writing, R delivered to A, a cinematograph projector. According to contract, A was to pay for the projector in instalments and it was expressly provided that the ownership of the machine was not to pass to A till the price had been paid in full. In default of payment of an instalment, R had the option of cancelling the contract. A defaulted in the payment of instalments and R exercised his option of demanding the return of machine :

Held, that A held the projector in a fiduciary capacity within the meaning of cl. (a) of S. 11 after R had terminated the contract and demanded its return. After the termination of the contract, A had no right to deal with it or even use it. He held it on behalf of R and it was his duty to deliver it up to him. He was not a trustee in the technical sense but held the machine in fiduciary character. A I R (Vol 32) 1945 Mad 281:I L R (1946) Mad 174:58 L W 248 : (1945) 1 M L J 460 : 1945 M W N 349 (D B).

——S. 11—Scope.

In a suit for accounts by the beneficiary against the trustee, the beneficiary is entitled to recover the movables back in specie under the provisions of S. 11. AIR (Vol 27) 1940 Cal 337 : I L R (1940) 1 Cal 373 : 71 C L J 215 : 44 C W N 304 : 190 Ind Cas 295 (DB).

——S. 11—Suit for delivery of specific movables.

In order to entitle a person to obtain delivery of specific movable property by suit and enforce the decree obtained by the stringent methods provided in O. 21, R. 31 of the C. P. Code, he should allege and prove facts which entitle him to compel the delivery of the specific movables under the provision of S. 11 of the Sp. Rel. Act. A I R (Vol 3) 1916 Mad 314 : 39 Mad 1 : 29 M I J 342 : (1915) M W N 644 : 2 L W 805 : 18 M L T 236 : 30 Ind Cas 840 (FB).

[On Appeal from : A I R (Vol 1) 1914 Mad 57 : 24 Ind Cas 676.]

——S. 12.

1. Scope.
2. Contract of loan.
3. Discretion of Court.
4. Clause (c) and Explanation.
5. Contracts specifically enforceable or otherwise —Illustrative cases.
6. Prayer for possession.

1. Scope.

——Ss. 12, 13 and 14—Suit for specific performance, what is.

A suit by the vendor for the recovery from the purchaser of the consideration for the transfer of the property is a suit for specific performance. On the same principle a suit for the recovery of a sum to which the plaintiff is entitled under a deed of release is also a suit for specific performance. A I R (Vol 30) 1943 Mad 761 : I L R (1944) Mad 83 : 56 L W 627 : (1943) 2 M L J 424 : 1943 M W N 647 (2) : I L R (1944) Mad 83 : 210 Ind Cas 389 (FB).

——S. 12 — Unperformed unregistered contracts — Maintainability of suit for specific performance.

Court can receive and adjudicate upon suits for specific performance of unperformed unregistered contracts. The exact condition under which a plaintiff will be allowed to sue depends, rather upon the circumstances, than upon a strict interpretation of S. 77, Regis. Act. A I R (Vol 22) 1935 Pesh 12.

——S. 12— Applicability of principles of equity in India—To determine whether time is of the essence of contract, equity looks to substance of contract.

In a suit for specific performance of a contract, in spite of the fact that in India relief by way of specific performance is the creature of statute, the principles of equity apply. Prima facie, equity does not regard the time of the contract but rather its substance. The disregard or the terms of a contract so far as the time is concerned may depend upon the express stipulations between the parties. the nature of the property, or the surrounding circumstances. A I R (Vol 21) 1934 Pat 518 : 15 P L T 469 : 1 B R 626 : 156 Ind Cas 558 (DB).

——S. 12—Duty—Plaintiff.

In an action for specific performance, it is necessary for the plaintiff to prove the existence of a concluded contract between himself and the defendant and that he was ready and willing at all material dates to perform his part of the contract. A I R (Vol 21) 1934 Pat 518 : 15 P L T 469 : 1 B R 626 : 156 Ind Cas 558 (DB).

——S. 12 - Mutuality is essential.

Mutuality is essential in a suit for specific performance of a contract and the Court will not pass a decree for specific performance of a contract unless the plaintiff also could be compelled to specifically perform his part of the obligation. A I R (Vol 20) 1933 Pat 306 : 14 P L T 1 Sup : 12 Pat 359 : 145 Ind Cas 1 (DB).

——S. 12 — Though independently of S. 77 of the Registration Act a suit to compel registration of a document does not lie, the Registration Act does not touch or affect the equitable jurisdiction possessed by the civil Courts to pass a decree for specific performance by the execution and registration of a fresh document where circumstances exist entitling the plaintiff to such a decree. AIR (Vol 13) 1926 Pat 89 : 1926 P H C C 11 : 7 P L T 730: 95 Ind Cas 187 (DB).

——Ss. 12, 18, 35—Purchaser's right.

A purchaser may sue for specific performance and ask for an enquiry into the title, by the result of which he will be bound. AIR (Vol 7) 1920 Mad 859 : 52 Ind Cas 971 (DB).

——S. 12—Report of Jury—If can form basis of suit.

A report of a jury constituted under S. 139, Cr. P. Code, does not amount to a contract between the parties and cannot be made a basis for a suit for specific performance. A I R (Vol 3) 1916 Pat 264 : 18 Cr. L J 305 : 38 Ind Cas 417.

——S. 12—Decree — Specific performance — Plaintiff ready to perform his part.

In a suit for specific performance of a term of an award directing a transfer of certain decrees to the defendant and payment by the defendant of their value to the plaintiff, the form of the decree was settled as in 54 L. T. 729; a sale deed duly executed and deposited in Court was directed to be delivered to the defendant and on the defendant's undertaking to render all help in the execution of the decree the defendant was directed to pay the value of the decrees to the plaintiff. (1901) 24 All 164 (169) : 1901 A W N 208 (DB).

——S. 12 — Agreement to renew Kanom—Specific performance — Subsequent purchaser with notice, rights of purchaser to eject.

Where there is only an agreement to renew a kanom for mortgage for 12 years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanom renewed under the agreement not withstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement. (1901) 13 M L J 217 : 27 M 202 (204, 205) (DB).

2. Contract of loan.

——S. 12 — Personal decree.

Debtor giving the documents of title to the creditor and writing to him that if payment is not

made within a certain period he will execute mortgage—Failure to pay — Suit for specific performance — Part payment during the pendency of suit.

Held, that the agreement being clear and sufficiently precise, could be specifically enforced; and even if certain payment had been made, the grant of specific performance could be made conditional upon the return of the same but under the circumstances, no personal decree would be passed against the defendant. A I R (Vol 22) 1935 Mad 560 : 1935 M W N 834 : 42 L W 500:158 Ind Cas 297 (DB).

——S. 12—Specific terms in contract.

According to the terms of the mortgage deed, the mortgagee was entitled to have the deficiency in the mortgage land made good from other land of the mortgagor. No specific khasra numbers were mentioned in the original mortgage-deed.

Held, that specification of land for making good the deficiency is not essential for the maintenance of of a suit for specific performance. The contract between the parties was that the deficiency was to be made in a specified manner and a suit for the performance of the contract in that manner is a suit for specific performance. A I R (Vol 17) 1930 Lah 997.

——S. 12—Bargain for kanom.

Bargain for kanom is not one for money, but for land. The mere fact that one of the incidents of the tenure is that the kanom tenant advances money to the jenmi and that there are stipulations for the return of the sum or such portion of it as is left after settling of arrears of rent at the termination of the tenure, is not sufficient to make the contract one of borrowing or lending. An agreement to grant a lease or kanom of a shop is not one of borrowing and lending money but it is an agreement by which the kanom tenant bargains for a substantial interest in the jenmi's property for the purpose of occupation, cultivation and improvement. The rule against granting specific performance of contracts to lend or borrow money has no application to such an agreement. A IR (Vol 16) 1929 Mad 777 : 1929 MWN 686.

——S. 12—Agreement to execute mortgage.

A promise to advance money in loan cannot sustain a suit for specific performance. The converse proposition that a promise to borrow money is not susceptible of specific performance is equally not open to any doubt. But a promise to execute a mortgage of immovable property in lieu of consideration advanced is a promise to transfer title in such property and can be specifically enforced where money compensation will not give adequate relief. A I R (Vol 14) 1927 Oudh 55 : 2 Luck 299 : 3 O W N Sup 315 : 99 Ind Cas 483 (DB).

——S. 12—Specific performance—Form of decree.

Ordinarily a suit will not lie for specific performance of a contract to pay money. But the case of a vendor is an exception to the general rule and the Court will grant a decree for specific performance of his contract against the purchaser. The form of the decree is that the plff. be at liberty to prepare and execute a conveyance to the deft. as an escrow to be delivered to the deft on payment of the purchase money within the time limited and the deft. should pay the purchase money after the conveyance is ready. If the contract is that the purchase money is to be paid before execution of the conveyance then the decree must be made accordingly. A I R (Vol 6) 1919 Mad 304 : (1918) M W N 896 : 9 L W 1 : 35 M L J 89 : 49 Ind Cas 385.

——Ss. 12 and 17 — Suit for balance of mortgage money.

A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage and is not maintainable. A I R (Vol 5) 1918 Lah 34 : 37 P R 1918 : 66 P W R 1918 : 124 P L R 1918 : 45 Ind Cas 61 (DB).

3. Discretion of Court.

——S. 12—Restitution of conjugal rights.

The relief asked for by the plaintiff in suit for restitution of conjugal rights is one which is in the discretion of the Court to grant. The suit is in the nature of a suit for specific performance. AIR (Vol 24) 1937 Rang 308 : 172 Ind Cas 118.

——Ss. 12, 22—Contract for sale of property—Alternative relief barred by time—Specific performance—Discretion of Court.

Where a contract for the transfer of immovable property is not such as can be specifically granted, the plaintiff will not be entitled to get that relief merely because he has allowed his alternative relief to be barred by time. But if the contract for specific performance is of such a nature as to admit of being specifically performed, then the mere fact that the other remedy has become barred by time should not deprive the plaintiff from getting the relief to which he is entitled. AIR (Vol 20) 1933 All 846 : 1913 ALJ 1584 : 56 A 142 : 148 Ind Cas 229 (DB).

——S. 12—Contract for sales of land — Time essence—Relief against stipulation.

Courts of equity look at the substance as distinguished from letters of agreements and administer justice accordingly; but they would not exercise their jurisdiction where the parties have expressed their agreements in clear terms that it will not apply by providing that time is to be of the essence of the bargain (contract for sale of land), unless the parties have subsequently waived them. AIR (Vol 2) 1915 P C 94: 33 Ind Cas 323.

4. Clause (c) and explanation.

——S. 12—Agreement to lease — Parties areeing to compensation in money in case of breach, if can be specifically enforced.

Where, according to the terms of the contract to lease immovable property and the other circumstances, it is proved that the parties have agreed to accept compensation in money in case of breach, the contract cannot be specifically enforced. A I R (Vol 30) 1943 Cal 586 : I L R (1943) 1 Cal 138 : 47 C W N 123 : 209 Ind Cas 566 (DB).

——S. 12—Agreement to transfer land.

Held, that in a case of a contract to transfer immovable property money compensation cannot give adequate relief and that the explanation to S. 12 of the Specific Relief Act consequently applies. (1930) 7 O W N 135 (DB).

——S. 12—Compensation in money.

Where compensation in money is an adequate relief to the plaintiff a decree for specific performance of the contract should not be made. Proper decree in such cases would be one for damages which should be calculated on the price of the property at the date of the breach of the contract. AIR (Vol 16) 1929 P C 190 : 25 N L J 121 : 30 M L W 443 : 50 C L J 197 : 31 Bom L R 883 : 56 I A 280 : 1929 M W N 452 : 33 C W N 893 : 1929 A L J 780 : 57 M L J 205: 117 Ind Cas 1.

——S. 12—Damages provided in default.

In a contract for the transfer of immovable property there was a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee. There was nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose than to provide a security for performance.

Held, in a suit for specific performance, that the contract was not one for the breach of which money would be adequate compensation. AIR (Vol 13) 1926 Mad 144 : 49 M L J 152 : 22 M L W 366 : 90 Ind Cas 605.

——S. 12—Presumption.

S. 12 raises a presumption that compensation would not be adequate and the party alleging that it is adequate must make out a case to that effect. AIR (Vol 11) 1924 All 529 : 5 L R A Civ 180 : 78 Ind Cas 167 (DB).

——S. 12 — An agreement to give land can be specifically enforced, as the breach of it could not be adequately compensated in money. There is no difference in this respect between an agreement to sell and an agreement to make a gift. AIR (Vol 10) 1923 Nag 47 : 71 Ind Cas 40.

——S. 12—Explanation—Scope of.

If a man promises to deliver land for an agreed price and fails to fulfil his promise, the Court can decree specific performance of the contract. AIR (Vol 2) 1915 L B 152: 8 Bur L T 101: 27 Ind Cas 732.

——Ss. 12 (c) and 54 — Injunction where pecuniary compensation is adequate—Sale of shares.

Injunction should not as a rule, be granted where pecuniary compensation would give adequate relief. The sale of shares held as security by the deft. Co. to which plff. owed large sums, could not be restrained by an injunction. (1911) 4 Bur L T 155 : 11 Ind Cas 807.

——S. 12—Adequacy of damages.

Where the terms of the award in favour of the defendant had been performed in part and plaintiff sued for specific performance of remaining term, viz., that the plaintiff should transfer certain decrees to defendant and the defendant should pay their value to the plaintiff.

Held, there was no measure by which damage for non-performance could be estimated and that specific performance should be granted. (1901) A W N 208 : 24 All 164 (169).

5. Contracts specifically enforceable or otherwise—Illustrative cases.

——S. 12 — Agreement to sell providing that if property is sold to another person, vendor would be liable for damages—Right to specific performance.

The right to claim specific performance is given by S. 12 of the Specific Relief Act, and a clause in an agreement to sell that if the vendor sells the property to any other person he would be liable for the payment to the transferee his amount together with compensation and damages, does not detract from that right but merely provides for another remedy to the transferee in case the agreement is not carried out by the transferor or something is done by him to the transferee's detriment. AIR (Vol 39) 1952 Nag 244 : I L R (1949) Nag 959 : 1950 N L J 41.

——S. 12 (c). Illus. (iii)—Specific performance in respect of sale of specified shares—Ordering of.

When shares are limited in number and are not ordinarily available in the market, it is quite proper in view of Illus. (iii) to Cl. (c) of S. 12, Specific Relief Act, to grant a decree for specific performance of a contract for the sale of such shares. AIR (Vol 36) 1949 F C 211 : (1949) 2 M L J 476 : 1949 F C R 379 : 85 C L J 34 : 1949 F L J 216 : 51 Bom L R 979.

——S. 12 — Agreement to execute lease at a future date.

A contract for a lease is enforceable notwithstanding that the commencement of the term depends on the happening of an uncertain contingency, provided that at the time the contract is sought to be enforced the contingency has occurred. Specific performance of an agreement to execute a lease at a future date can be ordered. AIR (Vol 34) 1947 Sind 6 : 225 Ind Cas 264.

——Ss. 12, 21, 27—A contracting to sell his house to B — Purchase money to be paid by instalments — B put in possession — Conveyance to be executed on payment of last instalment — Default by B waived by A — Subsequent sale by A to C—Contract held subsisting and could be specifically enforced against C.

A contracted to sell his house to B. The consideration which was fixed at Rs. 2000 was to be paid in instalments. B was to be put in possession on payment of first instalment and on payment of the last of the instalments A was to execute a conveyance in favour of B. In terms of the agreement B was put in possession and went on making part payments of the purchase money but subsequently found it difficult to pay further. A accommodated him by allowing him to pay easy monthly instalments of Rs. 25. After this arrangement B made two or three instalments and again defaulted. Thereafter, A demanded the balance and as it was not paid he subsequently sold the house to C. Thereupon B brought a suit for specific performance of the contract for sale :

Held, that (1) the fact that B and not A was in possession whether actually or through his tenants was sufficient to affect C with notice of B's interest which would necessarily include notice of his prior contract. C therefore was not a bona fide purchaser for value without notice and specific performance could be enforced against him.

(2) No doubt B failed to make payments at the stipulated time but as A had been all along very lenient in enforcing payment of instalments it could not be held that any particular default or defaults could terminate the contract except upon express notice to that effect which was not given by A. The contract therefore was subsisting.

(3) The contract was one of which Court should grant specific performance in the exercise of its discretion. The case could not be brought within any of the clauses of S. 21. The contract being for sale of immovable property there was a presumption under S. 12 that compensation in money was not adequate relief. This presumption was not rebutted. As the defaults in payments by B had been consistently waived by A neither he nor any one claiming through him could put it forward as a ground for refusing specific performance. AIR (Vol 33) 1946 Cal 521: 229 Ind Cas 73.

——S. 12—Contract of lease—Specific performance.

An oral agreement to lease, not coming under S. 27A can be specifically enforced. AIR (Vol 30) 1943 Cal 586 : I L R (1943) 1 Cal 138 : 47 C W N 123 : 209 Ind Cas 566 (DB).

——S. 12—Deed not presented for registration by vendee—Whether can compel his vendor to execute new deed and register that deed.

The Regis. Act does not touch or affect the equitable jurisdiction possessed by the Civil Courts to pass a decree for specific performance where circumstances exist entitling the plaintiff to such a decree. Hence, where a vendee has not presented a deed for registration, he can compel his vendor to execute a new deed and register that deed by obtaining a decree for specific performance, directing the vendor to execute and register a fresh conveyance in his favour. AIR (Vol 29) 1942 Pat 311 : 21 Pat 150 : 23 PLT 580: 201 Ind Cas 260 (DB).

——S. 12—Contract by vendors to sell land—One of them minor—Vendee going into possession and retaining it for long time without repudiating contract—Purchase price not paid—Suit by vendors for specific performance—Minor becoming major then :

Held, that the vendee having remained in possession of the land without repudiating the contract, must be deemed to have waived the right to repudiate it on the ground that one of the vendors was a minor when the contract was executed. The vendors were entitled to maintain the suit. AIR (Vol 27) 1940 Mad 625 : (1940) 1 MLJ 251 : 1940 MWN 183 : 51 L W 384 : ILR (1940) Mad 852 : 194 Ind Cas 446 (DB).

——S. 12—Suit for specific performance of contract of sale — There must be completed agreement of sale.

A decree for specific performance of a contract of sale can be passed only on proof of the fact that there was a completed agreement of sale between the plaintiff and the defendant. Where there is no completed agreement of sale between the plaintiff and defendant and all that is relied upon is promise by defendant to sell his share to the plaintiff if and when defendant decides to transfer his share, such a promise is not equivalent to a completed agreement of sale and cannot form the basis of a suit for specific performance. AIR (Vol 26) 1939 All 64: 1938 ALJ 1066 : 1938 AWR 736: 180 Ind Cas 361.

——S. 12—Suit for specific performance by vendor —Conditions necessary—Disposition of property after contract of sale, when disables vendor from carrying out contract.

In a suit for specific performance, the plaintiff must always be ready and willing to carry out his part of the contract. A transaction whereby a vendor disposes of the subject-matter of the contract in violation of the contract has a twofold significance; (1) as showing an intention on his part to treat the contract as at an end or to abandon the contract and (2) as bearing on the question of his capacity to perform the contract. Where, subsequently to the contract, the vendor sells away the subject-matter of the contract to a third party, the Court will be justified in drawing both the inferences above indicated, namely, that he had thereby shown his intention to abandon the contract so far as specific performance thereof was concerned and also diasabled himself from performing the contract in the sense of conveying the property to the original vendee. Where, however, the subsequent transaction entered into by him is not in the nature of a sale of the subject-matter of the contract and there is nothing to show that he intended to abandon the contract or to treat it as at an end, the question whether by such transaction he has incapacitated or disabled himself from performing his part of the contract will be a question of fact to be determined in the light of several considerations. The vendor's obligation to deliver possession arises only when the purchase money is paid by the vendee and the document of sale is executed by the vendor. It is with reference to these considerations that the question of the vendor's ability to carry out the several obligations imposed upon him by law as vendor must be determined. It is not right in all cases to take the state of things as on the date of the institution of the suit as conclusive proof that the vendor has incapacitated himself :

Held, on facts that the lease given by the vendor did not disable him from carrying out his contract with the vendee so as to disentitle the vendor to claim specific performance. AIR (Vol 26) 1939 Mad 547 : (1939) 1 MLJ 436 : 49 L W 362 : 1939 M W N 451 : 188 Ind Cas 691 (DB).

——S. 12—Contract, when can be enforced against minor's guardian.

Where the guardian or manager enters into a contract for sale of immovable property on behalf of the minor, and the legal necessity for such sale has been proved, the contract can be specifically enforced. AIR (Vol 22) 1935 Pat 237 : 1 B R 747 : 157 Ind Cas 327.

——S. 12—Registration of document—Obligation of vendor to execute a registered sale.

The doctrine that even though a vendor of property may execute a conveyance if the conveyance should fail to be registered the purchaser of property has still a claim for specific performance is a vicious doctrine. In all cases where the purchaser of property accepts an unregistered document he may be regarded as relieving the other party, the vendor, of his obligation to tender a registered document in performance of the contract. It cannot be said that a person who agrees to sell and convey property is bound not only to execute a proper conveyance once but go on executing as many conveyances as may be required by the vendor in respect of that property. Such an obligation cannot possibly be recognzied but there may be proper cases apart altogether from the provisions of the Registration Act in which a purchaser of property who had accepted a document unregistered will be entitled to come to Court and ask for specific performance of the contract on the ground that it has not been properly performed. But such a case must be made out on the particular facts. AIR (Vol 15) 1928 Mad 344 : 108 Ind Cas 782.

——S. 12—Suit to recover money.

A suit for the recovery of money can in no sense be treated as a suit to enforce a contract unless the contract is for the delivery of particular coins. A I R (Vol 13) 1926 Rang 198 : 4 Rang 227 : 5 Bur L J 133: 97 Ind Cas 1032 (DB).

——S. 12—Specific performance of contract to sell land—Decree, form of—Contract by minor's guardian.

A Shafi-i-sharik has a right of pre-emption in a village of large estates inasmuch as he is a partner in the thing sold.

In a suit for pre-emption brought on the ground that the plaintiff was Shafi-i-Sharik the evidence showed that the parties had divided the property including the soil of roadways and water courses leaving all public and private rights and rights of tenants in respect to irrigation as before: Held that the plaintiff was not Shafi-i-Sharik of the vendor.

Held further, that the fact that a tenant after partition between the landlords, irrigates his field in one mahal from his well situated in another mahal, does not constitute the plaintiff a Shafi-i-Khabit of the vendor, nor does the fact that the plaintiff and vendor are tenants-in-common of the choupal make him a Shafi-i-Khabit. A choupal is but a house and may be adapted to any other use to which a house may be put, and the sale of the zemindari does not include that of a choupal, because the ownership of the latter is distinct and separate from that of the former. (1908) 7 ALJ 879 : 33 All 28 : 7 Ind Cas 404 (407, 408) (DB).

——S. 12—Specific performance—Mistake common or unilateral.

The courts are recluctant to refuse specific performance on the ground of unilateral mistake, unless the defendant proves something further. What this further evidence should amount to has been thus expressed:—"That a hardship, amounting to injustice, would be inflicted upon the defendant by holding him to his bargain." (1905) 7 Bom L R 319 (322).

6. Prayer for possession.

——S. 12—An agreement to sell does not create any interest in the property, much less a right to obtain a decree for possession of the property. AIR (Vol 26) 1939 All 66: 1938 ALJ 1189: 1939 AWR 87 : ILR (1939) All 103: 180 Ind Cas 633 (DB).

——S. 14.

1. Applicability and scope.
2. Divisibility of contract.
3. English case law.
4. Necessity of proving title.
5. Sale.

1. Applicability and scope.

——Ss. 14, 15—Sections 14 and 15 should not be confined to the case where the inability to complete the contract is due to a legal defect such as want of title. AIR (Vol 25) 1938 Bom 134: 39 Bom L R 1299: 174 Ind Cas 75 (DB).

——Ss. 14 to 17—Whether exhaustive.

Sections 14 to 17 of the Specific Relief Act constitute a complete Code so far as specific performance of part of a contract is concerned AIR (Vol 20) 1933 Cal 98: 36 CWN 1002: 57 CLJ 1:141 Ind Cas 708 (DB).

——S. 14—Lease by co-sharer—Enforcement to at least his interest.

A co-sharer professed to grant a lease of the entire interest in a property of which he held a share only, had the draft of the Kabuliyat made, agreed to give an amalnama or authority to the lessee to take possession of the property and received the full selami stipulated from the lessee and accepted rent. The other co-sharers refusing to execute the kabuliyat the co-sharer refused possession of his share. Lessee sued for amalnama and possession.

Held, that the suit was not for specific performance of a contract and thus coming under Ss. 14, 15 and 16 but was for a declaration and consequential relief to which the plaintiffs were entitled. AIR (Vol 16) 1929 Cal 380 : 33 CWN 314 : 118 Ind Cas 849 (DB).

——Ss. 14, 15—Application.

Sections 14 and 15 of the Sp. Rel. Act refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties; they do not apply to the case where the obstacle to the full performance is known to the parties and no provision is made to meet it. Where the performance of a contract is dependent on the consent of a third person and such consent cannot be obtained specific performance will not be decreed even of so much of the contract as is possible on abatement of consideration or even the full stipulated consideration. AIR (Vol 2) 1915 Nag 15: 12 NLR 19: 34 Ind Cas 461.

2. Divisibility of contract.

——Ss. 14 to 17—Question of fact.

The question whether a contract is divisible or not for the purposes of enforcing specific performance depends on the facts and circumstances of each particular case and the question is essentially a question of fact. AIR (Vol 20) 1933 Cal 98: 36 CWN 1002: 57 CLJ 1: 141 Ind Cas 708 (DB).

——Ss. 14 to 17—Specific performance of part.

Where certain persons, acting as agents of five other persons, entered into a contract of sale of the shares of the latter and though the agents had acted in excess of their authority, three of the principals ratified the agreement.

Held, that the contract was a divisible one and could be specifically enforced as regards the shares of those who had ratified the agreement. AIR (Vol 20) 1933 Cal 98: 57 CLJ 1: 36 CWN 1002: 141 Ind Cas 708 (DB).

——S. 14—Assignment of lease rights—Specific performance of part—Severable contract—Joinder of parties.

A lease was executed by the Government in favour of the plaintiff's predecessor in title with a covenant for renewal. Just before expiry of the term, the plaintiff applied for renewal but the Government declined. The plaintiff had assigned a major portion of the leasehold interest in favour of a third party. On a suit for specific performance by plaintiff.

Held, Coutts-Trotter, C. J. and V. S. Rao, J.—Where a lessee has transferred his leasehold interest in part of the property to another, he can get the lease renewed in respect of the part which remains. When there is an assignment, each assignee holding his part in physical severalty, there come into existenance as many covenants as there are assignees, on which separate actions can be brought.

Krishnan, J.—The suggestion, that when the lessee assigns his right to two or more people and gives them possession of separate plots in the property, there results as many covenants to renew as there are assignees, is altogether unreasonable and is entirely unsupported by authority.

Cases bearing on the apportionment of rent or referring to covenants for repairs are not in point as they are not pari materia with covenants to renew which are covenants to create new rights. Whether the contract is made originally with two or more persons or two or more became jointly entitled to its benefit, some alone cannot enforce specific performance when the others do not join. AIR (Vol 14) 1927 Mad 513: 52 MLJ 443: 50 Mad 595: 25 MLW 525: 1927 MWN 318: 38 MLT 233: 102 Ind Cas 246 (DB).

3 English case law.

——S. 14—Per Suhrawardy, J.—The law on the point of specific performance must be taken to have been codified by Ss. 14 to 17, Specific Relief Act; and English authorities can only be resorted to for the purposes of explaining those sections. AIR (Vol 16) 1929 Cal 380: 33 CWN 314: 113 Ind Cas 849 (DB).

——S. 14—English law.

Sections 14 to 17 inclusive of the Specifi Relief Act, 1877, are both positive and negative in their form. Taken together, they constitute a complete Code, within the terms of which specific performance of contracts must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail. AIR (Vol 12) 1925 P. C. 45: 48 MLJ 172: 27 Bom L R 740: 23 ALJ 709: 29 CWN 919: 6 L R P C 38: 21 MLW 390: 1925 MWN 138: 52 I A 90: 52 Cal 335: 3 Pat L R Civ 93: 86 Ind Cas 232.

4. Necessity of proving title.

——S. 14—In a suit for a declaration that the plaintiff was the owner of the certain property, the fact that he was in possession is not in itself enough. He must also show a subsisting title. AIR (Vol 28) 1941 Nag 357: 1941 NLJ 534: ILR (1942) Nag 564: 197 Ind Cas 612 (DB).

5. Sale.

——Ss. 14, 15, 16—Vendor unable to transfer whole of property agreed to be sold—Purchaser, held entitled to relief only if he agreed to buy remaining portion for stipulated consideration—Sections 14, 15, 16, held not applicable. AIR (Vol 25) 1938 Bom 134: 39 Bom L R 1299: 174 Ind Cas 75 (DB).

——S. 14—Applicability—Sale by co-parcener of joint Hindu family.

Where the property sold by a co-parcener in a joint Hindu family is by no means small the vendee can obtain specific performance only in respect of the entire property sold and that of the share of the alienating co-parcener only. AIR (Vol 18) 1931 Cal 463: 35 CWN 40 (DB).

——S. 14—Where the purchaser is not allowed to obtain a small portion of the land sold, he can be awarded compensation for the same.

It makes no difference that the mistake is discovered only after the conveyance has been executed and registered. AIR (Vol 14) 1927 Rang 90: 5 Bur L J 206: 100 Ind Cas 327.

——S. 14—Claim against property—Damages.

In a suit for specific performance of a contract to sell, even if the plaintiff knows that there was a claim against the defendant for maintenance there would be nothing in that fact to put the plaintiff on notice that there was an incumbrance on the suit property, and even if the defendant sold the property, defendant would still be liable to provide maintenance out of the sale proceeds which would in spite of the sale retain the character of the ancestral property. The case comes within the section 14 of the Specific Relief Act and the plaintiff is entitled in compensation for the burden which is imposed

upon the property he contracted to buy owing to the decree passed for maintenance. AIR (Vol 10) 1923 Bom 271: 77 Ind Cas 500 (DB).

——Ss. 14, 15—Description by boundaries.

Where the property agreed to be sold was clearly described by boundaries, number and area, but was found on measurement to be incorrect in area the purchaser cannot claim specific performance with compensation for the area by which the property was found to be less. AIR (Vol 7) 1920 Bom 164: 22 Bom L R 849: 57 Ind Cas 957 (DB).

——S. 14—Contract to sell portion of joint family property—Specific performance.

Where the vendee of a share of joint family property bought it on the assurance of the vendor that he was competent to sell the property held by himself and his co-sharers. Held, that though the vendor was not competent to bind his co-sharers specific performance should be decreed against his own share of the property and he could not escape the obligation because he had acted in excess of authority. AIR (Vol 5) 1918 Lah 889: 27 CLJ 611: 42 Ind Cas 378 (DB).

—— S. 14—Applicability of—Deficiency in extent—Execution of conveyance.

The rule enunciated in S. 14 holds good even where the deficiency in area is discovered after the execution of the conveyance and the vendee is entitled to compensation. AIR (Vol 3) 1916 Mad 526: 29 M L J 122 : 18 M L T 364 : (1915) M W N 422 : 29 Ind Cas 394 (DB).

——Ss. 14 and 15—Contract—Vendor and purchaser—Specific performance—Deficiency in property to be purchased—Compensation.

In exercising its jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract.

If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get, and to have a proportionate abatement from the purchase-money. This right applies only to a deficiency in the subject-matter described in the contract, but not to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it, in which case the remedy is recision, or a claim for damages for deceit where there has been fraud or for breach of a collateral contract if there has been such a contract. AIR (Vol 2) 1915 P C 113: 32 Ind Cas 47.

——S. 14 — Covenant of title — Compensation not assessable in money—Enforceability of contract.

The vendor under a contract to sell lands undertook to give security against any claim set up by the reversioners in future.

Held, that the contract could not be specifically enforced as the portion of it relating to security cannot be compensated for in money under S. 14 of the Act. AIR (Vol 2) 1915 Mad 1161: 27 Ind Cas 449 (DB).

——S. 14 — Agreement to sell—Price not fixed.

In cases where there is an agreement to sell but the agreement is silent as to the price, it is the duty of the Court while ordering specific performance to determine by itself or through a commissioner the price which should in reason be paid. An agreement for the sale of a whole house may be enforced specifically to the extent of the vendor's share therein when it is found that he is only part owner of it. AIR (Vol 1) 1914 Lah 469: 71 PLR 1914: 109 PWR 914: 22 Ind Cas 517 (DB).

——S. 14—Alienation of property contracted to be sold before performance.

A contracted to sell land mentioned in a sale proclamation but before he could sell it, a portion of it had been alienated.

Held, that specific performance of the contract cannot be granted. (1911) 9 MLT 318 : 10 Ind Cas 678 (DB).

——S. 15.

1. Applicability and scope.
2. Illustrations.
3. Object.
4. Suit.

1. Applicability and scope.

——S. 15—Under S. 15 of the Specific Relief Act, the Court can grant a decree for specific performance limited to the share of the manager on payment of the Consideration agreed upon without any abatement. AIR (Vol 36) 1949 Sind 18.

——S. 15 — Relinquishment of claim to part of property.

There is nothing in S. 15 or any other provisions of the law limiting S. 15 to any particular state of the proceedings, it is, therefore, open to a person bringing a suit for specific performance of contract to relinquish his claim to any part of the property in suit on the conditions specified in that section at any time before the suit is finally decided by a Court. 119 Ind Cas 491 : 11 Lah 69 : 31 PLR 352 : AIR (Vol 17) 1930 Lah 34 (DB).

——S. 15 — Where the whole of the contract for renewal of a lease at rent to be fixed by lessor could not be performed and the lessees were not prepared to pay rent, for the entire leasehold, as demised by the lease, to the lessor for a small portion of the land as to which contract was enforceable.

Held, that the Court cannot make a new contract for the parties by splitting up the demised premises and apportion the rent payable for that portion only. 109 Ind Cas 298 : 55 Cal 841 : 47 CLJ 376 : 32 CWN 439 : AIR (Vol 16) 1929 Cal 50 (DB).

——S. 15 — Scope of — Conveyance, executed — Effect of.

Section 15 of the Sp. Relief Act applies only before the contract has been executed, but if it has been performed by the execution of a sale deed and delivery of possession the rights of the parties are governed by S. 55 of the T. P. Act. 45 Ind Cas 669 : AIR (Vol 4) 1917 Nag 125.

2. Illustrations.

——S. 15, Ill. (a)—Applicability—Hindu joint family property—Agreement for sale by father.

Illustration (a) to S. 15, Specific Relief Act, applies only to a case where the person who agrees to sell a particular property has no interest in any portion of it. It has, therefore, no application to an agreement for sale of joint family property by the father of the joint family, as he has interest in every portion of the joint family property. ILR (1950) Nag 397 : 1950 N L J 379 : AIR (Vol 37) 1950 Nag 78.

——S. 15, Illus. (a) (b), S. 17—"Unable to perform"—Specific performance of a contract to sell by managing member.

Section 15 is not applicable to a case of a contract to sell lands by an undivided Hindu father who is admittedly entitled to convey his portion of the lands. S. 15 would be applicable only if the contractors had no interest in any portion of the property agreed to be conveyed as in illustration (a) or is unable to convey such portion as in illustration (b) to that section. Where the managing member and undivided father of a Hindu family agree to sell the whole lands including his son's share the case does not fall within S. 15 and specific performance of the contract can be decreed to the vendor without any adjudication on the binding nature or otherwise of the con-

tract on the son. (1908) 32 M 320 (321, 322) : 4 Ind Cas 506 (DB).

3. Object.

——S. 15—Refusal to pay full price for part of the property.

Specific Relief Act, S. 15 is enacted for the benefit of the purchaser and cannot operate to his detriment. That section gives him option and if he declines to accept the offer whereby he has to pay the whole price for a fraction of the property which brings him loss, he cannot be regarded to have "improperly declined to accept delivery of the property" within the meaning of S. 55, T. P. Act. 115 Ind Cas 251 : 29 M L W 304 : AIR (Vol 16) 1929 Mad 189 : 56 M L J 99 (DB).

4. Suit.

(a) General.
(b) Grant of part performance.

(a) General.

——S. 15 — Agreement to sell joint family property by manager—Suit for specific performance — Other members not parties — Power of Court to consider if agreement is binding on them — Agreement not proved to be so binding — Court, if and when can grant decree limited to manager's share.

Where a plaintiff suing for specific performance of an agreement of sale of joint family property entered into by the manager of the joint family, seeks to bind the interests of the other coparceners, the Court is right in going into the question whether the agreement is binding on them, although they have not been impleaded in the suit. If the agreement is not proved to be binding on them, specific performance cannot be granted of the agreement so as to direct execution of a conveyance of the entire property. But under S. 15 of the Specific Relief Act, the Court can grant a decree for specific performance limited to the share of the manager on payment of the consideration agreed upon without any abatement. If, however, the plaintiff is not prepared to purchase the ahare of the manager in the property agreed to be sold for the entire purchase price without being only compensated for loss caused, the Court can refuse to grant a limited decree for specific performance. AIR (Vol 36) 1949 Sind 18 (DB).

——S. 15, Proviso — Applicability—Person invoking benefit of — If should relinquish right to appeal against portion of decree-holder that order for specific performance cannot be made as to part of the property.

Where a person sues for specific performance of an agreement and it is held that he cannot obtain an order in respect of the whole but only part of the property, the subject of the agreement sought to be enforced, it is at that stage that he must make up his mind what he will do if he considers that the decision of the trial Court, which has held that he is not entitled to specific performance of the whole, is incorrect. He cannot call in aid S. 15 of the Specific Relief Act and, at the same time, proceed in addition to obtain the remainder of the property or damages ; that is not relinquishment of all claims. But if, however, he is content to take what the section gives him, he must abandon all further claim and all further rights and indeed it would seem, a right of appeal which ordinarily would be open to him when the trial Court has held that the agreement in suit could not be ordered to be specifically performed but that the contracting party was able to perform a part of it ; the injured party must then and there make up his mind whether he will ask the Court to pass a decree giving him relief provided by S. 15, and, as a condition precedent to the Court granting a decree forego all further claims and rights to enforce performance of the contract or to compensation for loss or damage.

Per Horwill, J.—In saying that he intended to appeal the plaintiff was not refusing to give the undertaking required by the proviso to S. 15 in the event of its being held in appeal that the section applied. Anyhow as the grant of the relief under S. 15 is discretionary there is no need for interference in appeal. (1947) 69 L W 680 : 1947 M W N 629 : (1947) 2 M L J 366 (DB).

——S. 15—Vendor and purchaser—Purchase of land—Sale-deed describing land accurately by boundaries and stating it to be about 99 grounds—Land found to be only 85 grounds—Suit for compensation for deficiency.

A person purchased certain land. The sale-deed described the land accurately by boundaries and stated it to be about 99 grounds. The purchaser had full knowledge and all information regarding the land he was purchasing and knew what actually he was purchasing. After the sale, the land was surveyed and it then measured only 85 grounds. The purchaser brought a suit against vendor for compensation by way of damages for the deficiency on the ground that the vendor had agreed to sell 99 grounds but actually sold only 85 grounds :

Held, that though the suit was not one for specific performance, yet the principle of S. 15 applied the deficiency being a considerable portion. The purchaser being thorougly conversant with boundaries and extent of land and the sale deed having described it accurately by boundaries, the question of area was not material for the sale. Moreover, the sale-deed gave no warranty that land was 99 grounds. The purchaser, therefore, could not succeed. AIR (Vol 25) 1938 Mad 81 : 46 L W 797 : 1937 M W N 1027 : 176 Ind Cas 173.

——Ss. 15, 14, 19 — Contract by defendant to sell house — House belonging to defendant and his minor brother — Specific performance as regards half the house and compensation for the breach.

The defendant entered into a contract for sale to plaintiff for Rs 600 of a house which belonged jointly to the defendant and his minor brother. Both the lower Courts concurrently found that the defendant was not competent to enter into the contract on behalf of his minor brother. The lower Appellate Court granted the specific performance of contract relating to half the house and damages for the breach of contract on the part of the defendant :

Held, that as the portion of the contract which must be left unperformed is equal to the other portion in respect of which the decree for specific performance had been given, it was impossible to say that the part unperformed was small. Section 14 could not, in the circumstances apply to the case. The case was therefore, governed by S. 15. It clearly shows that if the plaintiff desires to have a decree for specific performance of part of the contract, he must relinquish all claim to compensation for the default on the part of the defendant. AIR (Vol 22) 1935 Oudh 453 : 11 Luck 390: 1935 O W N 890 : 157 Ind Cas 570.

——Ss. 15, 14, 16, 17—Co-sharer agreeing to lease entire property believing other co-sharer had given consent—Other co-sharer refusing – Suit for specific performance.

Where a co-sharer professed to grant a lease of the entire estate in a property of which he held a share only, in the belief that the lessee had already obtained the consent to the other co-sharer :

Held, that it could not be deemed that there was a concluded contract whereby the co-sharer undertook a binding obligation on behalf of himself and the other co-sharer to obtain the lease of the property and no suit for specific performance to execute a kabuliyat and give possession could lie against the entire body of the proprietors.

Held, further, that even assuming that there was a concluded contract, specific performance of the agreement in part could not be decreed under S. 15 as the plaintiff had not relinquished all claim to further performance and all right to compensation. AIR (Vol 19) 1932 P C 43 : 59 I A 47 : 36 CWN 231 : 55 C L J 46 : 62 M L J 243: 35 L W 825 : 59 C 1025: 136 Ind Cas 405.

—— S. 15 — Where a major agrees to sell property belonging to himself and his minor nephew whose property he has no right to sell, and consequently the agreement with regard to which is void, the purchaser is entitled, in a suit for specific performance, on offering to pay the whole purchase money, to a decree directing the adult party to convey all his interest in the property. 89 Ind Cas 422 : AIR (Vol 13) 1926 Lah 136 (DB).

——S. 15 — Other co-owner not joining — When specific performance of vendor's share decreed.

Where a person agrees to sell an undivided plot of land owned by himself and a stranger to the agreement who subsequently declines to join in the sale, under S. 15 of the Specific Relief Act, specific performance cannot be directed in respect of the agreement to sell the whole plot but can be directed in respect of so much of his part of the contract as he can perform. In other words, he can be directed to sell his half share of the land to the plaintiff but this can be done provided the latter relinquishes all claim to further performance and also all right to compensation for the deficiency. Further, if the plaintiff cares to purchase the share of the promisor alone he is bound to pay the full price that he has agreed to pay for the whole plot. But if the plaintiff does not agree to these conditions he will, however, be entitled to damages, though not to specific performance of any portion of the contract. 88 Ind Cas 472 : 26 P L R 366 : 6 Lah 221 : AIR (Vol 12) 1925 Lah 465 (DB).

——S. 15 — Where there is no completed contract between the parties, a court cannot decree specific performance. When plaintiff sued to enforce specific performance of a contract for sale of certain land by the first and second defendant and it was found that the second defendant had never agreed to sell, the contract cannot be specifically enforced. (1922) 65 Ind Cas 594 (DB) (Cal).

——Ss. 15 and 16 — Contract to sell whole house—Vendor possessing only a half—Specific performance.

Where a person on behalf of himself and as agent for another agreed to sell a house in which each of them had one half-share and it was found he had no authority to sell the half-share of the other.

Held that the plaintiff was only entitled to a decree for specific performance for half of the house on condition of paying the full price agreed upon for the entire house. 13 A L J 739 : 29 Ind Cas 628 : AIR (Vol 2) 1915 All 263 (DB).

——S. 15—Contract by manager—Not binding on others—Right to specific performance.

Where the manager of joint Hindu family contracted to sell family lands and the contract was not binding on the other members specific performance could not be decreed even against the manager. 37 Mad 387 : 14 M L T 199 : 15 Ind Cas 623 : AIR (Vol 1) 1914 Mad 456 (DB).

——Ss. 15 and 16—Co-parcener's agreement to sell —Specific performance.

One member of a joint Hindu family cannot agree to sell joint property without the consent of the others and such an agreement, if made, cannot be specifically enforced. (1913) 11 A L J 456 : 20 Ind Cas 247.

——Ss. 15 and 18—Contract for sale by manager—Specific performance—Damages.

Where a person is jointly interested in an estate with another person and deals with the entire property, specific performance will not be granted against him as to his share, the plaintiff's remedy being only by way of damages. (1913) 18 C L J 333 : 21 Ind Cas 528 (DB).

——S. 15—Contract to sell—Pardanashin woman—No independent advice—Consideration inadequate—Straitened circumstances—If can be enforced.

Where a contract for sale was entered into with a semi-illiterate pardanashin woman and it is found that she had no independent advice in the matter, that the consideration was entirely inadequate and it is also found that the allegation by the vendee that he had paid consideration was false.

Held, that the contract cannot be specifically enforced. Where a contract to sell was entered into by a widow and her executor in pursuance of a power given to her by her husband's will but latter on the probate was revoked.

It was held that if the contract was one which could otherwise be specifically enforced, it can be enforced against the widow's interest in the property provided here is nothing in the plaintiff's conduct amounting to abandonment, waiver or acquiescence and the defendant's position has not been altered by the plaintiff's delay in bringing the suit. (1912) 16 C W N 247 : 13 Ind Cas 879 (DB).

——Ss. 15, 17—Contract for sale of lands by some on behalf of themselves and some minors—Contract found not binding on minor—Contract indivisible—Decree form of.

In a suit for specific performance of a contract to sell lands by some of the defendants on their own behalf and on behalf of other defendants who were minors, if it be found that the contract is indivisible, and not binding on the minors, a decree cannot be passed compelling a conveyance of the interest of the minors as well by the major defendants on whom the contract was found binding. But the plaintiff is entitled to take a conveyance by the major defendants of all their interests in the properties for the purchase money agreed upon without abatement or compensation, if he be so willing. (1910) 5 Ind Cas 79 : 33 M 359 (361, 362) : 20 M L J 328 (DB).

——Ss. 15, 18 (b) and 21 (b)—Applicability.

Plaintiffs contracted to purchase a share of a village together with cultivating rights in the Sir land for Rs. 1,600. He sued for specific performance of the contract and obtained a decree which provided: "that the defendant to make a petition to the Revenue authorities under S. 45 of the Tenancy Act and prosecute the petition to its end.

Held, that as the price of the cultivating right in the Sir land was Rs. 850, these rights formed a "considerable portion" of the subject-matter of the sale and therefore the contract could not be specially enforced.

Held, that as, under S. 45, Tenancy Act, the Collector is not bound to sanction transfer of the cultivating rights in the Sir land at the vendor's request made under compulsion, the Lower Court's decree on this point could not be upheld and that the plaintiff may sue for damages for breach of contract. (1910) 6 N L R 185 : 8 Ind Cas 1184.

——Ss. 15 and 17—Contract to sell by manager—Specific performance.

An agreement to sell certain lands by the father as the menager of a joint Hindu family can be specially enforced in a suit against both the father and the son, even though the latter did not consent or ratify the contract, since the managing member is entitled to sell lands for certain purposes. S. 15 of the Sp. Rel. Act applies only if the father had no interest in the property agreed to be sold, or is unable to convey it. (1909) 32 Mad 420 : 4 Ind Cas 506 (DB).

(b) Grant of part performance.

——S. 15—Vendor agreeing to sell property belonging to him and others—Signatures of others not obtained—Vendee's suit for specific performance of contract—When maintainable.

Two defendants who were brothers executed an agreement to sell a certain vacant site. It was agreed that the balance of the price would be paid at the time of registration, that the sale deed should be registered within a month, that at the time of registration, the defendants would "obtain the signatures of the rest of the heirs", and that in the event of their failure to obtain the signatures of the heirs "they would be liable for damages and for getting the registration done." No deed of sale was executed in pursuance of this agreement, and a suit was brought by the plaintiff vendee to enforce specific performance :

Held, that the defendants were unable to perform the whole of their contract, and, therefore, under S. 15, the Court would direct the defendants to perform specifically so much of the contract as they could perform, provided that the plaintiff relinquished all claims to further performance and all right to compensation. AIR (Vol 30) 1943 Nag 313 : 1943 N L J 452 : ILR (1944) Nag 33 : 210 Ind Cas 579.

——S. 15—One party performing his part — Other incompetent to perform one part—Other part can be enforced.

In the case of conveyances where one party has performed the whole of his part of the contract, and it is only the opposite party which is incompetent to perform one part of it, then it is open to the Civil Court to enforce the performance by the second party of that part which he is competent to perform. AIR (Vol 22) 1935 All 862 : 1935 A L J 910 : 1935 A W R 1034 : 58 A 230 : 158 Ind Cas 1106 (DB).

——Ss. 15, 14, 16—Agreement by member of joint Hindu family for sale of entire property—Vendor unable to convey more than his share—Specific performance.

Where a member of a joint Hindu family purports to sell, not only his own share but those of his coparceners and the vendor is not able to give a good title to anything more than his own individual share in the property, if the purchaser desires to have a remedy by way of specific performance, he cannot claim more than the share of the actual contracting member of the joint family and he can only obtain even that share by being prepared to pay not merely a proportionate part of the purchase price the whole of the sum originally agreed upon as the consideration for the sale of the entire property in question. Such a case falls under S. 15 and not under S. 14 or S. 16 of the Act. AIR (Vol 18) 1931 Cal 463 : 35 C W N 40 : 131 Ind Cas 849 (DB).

——S. 15—Sale without title to whole property.

Where vendor agrees to sell certain property to vendee, but he is not legally entitled to sell whole of the property, the vendee can claim specific performance of contract in respect of so much of the property as is legally saleable by vendor provided the vendee consents to pay the full price. 102 Ind Cas 755 : AIR (Vol 14) 1927 Lah 773 (DB).

——S. 15—Sale of minor's share.

Contract for sale of property jointly belonging to an adult and a minor—Specific performance can be granted against the adult with regard to his share. 91 Ind Cas 517 : AIR (Vol 13) 1926 Cal 744 (DB).

——S. 15—Sale of joint family property.

The managing member of a joint Hindu family, who, for purposes not binding upon the other coparceners and without their concurrence, agrees to convey a specific item of joint family property, cannot 'perform' his contract in its entirety and the case falls within the provisions of S. 15. The purchaser in such a case cannot enforce specific performance of the entire contract. But Courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree. 96 Ind Cas 949 : AIR (Vol 13) 1926 Nag 493.

——S. 15—Where the managing member of a joint Hindu family enters into a contract to sell an item of family property and that contract is not proved to be binding on the other members specific performance cannot be granted so as to direct execution of a conveyance of the entire property but it is open to the purchaser to get specific performance so far as the share of the vendor is concerned on payment of the consideration agreed upon without any abatement. 26 Mad 74 and 32 Mad 320, Overruled. 63 Ind Cas 374 : 44 Mad 605 : 13 M L W 562 : 1921 MWN 316 : AIR (Vol 8) 1921 Mad 172 : 41 M L J 129 (FB).

——S. 15 — Contract to sell by member of joint family—Part performance.

A person is entitled to a specific performance of a contract by a member of Hindu family to sell his share of the property but not to a decree for part performance. Conveyance of a portion is not such a part of the contract as he can perform within the meaning of S. 15 of the Act. 26 M 74 : 32 M 320 : 37 M 387, Diss. 38 Mad 1187 : 16 M L T 370 : 26 Ind Cas 983 : AIR (Vol 2) 1915 Mad 740 (DB).

——Ss. 15 and 17—Part performance of contract.

Specific performance of a part of the contract affecting some of the properties in an undivided Hindu family cannot be ordered under S. 17 but in a case falling under S. 15 the Court can grant part performance as the word "may" in that section confers a discretion upon the Court. 37 Mad 403 : (1912) M W N 87 : 11 M L T 87 : 22 M L J 257 : 13 Ind Cas 471 : AIR (Vol 2) 1915 Mad 305 (DB).

——Ss. 15 and 16—Joint Hindu family — Agreement to sell by members — If can be specifically enforced against share of some.

Specific performance of an agreement to sell cannot be enforced against the share of an undivided member of a Mithakshara joint Hindu family. Before partition the members have no share to convey. The remedy of the aggrieved party lies in damages against the said co-sharer. (1912) 16 C W N 93 : 11 Ind Cas 892.

——Ss. 15, 16 and 18—Contract for sale by manager —Suit for specific performance.

In a suit for specific performance of a contract for the sale of joint family property by the father, it is open to the Court to grant a decree as regards the share of the father alone.

Obiter the liability of the sons might be determined in the suit it the plaintiff asks for it. (1913) M W N 995 : 14 M L T 495 : 21 Ind Cas 778 (DB).

——S. 16.

——S. 16—Contract to sell plot—Earnest money paid —Part then sold to bona fide purchaser for value without notice — Original contract not showing that part sold stood on separate footing from rest — Nor part sold equal in value to remainder :

Held, that S. 16 had no application. The specific performance of the part of the original contract could not be granted. A I R (Vol 25) 1938 Cal 234 : 66 C L J 1 : 175 Ind Cas 315.

——S. 16—Scope of—Agreement to sell — Contract becoming incapable of performance, not being divisible—Specific performance cannot be granted — Advance paid could be recovered.

Section 16 does not stand isolated and for understanding its full significance, it must be read in conjunction with certain other sections which along with it form a group. Sections 14 to 17 inclusive are both

positive and negative in their form. Taken together, they constitute a complete code within the terms of which relief of the character in question must be brought, if it is to be granted at all.

A agreed to sell to the plaintiff a plot of land his share being one-third, the two-thirds belonging to his children. Out of the agreed consideration, plaintiff paid a certain amount as advance to A. But later on the contract became incapable of performance as the sons were unwilling to fulfil it. Plaintiff sued for specific performance of the contract :

Held, that decree directing A to convey his one-third share on the plaintiff paying a third of the agreed price was wrong, as the Court could not substitute a new bargain and a new contract on the parties. As A had committed a fraud, a decree should be passed in favour of the plaintiff directing A to return the advance received with interest. A I R (Vol 24) 1937 Mad 596: 45 L W 393: 171 Ind Cas 30.

——S. 16—Applicability — Sale by member of joint Hindu family.

The shares of the co-parceners are not separate therefore S. 16 cannot apply to a case whether specific performance is claimed in respect of a contract of sale entered into by one of the co-parceners. AIR (Vol 18) 1931 Cal 463 : 35 C W N 40 (DB).

——S. 16—Conditions for applicability — Contract should be separable.

Where a person contracts to sell a house belonging to himself and another and the purchaser desires the Court to exercise power under S. 16, Specific Relief Act, the question is whether, if the original contract concerned the whole house, a sale of moiety of the house can be described as part of a contract which taken by itself can and ought to be specifically performed, and which stands on a separate and independent footing from the other part of the contract which admittedly cannot be performed.

Before a Court can exercise the power given by S. 16, it must have before it some material tending to establish these propositions and cannot apply the section on a mere surmise that if opportunity were given for further enquiry such material might be forthcoming and possibly might be found to be sufficient.

Before S. 16 applies, there must be a contract which stands on a separate and independent footing and it cannot be said that the contract for the purchase of half the house stands on an independent footing from the contract to purchase the whole house. AIR (Vol 14) 1927 Mad 1109 : 104 Ind Cas 192.

——S. 16—Divisible contract.

Where a contract is a divisible contract, the rule that specific performance will not be granted of a part only does not apply, for, that assumes that the contract is entire and indivisible. AIR (Vol 14) 1927 Mad 513 : 52 M L J 443 : 50 Mad 595 : 25 M L W 525 : 1927 MWN 318: 38 MLT 233 : 102 Ind Cas 246 (DB).

——S. 16—Separable contract—Could be capable of performance by itself—Power of court.

To make S. 16 applicable it has to be shown that there was a part of the contract, which (a) "taken by itself could and ought to be specifically performed," and (b) "stood on a separate and independent footing" from the other part of the contract, which admittedly could not be performed.

Before a Court can exercise the power given by S. 16 it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient; the words of the section, wide as they are, do not authorize the Court to take action otherwise than judicially and in particular do not permit it to make for the parties or to enforce upon them a contract, which in substance they have already not made for themselves.

When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to a small residue by compensation, it is not necessarily making a new contract to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract. For this jurisdiction S. 14 specifically provides and S. 17 forbids any extension beyond it. Hence S. 16, both because it must be something not covered by S. 14 and because no Court can act unjudicially without either statutory warrant or consensual authority, must be limited and the expression "stands on a separate and independent footing" points to a limitation, which would exclude any new bargain, that cannot be said to be contained in the old one. AIR (Vol 12) 1925 P C 45 : 48 M L J 172 : 27 Bom L R 740 : 23 A L J 709 : 29 C W N 919 : 6 L R P C 38 : 21 M L W 390 : 1925 M W N 138 : 52 I A 90 : 52 Cal 335 : 3 Pat L R Civ 93 : 86 Ind Cas 232.

——S. 16—Some properties not belonging to vendor —Properties distinct—Abatement in price.

Where two distinct plots are agreed to be sold by one agreement, and the enjoyment of one plot is not dependent on the enjoyment of the other, the Court will decree specific performance of one only if it is subsquently discovered by the purchaser that at the time of entering into the agreement, the vendor had no title to the other. The question whether the contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

Where the defendant made representation that he was able to convey the whole property but was really entitled, to a parcel thereof, the plaintiff is entitled on specific performance being decreed in respect of that parcel alone, to an abatement of price in respect of the parcel to which he has no title. AIR (Vol 10) 1923 Cal 694 : 50 Cal 700 : 27 C W N 693 : 75 Ind Cas 421 (DB).

——S. 16—Absence of specification.

Where an agreement to convey certain number of well-sites to be received in a certain year did not specify what sites were to be conveyed.

Held, (Per McColl, A.J.C.) that the case would fall under S. 21 (c).

Held, (Per Heald, A. J. C.) that the agreement could be specifically enforced to the extent of the number of sites, defendant could convey upto the agreed number. It was immaterial whether the defendant was able to perform whole of the agreement. AIR (Vol 8) 1921 U B 16 : 4 U B R 35 : 4 U B R 38 : 4 U B R 41.

——S. 16 — Contract for sale of land — Co-owner— Specific performance of portion.

Where a number of persons combined to sell property, parts of which are owned by some of them with other persons individually a claim by the vendee for enforcement of the contract as against some portions only of the property will be sustained, if the portions claimed can reasonably be enjoyed independently of the remainder. AIR (Vol 6) 1919 Mad 374 : 53 Ind Cas 283 (DB).

—S. 17.

——S. 17—Party's conduct making whole performance impossible.

Where the plaintiff by his conduct, has made it impossible for the Court to give effect to the contract in its entirety, the Court will not allow specific performance of a part. AIR (Vol 15) 1928 Cal 584: 55 Cal 1181: 32 CWN 1163: 109 Ind Cas 284 (DB).

——S. 17—Divisibility of contract — Sale of immovable property in one lot — Presumption as to indivisibility.

Court will not, as a general rule compel specific performance of a contract unless it can execute the whole contract. It may be that the contract though in form one and entire, is in substance divisible and where the contract is in substance divisible, there is nothing to prevent the Court from carrying into effect that portion of it, which is capable of being carried into effect.

The rule is firmly established that a contract for sale of property in one lot will generally be considered indivisible, for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided parts or shares of the estate. AIR (Vol 11) 1924 Pat 81: 4 PLT 553: 2 Pat L R Civ 181: 78 Ind Cas 483 (DB).

——S. 17—Specific performance—Variation of agreement.

Where the plaintiff called upon the defendant to perform a contract different from the real agreement between them, he cannot claim performance thereof. AIR (Vol 6) 1919 Cal 234 : 29 C L J 256 : 51 Ind Cas 13 (DB).

——Ss. 17 and 18—Void transaction — Sanction—Driving third party to suit.

A Court cannot sanction a transaction devoid of any legal effect, nor can it compel a party to do an act the effect of which would be to compel a third party to bring a suit. AIR (Vol 2) 1915 Mad 305: 37 Mad 403: (1912) MWN 87: 11 MLT 87: 22 MLJ 257: 13 Ind Cas 471 (DB).

——S. 17—Imperfect contract—Document signed by only one of the executants on the understanding that others would join it.

A deed of sale purporting to be executed by three persons was signed by only one of them. The contract embodied in the deed was to take effect only on its execution by all the parties.

Held, that the document constituted a proposed agreement and not a perfected one and as one of the executants only had signed it, the contract could not be enforced. (1910) 11 Cr L J 477: 7 Ind Cas 393 (DB) (All).

——S. 17 — Minors as parties to agreement to sell — Specific performance.

Contract entered into by some persons on behalf of themselves and some minors to sell certain lands cannot be enforced if the agreement was not for purposes binding on the minor. The persons who are sui juris in this case would be compelled to sell their land if the purchaser is willing to pay the whole amount in lieu of their shares only of the property. (1910) 33 Mad 359: 7 MLT 137: 20 MLJ 328: 5 Ind Cas 79 (DB).

——S. 17—Specific purformance of part.

Under S. 17 of the Sp. Rel. Act, the Court cannot direct specific performance of a part of a contract unless the case falls under one or other of the three preceding sections. (1909) 32 Mad 320: 4 Ind Cas 506 (DB).

——S. 18.

1. Applicability.
2. Concurrence of other persons.
3. Court's powers.
4. Redemption of encumbrance.
5. Implied covenant.
6. Interest acquired subsequently.
7. Return of deposit and costs.
8. Other illustrative cases.

1. Applicability.

——S. 18—In cases where the Transfer of Property Act applies S. 18, Specific Relief Act, cannot be invoked to enforce an agreement to relinquish or release as spes successionis which has been specifically declared to be void under S. 6 (a) T. P. Act. (1928) 108 Ind Cas 390 (Lah).

——S. 18 — Applicability of—Contract to sell by guardian as guardian.

Section 18 does not apply to a case where the vendor did not purport to sell the property as if it were his own, but purported to sell it as the property of her minor ward. (1905) 9 CWN 1019: 2 CLJ 6: 32 C 832 (836) (DB).

2. Concurrence of other persons.

——S. 18—Specific performance— Concurrence of other persons.

Plaintiff contracted with deft. and his landlord that plff. would give a plot of land to the landlord in exchange for that held by deft. under the landlord, that plff. was to be given actual possession of the plot held by deft. and that deft. was to get an equal plot, from the landlord out of the lands got by him in exchange from plff., deft. received the money but refused to vacate. Held that on the deft's landlord giving him a plot out of the lands given by plff. in exchange, deft. was bound to vacate and give possession to plff. AIR (Vol 4) 1917 Cal 635 : 35 Ind Cas 840 (DB).

3. Court's powers.

——S. 18—Sale of reversionary rights.

A sale of a reversionary right of succession, though at the time of the sale it does not affect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. Such a contract is enforceable in a province where the Transfer of Property Act is not in force. AIR (Vol 17) 1930 Lah 928 (DB).

——S. 18—Agreement to purchase — Title in the vendor—Unwilling purchaser — Court's discretion to force the title.

There must he something more than a very probable ground for believing that the title will prove unassailable before it can be forced on an unwilling purchaser. The cases in which the courts have forced a title on an unwilling purchaser, appear to have been for the most part cases in which the doubt alleged was dependent upon some question of law which the court could solve or upon the bare possibility of a fact being alleged which had through a long period of time been treated as affording no ground for doubting the title. (1903) 5 Bom L R 885 (891).

4. Redemption of encumbrance.

——S. 18—Vendor undertaking to discharge encumbrance.

When a vendor undertakes to discharge the encumbrances on the property, the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid the consideration for the sale, as S. 18 (c) applies not only to undisclosed encumbrances but to cases where the vendor undertakes to discharge the encumbrances on the property. AIR (Vol 13) 1926 Mad 569: 50 MLJ 228: 1926 MWN 271: 94 Ind Cas 561.

5. Implied covenant.

——S. 18 (d)—Scope.

Section 18 lays down certain rights which the purchaser or the lessee of a property has against the vendor or lessor who, having an imperfect title thereto, contracts to sell or let. It does not make the contract invalid.

If a person agrees to let, there is an implied covenant on his part to do all things necessary to make the transfer effective. If the lessor is in a position to do all things that are necessary for completing the title of the lessee, there is no reason why the contract to lease could not be specifically enforced. AIR (Vol 25) 1938 Cal 136: 42 CWN 97: ILR (1938) 1 Cal 563: 176 Ind Cas 832 (DB).

——S. 18—Implied covanant to procure sanction of Revenue Officer.

Where the subject-matter of the agreement sued upon was the same as the subject-matter of another deed of sale which mentioned the transfer of cultivating rights in sir land along with a share of the village sold, but the suit agreement made no mention of the same—Held, there was an agreement to transfer sir rights also and an implied covenant on the part of the vendor suing on the agreement to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer according to C. P. Tenancy Act, S. 50 (1). AIR (Vol 17) 1930 P C 287.

——S. 18—On 9th July 1914, one M agreed to buy from J a four annas share of a village including sir and khudkhast lands, with cultivating rights in sir for Rs. 46,100. M paid Rs. 5,000 as earnest money, but being unable to raise the balance of the purchase-money, arranged with S that he should have the benefit of the contract with J, pay the balance, take the sale-deed in his name and convey to him the said share at any time within ten years on his paying him Rs. 41,000. On 25th August 1914 S accordingly took a sale-deed from J and paid him the balance of the purchase-money. On 4th September 1914 an agreement was executed by S in favour of M stating the arrangement already mentioned. This document made no specific mention of the cultivating rights in sir. In a suit by S for specific performance of the agreement.

Held, that there was an implied covenant to transfer and under the Specific Relief Act the Court has got power to make a decree prayed for. AIR (Vol 17) 1930 P C 287.

6. Interest acquired subsequently.

——S. 18—As the Transfer of Property Act does not apply to the Punjab, the sale of spes successionis of a Hindu reversioner is transferable and under S. 18 of the Specific Relief Act a sale of reversionary right of succession, though at the time of sale it does not effect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. AIR (Vol 13) 1926 Lah 39 : 89 Ind Cas 792.

——S. 18—Movables.

If there is a sale or pledge to a bona fide purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee. A I R (Vol 11) 1924 Mad 438 : 45 MLJ 516 : 1924 MWN 6 : 46 Mad 852 : 18 M L W 545 : 77 Ind Cas 580 (FB).

——S. 18—Agreement to share tenancy.

Where the defendants, Government tenants induced plaintiffs, their brothers to come to help them to reclaim the land and promised to give them one half of whatever they might obtain, and after such reclamation proprietary rights were conferred on the tenants by Government. Held, that though an agreement to share the tenancy might be invalid under S. 8 of the Government Tenants (Punjab) Act an agreement to share whatever they might obtain is not invalid and on the principle of S. 43 of the T. P. Act, and S. 18 of the Specific Relief Act can be enforced when the proprietary rights were subsequently conferred on the tenants. AIR (Vol 9) 1922 Lah 287 : 3 Lah 92 : 3 L L J 506 : 64 Ind Cas 18 (DB).

——S. 18—Contract for sale by disqualified person—Subsequent removal of disqualification—Effect of.

A judgment-debtor selling the property while the Collector is exercising powers under S. 325A, C. P. C. must convey the property to the purchaser after the Collector's management ceases and his incompetence to sell it is removed. (1912) 36 Bom 510 : 14 Bom L R 598 : 16 Ind Cas 570 (DB).

——S. 18—Limited interest—Knowledge.

The mortgagee having full knowledge of the limited interest of the mortgagor in the property mortgaged cannot put his claim to any enlarged interest of the mortgagor in the property. (1910) 34 Bom 175: 12 Bom L R 143 : 5 Ind Cas 866 (DB).

——S. 18—Contract without power of performance—Subsequent acquisition of power.

A person who enters into a contract without having the power of performing it at the time can be compelled to perform it if he subsequently acquired the power. (1910) 7 Ind Cas 218 (DB) (Cal).

7. Return of deposit and costs.

——S. 18 (d)—Interest on deposit.

Prima facie, a purchaser is entitled under terms of S. 18 (d) to interest, provided there is nothing in his conduct to disentitle him to the same. AIR (Vol 27) 1940 Mad 739 : 1940 M W N 14 (DB).

——S. 18 (d)—Vendor's suit for specific performance dismissed—Purchaser, if can claim costs.

Section 18 (d) does not deprive the Court of any discretion in the matter of costs in cases where vendor's suit for specific performance has been dismissed due to his imperfect title. It is unreasonable to hold that S. 18 (d) lays down an absolute rule independent of the conduct of the purchaser as defendants in the course of the suit for specific performance. Under S. 35, Civil P. C., the Court has power to award costs in the light of the conduct of the parties to the suit. AIR (Vol 27) 1940 Mad 739 : 1940 MWN 14 (DB).

——S. 18—Sale by Registrar — Calcutta High Court Rules, Ch. 27.

The conditions of deposit for a sale under Ch. 27 of the Calcutta High Court Rules are similar to the principles of deposit and return as contained in S. 18 of the Specific Relief Act. AIR (Vol 17) 1930 Cal 324: 57 Cal 106.

——S. 18—Sale of ancestral property compensation.

Where a Hindu father agrees to sell family property without necessity, alleging that he is the only owner thereof, his title to the property is an imperfect title within S. 18 of the Specific Relief Act and he is guilty of misrepresentation within S. 18 Cl. 3 of the Contract Act. The vendee in such a case is entitled to compensation under Specific Relief Act, S. 19 and is entitled under S. 35 to rescission and its consequences such as refund. AIR (Vol 14) 1927 Sind 219 : 20 SLR 220 (DB).

——S. 18 —Agreement to purchase property in shares—No steps taken to pay purchase money — Right to specific performance.

Where an agreement to purchase is, through the inability of one of the parties to find the purchase-money, practically abandoned, he cannot turn round and claim specific performance though he may be entitled to recover any advance that he might have paid. (1911) 14 CLJ 159 : 11 Ind Cas 228 (DB).

8. Other illustrative Cases.

——Ss. 18 and 25—Defendant purchasing property in Court sale and agreeing to sell to plaintiff on its confirmation — Plaintiff's right to specific performance of contract on confirmation of sale—Doctrine of mutuality—If applicable.

The defendant purchased certain fields which were sold by auction for arrears of land revenue and passed a chithi in favour of the plaintiff agreeing to sell these fields to him for a certain amount after the sale was confirmed. It was stipulated that in the event of the sale being not confirmed the contract to sell between the parties would not operate and that in such an event the earnest money was not to be refunded. After the sale was confirmed the plaintiff sued for specific performance. It was contended for the defendant that the doctrine of mutuality was applicable and that the plaintiff was not entitled to specific enforcement of the contract. Overruling this contention,

Held, that the contract entered into was valid and one capable of specific performance and that specific performance should be enforced under S. 18 (a) of the Specific Relief Act. The doctrine of mutuality could have no application as the Specific Relief Act lays down the rights and disabilities in respect of doubts as to title both in respect of the vendor and of the vendee under S. 25 and S. 18 respectively. The two sections are complementary to each other and the rights of a vendee who brings a suit are not to be deduced by an attempted application of the doctrine of mutuality to the conditions laid in S. 25 but are to be determined by the conditions in S. 18 which defines the rights of the purchaser. The words "imperfect title" in S. 18 include the absence of title and certainly include the very contingent interest, far greater than a spes successionis, which exists when a person who had bid at an auction sale has deposited the money and has done everything that is necessary for him to do and has only to wait for the confirmation of the sale when possession except for unforeseen circumstances, would come to him. A I R (Vol 36) 1949 Nag 83 : 1948 N L J 424 : I L R (1948) Nag 815.

——S. 18—Contract of lease—Specific performance —Possession outstanding.

Possession of property by the mortgagee after the mortgage term is over does not render the mortgagor's title to the property defective and he can compel a lessee to accept specific performance of a contract of lease. AIR (Vol 6) 1919 Cal 162 : 50 Ind Cas 154 (DB).

——S. 18 (a)—Contract Act, S. 56, para (2)—Agreement to re-convey land purchased at Court auction.

Where the defendant and purchaser at Court auction agreed to convey the property purchased to plaintiff after applying for cancellation of the sale, on condition of the plaintiff depositing Rs. 100 before a certain date and failed to get the sale cancelled according to the agreement in spite of the plaintiff's depositing the sum, held in a suit for specific performance of the contract, that the defendant's failure to apply for cancellation of the sale did not make the contract impossible of performance, that the defendant was still liable to perform the contract and that money would not afford adequate relief in the case. AIR (Vol 4) 1917 Mad 67: 37 Ind Cas 761 (DB).

——S. 18—Contract of sale—Compensation for misrepresentation as to subject-matter.

If a vendor sues and can convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency if the vendor has not, by misrepresentation or otherwise disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get and to have a proportionate abatement from the purchase money. The right does not apply to a claim to make good representation about that subject-matter made, not in the contract, but collaterally, in which case the remedy is rescission or a claim for damages for deceit were there has been fraud. In cases of specific performance a Court of equity looks at the substance and not merely at the letter of the contract. AIR (Vol 2) 1915 P C 113 : 32 Ind Cas 47.

——S. 18—Agreement to lease—Subsequent lease to third party taking in good faith without notice of agreement—Specific performance.

S agreed to lease certain immoveable property to W for a term of fifteen years and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, S. executed a lease of the same property for two years in favour of N and others, who had no knowledge of the agreement to W.W thereupon sued S and his lessees claiming cancellation of the two years' lease to N and his co-lessees, and specific performance of the agreement to lease to him for fifteen years.

Held, that S was, having regard to S. 18, in the position of a person who had agreed to lease 'having an imperfect title' and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that although the lease to N and others could not under the circumstances be set aside, the plaintiff was entitled to a decree for specific performance of the agreement to lease to him, to take effect after the determination of the lease which had been executed to N and others. 1901 AWN 11 : 23 A 119 (120, 121) (DB).

——S. 18—Agreement to sell—Subsequent purchase with notice of agreement—Rights of the purchasers.

Where the property agreed to be sold to A is subsequently conveyed by the owner to B, who takes it with notice of the prior agreement, the decree for specific performance in favour of A should direct the execution of a conveyance by B and delivery of possession by him. A obtained a decree against the owner and conveyence from him not knowing of B's purchase. Subsequently B obstructing, A sued B for specific performance and possession. Held that a decree should be made for the execution of a conveyance and delivery of the properties. (1901) 3 Bom L L 596 (597, 598) : 26 Bom 159 (DB).

——S. 19

1. Applicability and scope.
2. Assessment of compensation.
3. Award of damages and compensation
   See also N. 6
4. Breach of contract.
5. Prospective damages.
6. Suit for specific performance.
   See also N. 3

1. Applicability and scope.

——S. 19—Mutuality.

The doctrine of mutuality which was one of the defences in English Law to an action for specific performance has been deliberately left out from the Specific Relief Act by the legislature and it is not applicable to India. 118 Ind Cas 220 : AIR (Vol 16) 1929 Sind 83.

——S. 19—Plaintiff's default—English Law.

Except as to the case provided for in the Explanation to S. 19 as to which there is introduced an express divergence from Lord Cairns' Act as expounded in England S. 19 embodies the same principle as the English Act and does not, any more than did the English statute, enable the Court in a suit for specific performance to award compensation for breach of the contract, where at the hearing the plaintiff has debarred himself by his own action from asking for a decree for specific performance. 111 Ind Cas 413 : 52 Bom 597 : 55 I A 360 : 30 Bom L R 1242 : 28 M L W 257 : 26 A L J 1220 : 48 C L J 451 : 1928 M W N 893 : 32 C W N 953 : AIR (Vol 15) 1928 P C 208 : 55 M L J 523.

——Ss. 19 and 29 — Sale not decreed — Refund—Vendor and purchaser.

Where a contract for the sale of land is not specifically enforceable owing to uncertainty in its terms the purchaser has a right to refund of the consideration with interest. (1909) 31 All 68 : 36 I A 44 : 9 C L J 512 : 11 Bom L R 525 : 19 M L J 295 : 6 MLT 89 : 1 Ind Cas 890 (PC).

2. Assessment of compensation.

——S. 19—'Compensation,' meaning of—Assessment —Principles.

Section 19 gives to the Court full discretion in the matter of assessing the compensation. Compensation may often have to be measured by the same rule as damages in an action for the breach. The word "compensation' used in S. 19 should, therefore, be

understood in the sense of damages contemplated in S. 73, Contract Act, which has been held in India to apply to cases of breaches of contract to sell immovable property. As S. 73, Contract Act, says, the damages are to be awarded as compensation for any loss or damage arising naturally in the usual course of thing from the breach of contract, if so, the vendees must prove that they sustained some loss or damage flowing as a consequence from the breach.

Where as a result of a compromise with the subsequent purchaser, the vendees have obtained more than they deserved the Court would be exercising its discretion rightly in refusing to award any more sum as damages. AIR (Vol 24) 1937 Nag 243 : ILR (1938) Nag 283 : 169 Ind Cas 887 (DB).

——S. 19 — Measure of compensation — Prayer for compensation is merely subsidiary.

Per Macleod, C. J.—Although a person suing for specific performance may ask for compensation in substitution for specific performance, that prayer is subsidiary to the claim for specific performance and not strictly speaking alternative. It is for the Court to decide whether the specific performance should be granted and if not, what compensation should be awarded. The measure of compensation is entirely in the discretion of the Court and the Court in awarding compensation, is not bound to follow the ordinary rules with regard to damages for breach of contract. 98 Ind Cas 358 : 28 Bom L R 126 : AIR (Vol 13) 1926 Bom 189 (DB).

3. Award of damages and compensation

See also N **6.**

——S. 19—Powers of Court—Damages not prayed for in suit for specific performance—Power to award in lieu of specific performance. See (1946) 51 Mys H C R 357.

——S. 19—Damages.

The award for damages under S. 19 cannot be claimed by a plaintiff who by his own conduct has disentitled himself to claim specific performance. AIR (Vol 26) 1939 Mad 547 : 1939 M W N 451 : (1939) 1 M L J 436 : 49 L W 362 : 188 Ind Cas 691 (DB).

— S. 19—Compensation.

Under the provisions of S. 19, the Court has power to award compensation to the plaintiff for breach of a contract if the plaintiff has not debarred himself from claiming specific performance of the contract. AIR (Vol 25) 1938 Cal 136 : 42 C W N 97 : I L R (1938) 1 Cal 563 : 176 Ind Cas 832 (DB).

——S. 19—Compensation.

Pro-note insufficiently stamped and hence inadmissible—Suit on original loan—Though the covenant as to interest contained in pro-note could not be proved, the pro-note being inadmissible, still the Court can grant compensation for the deprivation of the use of money. AIR (Vol 24) 1937 Oudh 387 : 1937 OWN 622 : 13 Luck 376 : 168 Ind Cas 927 (DB).

——S. 19 — Transfer of Property Act (IV of 1882), S. 83—Sale and agreement to reconvey — Deposit of money by vendor under S. 83, Transfer of Property Act for redemption—Suit for specific performance—Tender, validity of—Mesne profits—Interest.

The plaintiff sold certain lands to the defendant for Rs. 2800 and the defendant agreed to sell them back to the plaintiff if the latter paid Rs. 2800 within seven years. The plaintiff, treating the transaction as a mortgage by conditional sale deposited Rs. 2800 in Court under S. 83, T. P. Act, but the Court held that the transaction was not a mortgage but an out and out sale. The plaintiff thereupon sued for specific performauce of the agreement to reconvey :

Held, (i) that the deposit was a valid tender notwithstanding the fact that the plaintiff, at the time of making the deposit mistakenly thought that the transaction was a mortgage ;

(ii) that the Court had power to award mesne profits as compensation under S. 19, even assuming that the plaintiff had not expressly asked for a decree for mesne profits in the event of a decree being made for specific performance ;

(iii) the defendant was not entitled to interest from the date of deposit as it was owing to his own improper act that the money was not received by him. AIR (Vol 21) 1934 Mad 97 : 1933 M W N 869 : 147 Ind Cas 1062.

——S. 19—Damages, when granted.

The Court is empowered, whenever it should come to the conclusion that it is not a proper case for injunction, to grant damages instead. 108 Ind Cas 69: AIR (Vol 15) 1928 Mad 810.

——S. 19—Damages not prayed for.

Court can award damages in a suit for specific performance though not specifically prayed for. It ought to award damages when it thinks that damages should be awarded. This principle applies even in cases where specific performance is decreed. 83 Ind Cas 1047 : 5 Lah 509 : 6 L L J 286 : AIR (Vol 11) 1924 Lah 713 (DB).

——S. 19—Agreement to lease—No time fixed for commencement of lease.

Semble—Where there is no agreement as to the date of commencement of the lease, there is no concluded agreement. In the circumstances of this case there was a concluded agreement between the parties which could be enforced, and as the plaintiff had not appealed against the decree of the Court below refusing specific performance, he was certainly entitled to damages. (1909) 13 C W N 328 (335) : 6 M L T 368 : 4 Ind Cas 85 (DB).

4. Breach of contract.

——S. 19 — Property sold transferred to another—Compensation for breach of contract — Right of vendee.

Where the vendee chooses to keep the contract alive by suing for specific performance and damages for its breach on the ground that the vendor has transferred the property sold to a third person who was aware of the sale transaction and that it contained a clause as to damages for failure to execute the sale-deed, under S. 19, the vendee is entitled to obtain compensation either in addition to or in substitution for such performance. AIR (Vol 24) 1937 Nag 243 : ILR (1938) Nag 283: 169 Ind Cas 887 (DB).

——S. 19—Remedy of lessor in case of breach of lease agreement.

In a lease by the guardian of a minor Muhammadan girl, although the failure of condition might put an end to a term, the mere failure of a covenant or the impossibility of enforcing it would not have that effect. In such a case, the remedy of the lessee in the event of a breach can only be either by way of deduction from the rent or by way of a claim for damages or reimbursement of moneys spent. AIR (Vol 23) 1936 Mad 564 : 1936 M W N 379 : 43 L W 592: 70 M L J 477: 59 M 942 : 163 Ind Cas 384 (DB).

5. Prospective damages.

——S. 19 — Damages or compensation — Right to claim — Prospective damages — When can be awarded.

Under S. 19, the plaintiff claiming damages must establish that he is entitled to the same. Prospective damages can be awarded in cases where the Court reasonably anticipates that the plaintiff would suffer damages in future in consequence of the defendant's conduct or acts. There must be some evidence from which the Court can anticipate it. AIR (Vol 31) 1944 Bom 76 : 45 Bom L R 1075 : 214 Ind Cas 42.

6. Suit for specific performance.

See also N. 3.

——S. 19—Grant of damages in addition to specific performance—When justified—Specific performance

prayed for and granted — Alternative relief of refund not pressed — Granting of alternative relief by appellate Court.

Compensation for breach of contract by way of damages should be made to the plaintiff in addition to the relief of specific performance only when the Court is satisfied that the decree for specific performance is not sufficient to satisfy the justice of the case.

The appellate Court is not bound to grant the alternative relief of refund of purchase money with interest and damages to the plaintiff, where the plaintiff was satisfied with pressing in the lower Court for the relief of specific performance only and he did obtain that relief. A I R (Vol 38) 1951 Mad 282 : 63 L W 945 : 1950 M W N 702 : (1950) 2 M L J 509 (DB).

——S. 19—Contract for sale—Agreement to deliver vacant possession — Vendor unable to do so—Purchaser suing for specific performance — If can elect to accept property with tenant and claim compensation.

If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not by misrepresentation or otherwise disentitled himself to his remedy. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase money. In a suit by the purchaser for the specific performance of an agreement for sale of certain premises, in which the vendor has undertaken to deliver vacant possession but is unable to do so, the plaintiff may elect to take the property, in suit with the tenant and claim compensation. The vendor who was not bona fide in his attempt to eject his tenants, is not entiled to rely on his own default and failure to excuse himself from the performance of the contract of this nature. A I R (Vol 36) 1949 Cal 510.

——S. 19 — Suit for specific performance of agreement — Damages.

In a suit for specific performance of an agreement it is always possible for the Court if it does not think fit to enforce the agreement specifically, to award damages in lieu of enforcement, even if not directly claimed in the plaint. (1935) 157 Ind Cas 26 (Rang) (DB).

——S. 19—Omission to claim performance.

Where performance of the contract is refused by defendant plaintiff is entitled to claim back the earnest money and damages, provided they are not penal. His omission to claim specific performance does not bar his right to claim damages. AIR (Vol 13) 1926 Cal 1041 : 95 Ind Cas 700 (DB).

——Ss. 19 and 21 (a) — Contract for purchase of a money claim—Claim becoming barred—Compensation.

Plaintiff sued for specific performance on a contract by the defts. to purchase from them a money claim which the plff. had against another. The defts. had made default and on the date of the suit the claim had become barred. Held, that though the contract was not specifically enforceable by virtue of S. 21 (a) of the Sp. Rel. Act, the plffs. were entitled to compensation under S. 19, though there was no specific prayer to it in the plaint. 43 I. C. 990 (P. C.) Dist. A I R (Vol 6) 1919 Mad 560 : 9 L W 471 : (1919) M W N 714 : 51 Ind Cas 908 (DB).

——Ss. 19 and 21 (b)—Contract to file Jama Wasil papers—If enforceable.

A contract by a lessee to prepare and file a set of Jama Wasil baki papers with the lessor every year falls under S. 21 (b) of the Sp. Rel. Act and cannot be specifically enforced. In the absence of proof of actual loss suffered the plff. cannot get any relief in the alternative for damages in the suit for specific performance of the contract. A I R (Vol 5) 1918 Cal 306 : 42 Ind Cas 521 (DB).

——S. 20.

——S. 20 — Alternative contract, what is—Cause of action—Contract, held not alternate.

Agreement to sell land — Clause for payment of compensation in default — It is not an "alternative contract" giving the defendant right either to sell or pay compensation—Contract embodied a single contract and can be specifically enforced.

In an "alternative contract", the person who has the right to elect, must make his choice within a reasonable time and give notice of his having made the election to the opposite party.

Obiter.—The cause of action to claim compensation under such an agreement would accrue to the plaintiff only on the date when the defendant makes his election not to sell. A I R (Vol 18) 1931 Lah 657: 33 P L R 66 : 132 Ind Cas 489 (DB).

——S. 20 — Specific performance, when allowed.

An agreement which is otherwise capable of specific performance can be specifically enforced by the plaintiffs under S. 20 although a sum is named in it as damages for breach and the defendant is willing to pay the same. A I R (Vol 18) 1931 Lah 227 : 12 L 328 : 32 P L R 40 : 131 Ind Cas 289 (DB).

——S. 20 - Stipulation about damages.

A party to a contract for the sale of an immovable property should not be allowed to evade specific performance merely because the agreement provides a penalty to be paid on default. The onus is upon the defendant to show that the case is one in which the Court should not exercise its discretion and grant specific performance in favour of the plaintiff. A I R (Vol 12) 1925 Lah 605: 87 Ind Cas 511: 26 P L R 751 (DB).

——S. 20—No bar to specific performance.

The elder of the two brothers acting under the authority of his younger brother agreed to sell to plaintiff certain properties belonging to them and stipulated that in case of default by the younger brother the amount paid as advance, together with interest and an equal amount, should be paid as damages. A stranger purchased the properties with knowledge of the agreement.

Held in a suit for specific performance that the provision for damages did not render the agreement an incomplete one and the provision did not bar suit for specific performance.

Held, further that the elder brother was competent to settle the terms of the agreement under the authority conferred on him by the younger brother in the absence of any express limitation thereon. A I R (Vol 12) 1925 Mad 227 : 28 M L W 523 : 1924 M W N 857 : 84 Ind Cas 612.

——S. 21.

1. Scope.
1-A. Mutuality.
2. Clause (a).
3. Clause (b).
4. Clause (c).
5. Clause (d).
6. Clause (e).
7. Clause (g).
8. Clause (h).
9. Arbitration.
10. Contingent contracts.
11. Other illustrative cases.

1. Scope.

——S. 21 — Applicability.

Contract with Secretary of State — Agreement

to refer disputes to Deputy Commissioner and abide by his decision — Agreement, held fell under exception I to S. 28, Contract Act and suit in contravention of agreement, held was barred by S. 21, Specific Relief Act. AIR (Vol 19) 1932 Oudh 265 : 9 OWN 563 : 8 Luck 98 : 139 Ind Cas 362 (DB).

——S. 21 — Section 21 of the Specific Relief Act is limited by paragraph 22 of Sch. 11 of the Civil P. C., and does not apply to any agreement to refer to arbitration or to any award governed by Sch. II, Civil P. C. AIR (Vol 7) 1920 Cal 975 : 64 Ind Cas 204 (DB).

——S. 21 — **Contract not falling under S. 21 — Court can still refuse specific performance.**

The specific relief is a discretionary relief and cannot be claimed as of right. Hence, even if a contract does not fall under any of the provisions of S. 21, the Court may refuse specific performance. AIR (Vol 31) 1944 Bom 76 : 45 Bom LR 1075 : 214 Ind Cas 42.

1-A. Mutuality.

——**S. 21 — Scope — Contract — Specific performance — Proof of mutuality — Necessity — Mutuality at time of contract — Sufficiency — Contract by manager of Hindu family — Enforceability against minor son after death of manager.**

It is a fundamental rule of equity that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the same time as it is executed have the right to resort to equity for specific performance of it. The contract must, to be capable of specific performance be mutual. That this doctrine is a part of the law in India is supported by the last illustrations of Cl. (b) of S. 21 of the Specific Relief Act. If there is a lack of mutuality, the Court cannot order specific performance of a contract even if the transaction be beneficial to a minor who is one of the parties. But want of mutuality, to be fatal, must exist at the time the contract is entered, not merely at the time when the performance is sought. Where the transaction is entered by the karta of joint Hindu family who fully represents all the members of that family including his minor sons, and when it is supported by legal necessity or benefit to the estate, the fact that at the time of the suit for specific performance the karta is dead, and that his mnor son is made a defendant to the suit makes no change in the legal position and the Court can pass a decree for specific performance which will be binding on all the members of the family, including the minor son of the deceased karta who entered into the contract. AIR (Vol 37) 1950 Pat 535 : 29 Pat 912 (DB).

2. Clause (a).

(a) General.
(a-1) Contract to sell.
(b) Contract of loan.
(c) Contract to pay money.
(d) Service contracts.

(a) General.

——**S. 21 — Compensation, proper remedy — Specific performance, if should be granted.**

If, upon the facts pleaded in the plaint, a case is made out which would lay the foundation for the relief granted, although not specifically asked for, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer contained in the plaint. But if during the progress of the suit and before the final hearing the plaintiff abandons his claim to specific performance or disentitles himself to that relief by some act on his part, he cannot claim or be awarded by the Court damages in lieu of the specific performance of the contract. Jurisdiction to award damages in substitution of the relief for specific performance remains so long as the plaintiff does no act on his part to disentitle himself to a decree for specific performance. AIR (Vol 32) 1945 All 395 : 1945 OWN (HC) 244 : 1945 ALJ 405 : 1945 AWR (HC) 258: ILR (1945) All 917 (DB).

——**S. 21 — Damages.**

In a suit for specific performance plaintiff is not bound to pay specifically for damages either in addition or in substitution as he has a choice of remedies to apply for and the Court has discretion to allow damages if it finds that damages will be the appropriate remedy. AIR (Vol 12) 1925 Lah 132 : 80 Ind Cas 712 (DB).

——**S. 21 — 'Adequate.'**

In S. 21 the word "adequate" means adequate appearing to the Court for some reason found as a fact and stated by the Court in spite of the plaintiff's opinion that it is inadequate. AIR (Vol 11) 1924 All 529 : 5 LRA Civ 180 : 78 Ind Cas 167 (DB).

(a-1) Contract to sell.

——**S. 21 (a) — Compensation when adequate relief — Plaintiff willing at one stage to accept compensation.**

Where it is established on the facts of a case that the plaintiff in the suit for specific performance of a contract to sell immoveable property considered that damages would be adequate compensation and by his conduct indicated that he was willing to accept damages for the breach of the contract, the Court would be justified in decreeing compensation as an adequate relief instead of decreeing specific performance. AIR (Vol 36) 1949 All 440 : ILR (1949) All 735 : 1949 AWR 2 (DB).

——Ss. 21, 12 — Hire-purchase agreement between A and B — Articles to remain A's property till payment of all instalments — B entitled to return articles at any time in good working order provided all instalments due were paid — A entitled to take possession on default of payment of instalment and to recover instalments due and costs of putting articles in order — B, instead of returning articles, himself asking A to take them back — A asking for time and subsequently refusing to take them back as not being in working order — Suit by A for recovery of all instalments due up to date of suit and for declaration of B's liablity for remaining instalments:

Held, that the suit was a suit for the specific performance of a contract for the sale of goods and as the failure of B to perform his obligations under a hire-purchase agreement for the sale of goods could be adequately compensated in money, the contract could not be specifically enforced.

Held, further that A's letter asking for time to take back the article amounted, so far as the obligation of B to return the goods was concerned, to a novation of the agreement. AIR (Vol 28) 1941 Rang 177 : 195 Ind Cas 860 (DB).

(b) Contract of loan.

——**S. 21 — Agreement to mortgage.**

An agreement to mortgage is not generally capable of specific performance. AIR (Vol. 25) 1938 Bom 357 : 40 Bom LR 545 : 177 Ind Cas 467 (DB).

——**S. 21 — Agreement to lend money — Suit to enforce — Maintainability.**

Under hypothecation deed, a sum of Rs. 3,500 was expressed to be advanced by the mortgagee to the mortgagors. An amount of Rs. 855 was, however, agreed to be left with the mortgagee on condition that he would pay that amount within a month to the first mortgagor with interest. The

first mortgagor assigned this right and the assignee brought a suit against the mortgagee to recover this amount :

Held, that the suit was one to enforce an agreement to lend money on a mortgage and not a suit to recover a debt, and as such, it was not maintainable ;

Held, also that S. 21 (a), illustration 3, covered the case and specific performance of an agreement of this nature cannot be enforced. AIR (Vol 22) 1935 Mad 1045 : 1935 MWN 1348 (2) : 69 MLJ 760 : 43 LW 60 : 159 Ind Cas 1034.

——S. 21 — Money reserved with mortgagee for payment to mortgagor's creditors — Default by mortgagee — Suit by mortgagor to recover the money — Maintainability.

Where money is reserved with the mortgagee in trust for payment to the creditors of the mortgagor, a suit by the mortgagor to recover the money so reserved on default of payment, is maintainable; the mortgage transaction is complete in such a case and no question of specific performance of a contract to lend money arises. A I R (Vol 20) 1933 Lah 1 : 33 PLR 1085 : 140 Ind Cas 495.

——S. 21 (a) — Suit for payment of balance of mortgage money.

Where a person had advanced part of the consideration agreed upon for executing a mortgage and sued for specific performance on payment of the balance.

Held, that no specific performance should be decreed and that the lender was only entitled to damages for breach of contract if the borrower was ready to pay off the advance at once. If not specific performance should be decreed on payment of the balance. AIR (Vol 6) 1919 Mad 322 : 41 Mad 959 : 35 MLJ 489 : 8 LW 438 : 24 MLT 315 : (1918) MWN 811 : 49 Ind Cas 291 (DB).

——S. 21 (a) — Contract of loan — Specific performance.

A contract to lend or borrow money on a mortgage will not be specifically enforced at the instance of the lender or borrower. A I R (Vol 3) 1916 Cal 530 : 43 Cal 59 : 19 CWN 1332 : 21 CLJ 532 : 29 Ind Cas 621 (DB).

——S. 21 — Agreement to lend money.

(Obiter)—An agreement to lend money is not capable of specific performance and creates no debt, though the breach of it may give rise to a claim for damages. (1909) 33 Bom 426 : 11 Bom LR 386 : 2 Ind Cas 432 (FB).

——S. 21 — Portion of loan unpaid — No specific performance — Damages only.

A borrower who is not paid a portion of the debt agreed upon to be advanced on the mortgage is not entitled to sue for specific performance. He is only entitled to damages, if any. (1908) AWN 105 : 5 ALJ 491 : 30 All 252 (DB).

(c) Contract to pay money.

——S. 21 — Agreement to lend — Enforceability of — Decree.

Where a person who was indebted to the plaintiff, executed a bond in favour of the defendant leaving the entire amount with the latter for payment to the plaintiff and on not receiving payment, the plaintiff instituted a suit on the basis of the bond :

Held, that in substance, the plaintiff's case, so far as it was based on the bond, amounted to a claim for enforcement of the defendant's promise to advance money in future, and as an agreement to lend money, not being specifically enforceable, no decree could be passed against the defendant.

AIR (Vol 22) 1935 All 688 : 1935 ALJ 429 : 1935 AWR 417 : 155 Ind Cas 550.

——S. 21 — Agreement to pay money — Money not paid — Contract if can be specifically enforced.

A contract under which a sum of money had been agreed to be paid, but was not paid cannot be specifically enforced. In a case of this kind, it is open to the mortgagor to sue the mortgagee for the recovery of damages on account of the failure of the mortgagee to perform his part of the contract. AIR (Vol 21) 1934 All 449 : 1934 ALJ 713 : 4 AWR 478 : 154 Ind Cas 542 (DB).

——S. 21 — Specific performance — Relief of, when can be allowed — Other relief available — Delay in bringing suit, if a ground for refusing relief.

Where A advanced a certain amount to B and C, husband and wife who promised to execute a mortgage and two years after the death of B, A brought a suit against C and other legal representatives for specific performance of the contract :

Held, that the relief of specific performance could be refused on the ground of delay. Specific performance is, as a rule, only allowed when there is no other sort of relief which will meet the circumstances of the case and in this case, a suit for recovery of money coupled perhaps with attachment before judgment, would have served all necessary purposes. AIR (Vol 20) 1933 Rang 149 : 150 Ind Cas 245.

——S. 21 (a) — Contract to pay money — Specific performance.

A suit will not lie for specific performance of a contract to pay money. But the case of a vendor is an exception and the Court will grant the vendor specific performance of the contract against the purchaser. The suit would be a suit for specific performance and not a suit for damages if the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards. AIR (V 6) 1919 Mad 304 : 36 MLJ 89 : 9 LW 19 : (1918) MWN 896 : 49 Ind Cas 385 (DB).

——S. 21 — Suit on bond or contract — Nature of.

Suit to recover money payable under a bond or contract is not one for specific performance ; it is one for compensation for breach of contract. (1912) 6 SLR 148 : 19 Ind Cas 376.

——S. 21 (a) — Contract to pay money.

An agreement to pay money by instalments cannot be specifically enforced as compensation in money for non-performance of the agreement is an adequate relief. (1911) 8 ALJ 1282 : 12 Ind Cas 952 (DB).

——Ss. 21 and 30 — Suit to recover money due on an award — Specific performance — Damages.

In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay, for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought, having regard to Ss. 21 and 30 of the Specific Relief Act (1 of 1877) :

Held, disallowing the contention, that the suit was not for specific performance. It was a suit for the recovery of money and for relief incidental thereto. (1903) 28 Bom 1 (3) : 5 Bom LR 705.

(d) Service contract.

——Ss. 21 (a), 56 (f) — Wrongful dismissal of Secretary of District Board — Secretary, if entitled to injunction against Board restraining it from enforcing resolution of dismissal.

Although the Secretary of District Board may establish that he has been wrongfully dismissed, he is not entitled to the remedy of injunction or specific performance against the Board. He cannot get an order for temporary injunction restraining the Board from enforcing its resolution as to the dismissal: AIR (Vol 20) 1933 All 826, Dissented from. AIR (Vol 21) 1934 All 101 : 1934 ALJ 368 : 56 All 573 : 4 AWR 543 : 148 Ind Cas 945

——S. 21 — Power-of-Attorney — Revocation.

A promise, contained in an ordinary power-of-attorney that it will not be revoked except on certain grounds is the same as a contract to keep a servant on hire and is not specifically enforceable. AIR (Vol 17) 1930 Mad 231 : 121 Ind Cas 598 (DB).

——Ss. 21, 56 and 57 — Contract of service, if can be specifically enforced — Injunction if can be granted restraining company from dispensing with services.

A servant cannot enforce a positive contract of service and he cannot obtain an injunction restraining the master from dispensing with his service except in a given manner or until after a particular period; his only remedy if he is wrongfully dismissed is to sue for damages. (1912) 16 CWN 289 : 13 Ind Cas 868.

3. Clause (b).

——S. 21 (b) — Decree preventing dismissal of managing agent of Company by ordinary resolution when articles of association require extraordinary resolution — Whether has effect of enforcing contract of personal service.

A decree which merely prevents dismissal of the managing agents of a company or termination of their appointment by an ordinary resolution in violation of the articles of the association which require an extraordinary resolution, has not the effect of enforcing a contract of personal service as between the company and the managing agents. AIR (Vol 37) 1950 PC 81 : 77 IA 128 : 52 Bom LR 501 : 1950 Com C 133.

——S. 21 (b) — Sale-deed to be executed on ascertainment of amount of encumbrance — Non-fulfilment of condition precedent — Effect.

Where the ascertainment of the exact amount due under the mortgage is a condition precedent to the execution of the deed of sale in respect of property under the mortgage, and that condition is not fulfilled, it is impossible for the Court to pass a decree for specific performance without knowing the exact amount due to the mortgagee. AIR (Vol 32) 1945 All 39 : 1944 ALJ 454 : 1944 A W R H C 256 (DB).

——S. 21 — Applicability.

In pursuance of certain articles of association, a member was appointed by the company as its managing director but was subsequently removed by special resolution which was ultra vires. The managing director, on the basis that the articles of association constituted an implied contract between him and the company, brought a suit for declaration that he was still the Managing Director :

Held, that the contract on which the Managing Director relied, being dependent on personal services and volition of the parties, the contract could not be specifically enforced under S. 21. A I R (Vol 27) 1940 Lah 243 : 190 Ind Cas 819.

——S. 21 (b) — Suit for injunction by Secretary of Local Board.

Quaere. — Whether a suit for an injunction by a Secretary of a Local Board filed in a Civil Court is at all mantainable and whether any relief for injunction can be granted in the face of the provisions of S. 21 (b) of the Specific Relief Act. AIR (Vol 22) 1935 All 663 : 1935 AWR 485 : 155 Ind Cas 593 (DB).

——S. 21 (b) — Contract of personal service — Specific performance.

The Court will not make an order the effect of which is to enforce specifically any contract of personal service. A I R (Vol 21) 1934 Bom 427 : 36 Bom LR 907 : 59 Bom 218 : 156 Ind Cas 80 (DB).

——S. 21 (b) — Contract for preparation of account papers — Specific performance.

A contract for preparation of a set of account papers relating to the darpatni mahal is one which cannot, from its very nature, be enforced specifically. AIR (Vol 19) 1932 Cal 481 : 59 Cal 352 : 138 Ind Cas 640.

——S. 21 — Agreement to sell land — Subsequent purchaser with right of pre-emption.

Specific performance of an agreement to sale of land against a subsequent purchaser where the latter is entitled to a right of pre-emption against the person seeking to enforce the agreement for sale, cannot be enforced. AIR (Vol 17) 1930 All 166 : 122 Ind Cas 740 (DB).

——S. 21 — Contract of service.

Certain persons were employed as managing agents of a company on account of their reputation in commercial circles. Afterwards those persons lost their previous reputation.

Held, that such contract of service was not specifically enforceable. AIR (Vol 16) 1929 All 87 : 26 ALJ 1119 : 119 Ind Cas 387 (DB).

——S. 21 — Contract by Court of Wards — Depending on the volition of a party.

Where an agreement to grant a prospecting license and lease to the plaintiff was entered into by the Manager of an infant's estate under the Court of Wards, but it was found that it was not the intention of the parties that this agreement was to be considered a concluded contract until the draft license and lease had been submitted to and sanctioned by the Board of Revenue.

Held, that the plaintiff could not sue for a decree for specific performance of the contract. AIR (Vol 12) 1925 Pat 259 : 3 Pat 968 : 84 Ind Cas 178 (DB).

——S. 21 (b) — Contract — Apprenticeship.

A contract of apprenticeship cannot be specifically enforced against the apprentice either directly or by injunction restraining him from taking service under others or others from employing him. (1910) 33 Mad 288 : (1910) MWN 187 : 8 MLT 47 : 6 Ind Cas 754.

——Ss. 21, 57 — Civil Procedure Code, S. 493 — Positive covenant — Negative covenant — Perpetual injunction — Principles — Judicial discretion — Offer by defendants' counsel — Absence of suggestion that offer will not be carried out — Defendants' financial position.

A perpetual injunction may issue in a case where there has been breach of a negative covenant, although a positive covenant may be incapable of specific performance. Section 57 is general and is not confined to cases of contracts which are specified in S. 21, Cl. (b). Under S. 57 the plaintiff will be entitled to an injunction only when he has not failed to perform his part of the contract. But when the failure of the plaintiff is due to the defendants' default in not performing the contract, it does not lie in the mouth of defendant to say that the plaintiff is not entitled to an injunction by reason of the latter's default or failure.

A temporary injunction is regulated by the provisions of S. 493, Civil P. C., and under that section the granting of an ad interim injunction is a matter of discretion — though judicial. An injunction may be rightly refused on account of the plaintiff's conduct in refusing an offer made by the defendants at the bar unless having regard to the financial position of the defendants there is reasonable apprehension that the offer will not be carried out. (1903) 13 MLJ 13 (19, 20): 26 Mad 168 (DB).

4. Clause (c).

——S. 21 — Agreement to grant lease — Date of commencement of lease not specified — Whether enforceable.

If an agreement to grant a lease does not specify the date from which the lease is to commence, it cannot be specifically enforced. AIR (Vol 36) 1949 Nag 286 : ILR (1949) Nag 106 : 1949 N L J 591.

——S. 21 — Contract of lease — No date of delivery of possession fixed — Specific performance.

Contracts of lease in which no date for delivery of possession is fixed, cannot be specifically enforced. AIR (Vol 27) 1940 Lah 225 : 42 PLR 194 : 189 Ind Cas 418.

——S. 21 (c) — Completion of contract — Specific performance.

If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced specifically either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. AIR (Vol 20) 1933 Cal 109 : 60 Cal 111 : 36 CWN 1108 : 142 Ind Cas 465 (DB).

——S. 21 — Date not fixed.

Plaintiffs' case throughout had been that a tank had been excavated by their ancestors and that they had been all along in possession. Their possession of the eight annas share had been regularized by their taking a lease from the eight annas proprietor and with regard to possession of the other half an agreement of lease was entered into which was to be completed and registered by a certain date. It was contended that the plaintiffs were not entitled to the specific performance of the agreement which was uncertain as there was no date expressed from which the lease was to take effect.

Held, that the implied term in the agreement was that the lease would run from the date on which it was to be completed and registered, the plaintiffs being already in possession and consequently such non-mention of the date was no ground for refusing specific performance of the agreement. AIR (Vol 17) 1930 Pat 601 (DB).

——S. 21 — Where the defendant has performed his part.

Where the terms of certain agreement being indefinite, the plaintiff could not be able to obtain specific performance of such an agreement in case of its breach by the defendant but the defendant had wholly performed his part of the agreement.

Held, that the plaintiff's possible inability to specifically enforce the contract could not arise in the case. AIR (Vol 16) 1929 Nag 194 : 25 NLR 131 : 117 Ind Cas 271 (DB).

——S. 21 — In the absence of a date fixed, from which the lease is to be granted, specific performance of an agreement to grant a lease cannot be ordered. AIR (Vol 12) 1925 Pat 259 : 3 Pat 968 : 84 Ind Cas 178 (DB).

——S. 21 —— Where an agreement ran:- "We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract."

Held, (1) that the above writing could not be considered as a concluded agreement for it was impossible for the parties to draw up a formal lease in accordance with that writing as its terms were too uncertain to be reduced to a formal document, and the words "subject to the conditions and entering into regular lease" made the "entering into a regular lease" a condition precedent to the parties coming to a definite agreement.

(2) That the writing was, therefore, not a document which the Court could direct to be specifically performed. 67 Ind Cas 433: 24 Bom. LR 466: AIR (Vol 9) 1922 Bom. 404. (DB)

——S. 21 ——Where an agreement to convey certain number of well-sites to be received in a certain year did not specify what sites were to be conveyed.

Held, (Per McColl, A J. C.) that the case would fall under S. 21 (c).

Held, (Per Heald, A. J. C.) that the agreement could be specifically enforced to the extent of the number of sites, defendant could convey upto the agreed number. It was immaterial whether the defendant was able to perform whole of the agreement. 4 UBR 35: 4 UBR 38: 4 UBR 41: AIR (Vol 8) 1921 U.B. 16.

——S. 21 — Agreement to lease — Failure to mention the date from which the lease is to run.

Specific performance of an agreement to lease cannot be decreed if the date from which the lease is to run is not fixed either expressly or impliedly. 29 MLT 1: 39 MLJ 329: (1920) MWN 653: 22 Bom LR 1932: 57 Ind Cas 626: AIR (Vol 8) 1921 P.C. 71

——S. 21 (c) — Contract — Vague — Unenforceable.

An agreement in a lease to pay a particular rate of rent which is so vague as not to make it clear what the intention of the parties was, cannot be enforced. (1920) 2 UPLR BR 29: 55 Ind Cas 923.

——S. 21 — Agreement to enter into contract.

A document which is merely an agreement to enter into a contract cannot be specifically enforced. 21 Bom. LR 302: 50 Ind Cas 403: AIR (Vol 6) 1919 Bom 154

——S. 21 — Contract — Specific performance.

Formal document not executed where the parties agree to the execution of a formal lease the draft of which is to be approved by them, specific performance can be decreed though the draft is not drawn up. 46 Cal. 771: 23 CWN 563: 52 Ind Cas 575: AIR (Vol 6) 1919 Cal 369 (DB)

—S. 21 (c) — Contract uncertain — Question of fact.

(Per Woodroffe, J.)—The Court will not enforce a contract the terms of which are uncertain. Uncertainty is a question of fact arising on the document and on the oral evidence adduced. 20 CWN 66: 32 Ind Cas 53: AIR (Vol 3) 1916 Cal 1 (DB)

——S. 21 (c) and S. 24-A — Contract — Essential terms not agreed on — Party, guilty of breach.

In the absence of complete agreement between the parties as to the essential terms of the contract of lease the latter cannot be specifically enforced.

The party breaking a contract is not entitled to specific performance thereof and the other party can refuse to perform his part of the contract. 87 PWR 1913: 149 PLR 1913: 18 Ind Cas 911 (DB)

——S. 21 (c) — Vague claim — Original claim unsustainable — Relief on amended claim — Discretion of Court — Meaning of.

Where the plff. has asked for specific performance of an agreement and it is found that the claim was excessive he may be allowed to succeed on the basis of an alternative claim for a more limited right. But if he gives evidence in support of the original claim which is found unsustainable he cannot succeed on a different claim contrary to his own evidence. (1911) 14 CLJ 627: 10 Ind Cas 503 (DB).

5. Clause (d).

——S. 21 — Invalid agreement to sell — Valid sale effected subsequently to a third person.

J contracted to sell agricultural land held on a restricted tenure to plaintiff and subsequently sold the land to N with sanction of the revenue authorities under S. 73-A Bombay Land Revenue Code, and N took possession of the land. Plaintiff instituted a suit against N for recovery of possession under S. 9, Specific Relief Act, and another against J for specific performance of the contract as per contract, and in the alternative for damages for breach of contract.

Held, the title of N under the sale-deed remaining, there would be no point in decreeing this suit for possession because N by the very production of the title deed dispossess the plaintiff and further on the facts of the case the evidence of dispossession was conflicting and therefore plaintiff could not be given relief. AIR (Vol 15) 1928 Sind 63 : 22 SLR 396 : 105 Ind Cas 735.

——S. 21 — Agreement to sell by minor's father — Specific performance against minor.

No Court will grant specific performance against a minor unless the contract is for his benefit. (1901) 3 Bom LR 898 (900) : 26 Bom 326 (DB).

6. Clause (e).

——S. 21 — Right of management — Debuttar property — Performance of Sheba — No proprietary rights transferred.

A solenama provided that "Sm. J., hands over the charge of realization of the income of the debuttar properties in her share to K and his brother. They shall realise the rents of the said debuttar properties from the tenants as empowered by the said Rani as well as the produce, etc., of the Khamar lands. And if necessary they shall be entitled to exercise all rights of a proprietor or Shebait for recovery of possession in case they are dispossessed from any portion of the said property. That is to say they will hold possession of the said property and they shall perform the Debsheba from the income of the same as trustees and agents of the said Rani. The brothers sued the executrix for specific performance of the term.

Held, that upon the proper reading of the language used the executrix did not desire to give up her interest as Shebait in favour of the plaintiffs. What she wanted to do was to clothe the plaintiffs with the right to realise rents, manage the property and perform the sheba on her behalf as her trustees and agents. No right to any property was agreed to be conveyed but only the right of management as agent and therefore according to the provision of S. 21, it was not a contract which could be specifically enforced. AIR (Vol 16) 1929 Cal 561 (DB).

——S. 21 (e) — Lease by trustee.

In a suit for specific performance of a contract its terms can be proved even from the unregistered amalnamah and by oral evidence. The registration of an amalnamah is optional when from its condition the parties' intention of executing a properly registered document to perfect the lessee's title, is clear. A Court in decreeing specific performance must ascertain beforehand whether the contract is enforceable specifically and does not involve any breach of trust. The Equity Courts would refuse specific performance of a lease entered into by a trustee lessor of a trust property beyond his authority. (1912) 16 Ind Cas 390 (Cal) (DB).

——S. 21 — Specific performance — Unlawful compromise — Compromise in excess of a trustee's powers.

A Court of equity will not enforce specific performance of an agreement which would necessitate a breach of trust, e.g., execution of a lease by a trustee or administrator in excess of his powers. A consent decree which is based in part on an unlawful agreement and is consequently set aside in part, will not necessarily be maintained as to the remainder. The test to be applied is whether the transaction is divisible or whether the parties intended that the agreement should be enforced, if at all, in its entirety. (1909) 11 CLJ 346 : 14 CWN 451 (457) : 5 Ind Cas 236 (DB).

7. Clause (g).

——S. 21 (g) — Contract requiring execution of kabuliyat every year for 25 years — If enforceable.

A contract which requires the execution of a kabuliyat every year for a period of 25 years, offends against the provisions of S. 21 (g) of the Specific Relief Act, and is, therefore, specifically unenforceable. AIR (Vol 36) 1949 Nag 286 : ILR (1949) Nag 106 : 1949 NLJ 591.

——S. 21 — Scope — Contracts as to forbearance of continuous acts.

There is a clear distinction between agreements which contemplate the continuous performance of specific acts for more than three years and contracts which contemplate forbearance from the performance of certain acts. While the former kind of contracts cannot be enforced under S. 21 (g) and, therefore, a mandatory injunction in respect thereof cannot be granted under S. 56, there is nothing in that section to prohibit the grant of preventive relief by way of an injunction in the latter kind of cases. AIR (Vol 14) 1927 Lah 898 : 9 LLJ 311 : 28 PLR 656 : 103 Ind Cas 715.

——S. 21 (g) — Workman's Breach of Contract Act (XIII of 1859).

A contract binding the debtor to work for the creditor for more than 3 years and for no other person cannot be enforced under Act XIII of 1859. AIR (Vol 1) 1914 Lah 421 : 61 PLR 1914 : 22 PWR 1914, Cr : 15 Cr LJ 423 : 24 Ind Cas 159.

8. Clause (h).

——S. 21 (h) — Contract embodied in document — Document set aside by Court — Specific performance.

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a solenamah filed in the Court which was subsequently set aside by the Court. Held, that there was no contract subsisting which the plaintiff could put before the Court for enforcement. The plaintiff could not fall back upon some verbal agreement to grant

the lease. AIR (Vol 5) 1918 Cal 108 : 44 Ind Cas 225 (DB).

9. Arbitration.

(a) General.
(a-1) Burden of proof.
(b) Agreement to refer, whether bars the suit.
(c) Enforceability.
(d) Revocability.

(a) General.

——S. 21 — Scope.

Agreement to refer to arbitration cannot be specifically enforced under Specific Relief Act. AIR (Vol 28) 1941 Mad 129 : (1940) 2 MLJ 520 : 52 LW 556 : 1940 MWN 1083 (DB).

——S. 21 — Agreement to refer to arbitration.

Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation is not against the tenor of S. 21. That section has no application except where a person, having made a contract to refer a controversy to arbitration, has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract. AIR (Vol 17) 1930 All 877 (DB).

——S. 21 — Civil P. C., Sch. II, Para. 22.

After the enactment of para 22 of Sch. II, Civil P. C., S. 21 of the Specific Relief Act has no application to any agreement to refer to arbitration or to any award to which the schedule applies. AIR (Vol 3) 1916 LB 101 : 9 Bur LT 98 : 35 Ind Cas 710.

——S. 21 — Arbitration — Scope of section.

The proviso to S. 21 refers only to incohate and abortive arbitration and not to a contract which has been admittedly carried out. AIR (Vol 3) 1916 LB 74 : 8 LBR 57 : 33 Ind Cas 554.

(a-1) Burden of proof.

——S. 21 — Agreement to refer to arbitration — Burden of proof.

Where the plea to a suit for recovery of money under an agreement is that the agreement provided that disputes should be referred to the arbitration of a person named therein and that the decision should be binding and that the plaintiffs had refused to so refer the dispute, the burden of proof rests with the defendant. 35 PLR 1911 : 25 P R 1911 : 55 P W R 1911 : 9 Ind Cas 736 (DB).

(b) Agreement to refer, whether bars the suit.

——S. 21, Exception — Applicability — Arbitration in pending suit without intervention of Court — If bar to continuance of suit.

The latter part of the Exception to S. 21 Specific Relief Act does not apply to the case of an arbitration during the pendency of a suit. The bar applies to a subsequently instituted suit and not to one which is pre-existing. An arbitration agreement without intervention of the Court relating to the subject-matter of a pending suit cannot have the effect of superseding it, resulting in an automatic lapse of the Court's jurisdiction of the cause. AIR (Vol 37) 1950 Orissa 169 : ILR (1950) Cut 1 (DB).

——S. 21 — Where a suit is settled by an agreement one of the provisions of which is that future disputes should be referred to arbitration, the provision has no force and does not preclude a suit brought without resorting to arbitration. AIR (Vol 12) 1925 All 366 : 47 All 327 : 23 ALJ 141 : 86 Ind Cas 554 (DB).

——S. 21 — Reference — Civil P. C., Sch. II.

Section 89 (1), Civil P. C., renders the concluding provision of S. 21 of the Specific Relief Act inapplicable to arbitration agreements and awards governed by Sch. II, Civil P. C. AIR (Vol 6) 1919 Cal 479 : 46 Cal 1041 : 23 CWN 716 : 29 CLJ 399 : 51 Ind Cas 80 (FB).

——S. 21 — Arbitration — Suit pending reference to Civil P. C., Sch. II, Para. 22.

A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit. This is a substantive right and S. 21 bars a suit pending disposal of the reference by the arbitration.

Per Richards J. The repeal of S. 21 by Para. 22 Sch. II of the Civil P. C., does not effect a right which had accrued under the former Act when the contract to refer was made before Act V of 1908.

The death of an arbitrator without disposing of the reference removes the bar created by S. 21 and restores to the parties, the right of suit and the term commences to run for the suit from the date of the arbitrator's death under Art. 120. Sch. I, Limitation Act.

Per Wallis C. J. — Whether the effect of S. 21 of the Specific Relief Act is merely to suspend the running of time under the Limitation Act, or to bring the cases under Art. 120 of the Act, the cause of action for a suit arises only when by the death of the arbitrator further proceedings in the arbitration became impossible. AIR (Vol 5) 1918 Mad 548 : 33 MLJ 46 : 41 Ind Cas 581 (DB).

——S. 21 and Civil Procedure Code, Sch. II, Cl. (18) — Party to an agreement to refer to arbitration, if can sue independently on title.

A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. AIR (Vol 1) 1914 All 275 : 12 ALJ 757 : 24 Ind Cas 490.

——S. 21 — Arbitration — Agreement to refer — Bar of suit — Civil P. C., Sch. II, Para. 18.

The Arbitration Act applies to a case where a suit could be instituted in a presidency town, if the matter submitted to arbitration were the subject of a suit. Consequently the last 37 words of the saving clause of S. 21 of the Specific Relief Act do not apply to an agreement to refer to arbitration in such a case. When no application for stay of suit under S. 19 of the Arbitration Act under Para. 18 of Sch. II, Civil P. C., is made, the existence of the agreement to refer to arbitration does not bar the suit under S. 21 of the Specific Relief Act. 37 PR 1912 : 130 P W R 1912 : 15 Ind Cas 402.

——S. 21 — Reference to arbitration in a suit — Suit subsequently withdrawn with leave to file fresh suit, effect of.

An order of reference to arbitration was made by a Court, but the award was not submitted on the date fixed for the delivery of award; and the plaintiff withdrew his suit under S. 373, Civil P.C., without notice to the other side, with leave to bring a fresh suit.

Held, that the reference to arbitration has been in effect superseded by the Court's order to the arbitrator to return the record, and that the plaintiff was competent to bring a fresh suit. (1904) 1 ALJ 257 (258) (DB).

——S. 21 — Arbitration — Agreement to refer made pending suit — Bar to fresh suit.

Where parties to a suit have agreed to refer the matters in dispute between them to arbitration, such an agreement ousted the jurisdiction of the Court, whether it is filed in Court under S. 523 Civil P. C., or not : 23 Cal 956, Diss from : 1904 AWN 9 (9, 10)

(On appeal 1 ALJ 388 : 1904 AWN 160 (161) : 27 All 53.)

(c) Enforceability.

——S. 21 — Applicability.

Suit for accounts — Plaintiff agreeing to take only her share of income on reference to Vakils in consideration of her giving up her rights to an account from defendants — Agreement to refer amounts to one for submission to arbitration and such a contract cannot be enforced under S. 21. AIR (Vol 24) 1937 Pat 232 : 3 BR 611 : 169 Ind Cas 741 (DB).

——S. 21 — Agreement to refer to private tribunal cannot be specifically enforced but if suit is filed for breach other party has remedy to ask for stay of suit which Court may grant or refuse at its discretion — Objection if not raised for stay of suit is refused Court has seisin of dispute and its decision alone is binding. 31 Bom LR 1403 : AIR (Vol 17) 1930 Bom 98.

——S. 21 — Arbitration — Enforcement of — Reference to.

Under S. 21, Sp. Rel. Act, no suit lies to enforce a reference to arbitration nor to compel a party to sign a reference. (1910) 4 SLR 149 : 8 Ind Cas 925.

(d) Revocability.

——S. 21 — Suit to set aside agreement to refer — Stay.

In a suit attacking the original agreement to refer to arbitration, the subject-matter is not the same as in the reference to arbitration, and the suit attacking the agreement should not be stayed. AIR (Vol 21) 1934 Lah 162.

——S. 21 — Arbitration — Refusal — Filing of suit.

Where two days after concluding an agreement to refer their disputes to arbitration, one of the parties instituted the suit.

Held, per Fletcher. J. :— That the filing of a suit was not a refusal within the meaning of S. 21 of the Sp. Rel. Act.

Per Shamsul Huda, J. : — Neither demand nor refusal need be expressed and both be implied. The institution of the suit in circumstances which showed that plff. was determined not to go to arbitration amounted to a refusal to perform the contract to arbitrate. AIR (Pol 5) 1918 Cal 318 : 22 CWN 362 : 44 Ind Cas 279 (DB).

——S. 21, proviso — Arbitration — Revocability— Good and sufficient cause — Delay in commencing arbitration proceedings.

When a person has agreed with another that all matters in controversy between them should be referred to arbitration, he cannot resile from the agreement unless good and sufficient casue is shown. Delay of six months in commencing the arbitration proceedings, in the absence of proof that a party made any effort at all to push forward the proceedings before the arbitrators and that he was not himself responsible for the delay, is not good and sufficient cause to withdraw from arbitration. Therefore, under S. 21 of the Sp. Rel. Act, the party cannot sue in respect of a debt which he had contracted to refer. (1913) 17 CWN 351 : 17 Ind Cas 600 (DB).

——S. 21 — Arbitration — Refusal to perform contract to refer to arbitration.

Refusal to perform contract to refer to arbitration on the part of a person is a bar to a suit by him only when the other party has not acquiesced therein and thus annulled the contract by mutual consent. The proper procedure for the other party to observe is to file the award under C. P. C., Sch. II, S 18. In action on his part for a length of time amounts to lapse of the contract. (1911) 33 All 315 : 8 ALJ 66 : 9 Ind Cas 80 (DB).

——S. 21 — Reference to arbitration — Contract for — Rescission.

Contract to refer a dispute to arbitration, means to do all things necessary to make the award valid. A contract to make a reference may be rescinded by mutual agreement or by one of them for just cause proved. (1910) 6 Ind Cas 420 (DB) (All).

10. Contingent Contracts.

——S. 21 — Contract for sale subject to Court's approval —Approval refused by Court — Contract, if enforcible.

A contract for sale in respect of property under attachment made "subject to Court's approval," is a contingent contract. If the contingency fails, (i.e.,) if the approval is refused by the Court, the contract falls to the ground and cannot be made the basis for a decree for specific performance. The approval of the Court is a vital condition of the agreement intended not exclusively for the benefit of the purchaser and it is for the benefit of the vendor also. It follows therefore that the purchaser cannot get rid of the necessity for the approval of the Court by his waiver. AIR (Vol 34) 1947 PC 182 : 1948 MWN 107 : 52 CWN 472 : 51 PLR 104.

——S. 21 — Performance depending on third person's will.

In a suit for specific performance of a contract of sale and alternatively for refund of consideration, if the performance depends upon volition of a person not party to the suit, a decree for specific performance should not be granted. AIR (Vol 14) 1927 Nag 233 : 101 Ind Cas 654 (DB).

——S. 21 — Agreement to sell sir rights.

A contract to sell a share in certain village with the cultivating rights in the sir is specifically enforceable where sanction to transfer sir land cannot be refused, the conditions necessary for sanction being satisfied: 6 NLR 185, Diss. AIR (Vol 13) 1926 Nag 465: 96 Ind Cas 898: 22 NLR 101: 9 NLJ 125 (DB).

——S. 21 — Contract requiring Court's permission for performance.

A contract for the performance of which the permission of the Court is necessary is not specifically enforceable. (1909) 1 Ind Cas 364 (DB) (Cal).

11. Other illustrative cases.

——S. 21 — Managing agent of mills agreeing to associate others in agency — Specific performance.

An agreement entered into by the managing agent of the textile mills to transfer the managing agency from himself to two other persons and himself jointly and to associate them in the agency work comes under S. 21 and cannot be enforced specifically when there are differences between them. AIR (Vol 31) 1944 Bom 76 : 45 Bom LR 1075 : 214 Ind Cas 42.

——S. 21 — Specific performance — Agreement to mortgage.

Obiter :— Specific performance of an agreement to mortgage can be granted. AIR (Vol 27) 1940 Nag 354 : ILR (1942) Nag 182 : 1940 NLJ 445 : 193 Ind Cas 401 (DB).

——S. 21 — Appeal — Failure to exercise discretion on an error of law.

Where in a suit for specific performance of a contract to sell the Munsif held that an agreement was inadmissible in evidence but treated the case as one for refund of earnest and decreed the same and in appeal the District Judge while disagreeing with the Munsif as to the admissibility of the document refused to remand the case on the ground that the granting of specific relief was merely discretionary.

Held, that the appellate judgment was unsound because it ought to have remanded the case once it found that owing to the error of law the lower Court did not exercise a judicial discretion. AIR (Vol 18) 1931 Cal 171 : 34 CWN 881 : 52 CLJ 158 (DB).

——S. 21 — Contract by certificated guardian — Sanction of Court — Effect.

A certificated guardian can enter into a contract with an intending purchaser,but such a contract is subject to sanction being accorded to the proposed transaction and that, when the sanction has been accorded, the contract becomes a completed contract by virtue of that sanction. After the sanction is actually accorded, it is not necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser : AIR (Vol 16) 1929 Pat 202 : 117 Ind Cas 161 : 8 Pat 226 (DB).

——S. 21 — Political pension.

Court cannot grant specific performance of an agreement enabling a person to draw a political pension and appropriate the whole or any portion of it towards the payment of a debt due by the pension-holder. AIR (Vol 14) 1927 Mad 604 : 103 Ind Cas 339 : 50 Mad 711 : 38 MLT 299 : 25 MLW 640 : 1927 MWN 374 : 52 MLJ 622 (DB).

——S. 21 — Moveable property.

There is no invariable rule that in cases relating to moveable property damages only should be given. In a suit against a person who agreed to take an assignment of a decree the price which he promised to pay to the assignor may be decreed. AIR (Vol 11) 1924 Mad 801 : 82 Ind Cas 78 : 20 MLW 328 : 1924 MWN 693.

——S. 21-A.

——S. 21-A — Mortgagee undertaking to discharge prior debt — Default — Remedy of mortgagor.

Where the mortgagee fails to perform his undertaking to discharge a debt due from the mortgagor, the remedy of the latter is to institute a suit for compensation against the defaulting mortgagee and not by specific performance of the agreement. Specific performance cannot be compelled where the compensation is the adequate remedy. AIR (Vol 18) 1931 All 40 : 1930 ALJ 1577 (DB).

——S. 22.

1. **Applicability and scope.**
2. **Damages.**
3. **Delay and laches.**
4. **Discretion of Court.**
5. **Interference by appellate courts.**
6. **Other illustrative cases.**

1. Applicability and scope.

——S. 22 — Suit for specific performance—Proof required of plaintiff.

The plaintiff in a suit for specific performance has to allege & if the fact is traversed must prove his continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment bring with it the inevitable dismissal of his suit. AIR (Vol 37) 1950 Nag 238 : ILR (1950) Nag 386 : 1950 NLJ 456 (DB).

——S. 22 — In consideration of certain personal service (pairvi) being done by B in conducting his litigation for the recovery of certain property, the latter promised to give the former certain portion of these properties when recovered. B conducted the litigation successfully. Instead of fulfilling his promise to B, K endowed the whole house to an idol Shri Mahadevji. Thereupon B filed a suit :

Held, that the circumstances mentioned in S. 22 in which the discretion to exercise specific relief should be exercised were not present since an idol who was the main defendant was above all earthly-hardships, and K who was also a defendaut transferred the property to the idol with the deliberate intention of avoiding the claim of the plaintiff. Hence, B was entitled to specific relief and not merely to money compensation. AIR (Vol 30) 1943 Oudh 89 : 1942 OWN 652 : 1942 AWR 349 : 18 Luck 647 : 204 Ind Cas 253.

——S. 22 — Illustrations, effect of.

The power of the Court under S. 22 should not be cut down by looking into the illustrations attached to the section. 1930 MWN 638.

——S. 22 — Lease by co-sharer — Agreement to substitute his property on partition — Enforcement of.

The defendant was one of the proprietors of a Taluka which was encumbered and attached by the Collector for non-payment of revenue. During this attachment the defendant, to obtain ready cash, executed a perpetual lease in respect of 90 bighas and odd of land in village R, in favour of the plaintiff. One of the conditions of the lease was that should partition take place between the co-sharers of the taluqa and the leased land be allotted to co-sharer other than the lessor, the lessee would be entitled to take possession of land similar to the land leased in any other village allotted to the lessor. Subsequently on a partition between the co-sharers of the taluqa the village R, was allotted to a co-sharer other than the defendant and the plaintiff filed a suit for possession of 90 bighas and odd of land similar to that described in the lease in another village which was allotted to and was in possession of the defendant,

Held, that the suit was not one for specific performance but one for possession on the basis of a deed of transfer, and no question of applicability of S. 22 arose. AIR (Vol 11) 1924 Oudh 165 : 26 OC 393 : 10 OLJ 120 : 80 Ind Cas 796.

——S. 22 — Sale or purchase.

No distinction can be drawn between a contract for purchase and a contract for sale. AIR (V 11) 1924 Pat 81 : 4 PLT 553 : 2 Pat LR Civ 181 : 78 Ind Cas 483 (DB).

——S. 22 — Vendor's title defective — When title can be held defective.

There is an established practice of disallowing a class of titles which, without finding them to be bad, the Court considers so doubtful as that it would not compel a purchaser to take them. The Court would consider the title doubtful where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or where there is a reasonable decent probability of litigation. The unwillingness of the Court is increased where the title depends on a question of fact to be proved by oral testimony of witnesses whom, at the time when the controversy is raised, it may be difficult to find, or who may be dead, or out of the jurisdiction. AIR (Vol 8) 1921 Nag 30 : 4 NLJ 10 : 64 Ind Cas 87 (DB).

——S. 22 — Discretion of Court — Contract — What plaintiffs must prove — Plaintiff's omission to tender balance of consideration — Suit for specific performance of.

The requisites for the plaintiff's success in a suit for specific performance of a contract being (1) his performance or his readiness and willingness all along to perform the terms of the contract and (2) his readiness and willingness to do all matters to be thereafter done, a failure of the plaintiff in any of these respects will afford a good defence to the suit to the opposite side.

Failure of the plaintiff to tender the balance of the consideration for the contract on or before due date goes against him in a suit for specific performance of the contract, in spite of proof that the defendant would not have accepted such tender even if actually made. AIR (Vol 4) 1917 Cal 283 : 24 CLJ 90 : 37 Ind Cas 257 (DB).

——S. 22 — **Minor — Specific performance.**

No Court would be justified in enforcing specific performance against a minor when such enforcement would be to his detriment. A I R (Vol 3) 1916 All 179 : 38 All 433 : 14 ALJ 645 : 34 Ind Cas 298 (DB)

——S. 22 — The circumstances stated in S. 22 of the Specific Relief Act are illustrative and not exhaustive. The relief under Specific Relief Act lies in the discretion of the Court only in so far as it must necessarily Judge, whether under the circumstances of the case the contract is or is not an equitable one; but if it is determined that the contract is fair and reasonable and the conduct of the plaintiff has not been unconscious there is no room for such discretion. An agreement in order to be executed must be certain and definite; but that is sufficiently certain which can be made certain. A contract which although not illegal, is detrimental to the public welfare, should not be enforced in equity. (1911) 14 C L J 627 : 10 Ind Cas 503 (DB).

——S. 22 (III) — **Doctrine of part performance.**

If a party to a verbal agreement performs a part of his part of the contract to the knowledge of the other party, specific performance can be asked for. But if the parties can be restored to their original position precisely, the doctrine of part performance will not ordinarily be applied. (1910) 12 CLJ 25 : 15 CWN 375 : 6 Ind Cas 346 (DB).

2. **Damages.**

——Ss. 22, 21 — **Plaintiff may be involved in serious losses by defendant's acts—Hypothetical damages — Specific relief.**

It is not that the specific relief is granted only when damages have been incurred, but they cannot be assessed in terms of money. When the acts and the conduct of the defendant involve the plaintiff in serious losses, the damages may be hypothetical, but it is just in cases like this that the Courts would grant specific relief provided the other conditions necessary are present. AIR (Vol 31) 1944 Bom 76 : 45 Bom LR 1075 : 214 Ind Cas 42.

——Ss. 22, 19 — **Agreement to sell — Penalty for breach — Agreement broken — Aggrieved party, held entitled to damages and not specific performance.**

Where parties agree to sell and purchase a certain property with a stipulation that in case of breach, certain sum should be paid as penalty, but subsequently, the property is sold to third person, in spite of the warnings given to the vendor and the third person that they would be liable for damages; in a suit for specific performance of the agreement, the vendee shall be entitled only to damages and not specific performance. AIR (Vol 24) 1937 Sind 263 : 172 Ind Cas 322 (DB).

3. **Delay and laches.**

——S. 22 — **Contract for sale of immovable property — Lapse of time and delay — Effect of.**

Whether lapse of time destroys plaintiffs rights has to be considered with reference to the other prevailing circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and has always been claiming the completion of the legal estate, delay if properly explained will not affect his rights to claim specific performance. AIR (Vol 37) 1950 Cal 526 : ILR (1951) 2 Cal 198.

——S. 22 — **Discretion of Court — Delay — Relief.**

Under S. 22, the Court may exercise its discretion and not decree specific performance where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant. Mere delay itself is no ground for refusing relief but when it raises the presumption of an abandonment of the plaintiff's claim or has caused a hardship to the opposite party or something to his prejudice, Courts are entitled to exercise their discretion and refuse the relief prayed for. AIR (Vol 24) 1937 Mad 124 : 71 MLJ 599 : 1936 MWN 1238 : 44 MLW 749 : 169 Ind Cas 12 (DB).

——S. 22 — **When fatal.**

In no case does mere lapse of time deprive the plaintiff of his right to specific performance, unless it be held that there has been abandonment, acquiescence or waiver, or at the least, an alteration in the position of the defendant in that the other party has been put in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. AIR (Vol 16) 1929 Lah 679 : 30 PLR 285 : 117 Ind Cas 225 (DB).

——S. 22 — **When fatal.**

Even if mere delay does not disentitle a plaintiff to claim specific performance of a contract, nevertheless delay is one of the factors to be considered in giving the discretionary relief. Inordinate and unexplained delay coupled with the change of conditions is a sufficient ground for refusing specific performance. AIR (Vol 16) 1929 Lah 249 : 113 Ind Cas 140 (DB).

——S. 22 — **Where there is no waiver or prejudice to defendant.**

Delay may, in certain cases, be evidence of abandonment or acquiescence; but delay which does not amount to waiver, abandonment or acquiescence and which, in no way, alters the position of defendants does not disentitle the plaintiff to sue for specific performance. Where the suit is within time and the delay is not so great as to induce the Court to hold that the plaintiff has forfeited his right under the agreement, the Court will not refuse equitable relief. AIR (V 9) 1922 Lah 461 : 3 Lah 376 : 32 PCR 1922 : 67 Ind Cas 700 (DB).

——S. 22 — **Change in the value of property.**

The plaintiff's conduct amounted to an abandonment of the contract. The matters at the time suit was brought, were not in status quo "they were at the time the contract was entered into." There was a change in the value of the property and it had occurred by reason of the delay which was attributable to the plaintiff.

Held, that in these circumstances specific performance was rightly refused. AIR (Vol 8) 1921 Cal 179: 34 CLJ 364 (DB).

——S. 22 —— It would be a wrong exercise of discretion to grant specific performance when the plaintiff has been guilty of serious laches.

Where plaintiff was guilty of a delay of over two years in filing suit.

Held, specific performance should not be granted. 15 SLR 21: AIR (Vol 8) 1921 Sind 197.

——S. 22 — **Discretion of Court.**

Plaintiff is not entitled to specific performance if he delays till the end of the limitation period unnecessarily. 58 Ind Cas 23: AIR (Vol 7) 1920 Nag 173

——S. 22 — **Bar to relief.**

If the plff. causes such a long delay as to the evidence of abandonment he cannot ask for specific performance. Nor can he do so where time was originally or has subsequently been made the essence of the contract between the parties, in other cases specific performance can be granted. 22 CWN 190: 50 Ind Cas 177: AIR (Vol 6) 1919 Cal 837 (DB)

——S. 22 — Discretion — Long delay.

A delay of nearly three years in bringing a suit for specific performance of a contract of sale coupled with the fact that the plffs. accepted payment of a debt due to them by the vendor from the subsequent vendee is a waiver of their claim to sue for specific performance. 57 PR (1919) 51 Ind Cas 704: AIR (Vol 6) 1919 Lah 393 (DB)

——S. 22 — Specific performance — Delay — Damages — Mere delay in instituting a suit for specific performance, is not sufficient to defeat the plff's suit.

It must be of such a character as to give rise to an inference of the abandonment of the right or should disclose any prejudice to the deft. In a suit for specific performance of a contract in the first instance and for damages in case the Court found any difficulty in granting the relief. Held, that in the absence of any special damages the relief sought in the first instance viz, specific performance should be granted. 4 Pat LW 192: 44 Ind Cas 244: AIR (Vol 5) 1918 Pat 630

——S. 22 — Contract Act, S. 55 — Contract to sell — Delay.

Considerable lapse of time after the agreed date is a good ground for refusing specific performance of a contract. AIR (Vol 4) 1917 Mad 8 : 37 Ind Cas 776 (DB).

——S. 22 — O. 20, R. 11 — Time fixed by decree — Decree for specific performance.

A plaintiff to whom a conveyance is due under a decree, is not entitled to apply beyond the period allowed by the Court, where the defendant is to convey the properties only if he received the money within the time allowed by the Court. AIR (Vol 3) 1916 Mad 967 : 31 Ind Cas 457 (DB).

——S. 22 — Contract for sale of land — Delay.

Time is not of the essence of a contract to sell immoveable property unless expressly so stipulated at the time of the contract.

Failure to keep to the dates assigned will not prevent a party from claiming specific performance unless the delay has been very gross. AIR (V 2) 1915 PC 83: 40 Bom 289: 43 IA 26: 30 MLJ 186 : 3 LW 239 : 19 MLT 184 : 14 ALJ 225 : (1916) 1 MWN 229 : 18 Bom LR 163: 23 CLJ 358 : 20 CWN 744: 32 Ind Cas 246.

——S. 22 — Delay — Contract to sell — Vendee's delay.

The grant of a relief by way of specific performance of contract of sale is discretionary and such relief will not be granted to a plaintiff who has been guilty of gross carelessness and delay. AIR (Vol 2) 1915 Lah 124: 52 PWR 1915: 18 PLR 1915 : 27 Ind Cas 481 (DB).

——S. 22 — Delay — Waiver.

A suit for specific performance instituted 20 months after the date of the contract cannot be decreed, the ground of waiver. AIR (Vo 2) 1915 Mad 546 : 27 MLJ 482 : 26 Ind Cas 121 (DB).

——S. 22 (2) — Laches in instituting suit — Contract to sell — Failure by vendor to perform his part of contract.

Mere laches or delay, even where it is up to the hilt of the limitation period is not always evidence of waiver or abandonment and is no ground for refusing specific performance. A vendor bound under the terms of an agreement to sell to execute and register a proper conveyance, before he can demand balances of purchase money, commits a breach of contract, if he demands such payment, before executing a conveyance. AIR (Vol 1) 1914 Mad 462: 26 MLJ 518: 23 Ind Cas 560 (DB).

——S. 22 — Delay — Refusal of specific performance.

A plaintiff guilty of continuous delay is not entitled to a decree for specific performance. (1913) 21 Ind Cas 35 (All).

——S. 22 — Delay in instituting suit.

Delay in instituting a suit for specific performance is not fatal to the suit unless it can be shown that the delay has prejudicially affected the defendant. (1912) MWN 1004 : 17 Ind Cas 399 (DB).

——S. 22 — Discretion of Court — Laches — Limitation Act, S. 3.

In a suit to enforce specific performance of a contract to sell the plaintiff, slept over his alleged rights for very nearly twelve years and made no attempt until within a few months of the institution of the suit, to pay to the defendant, the balance of the sale price, and to get a sale-deed executed and registered in his favour. Held, that the Court should not decree specific performance of the contract. (1910) 7 Ind Cas 568 (Lah) (DB).

——S. 22 — Laches, plea of, when good.

To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time short of the period allowed under the Limitation Act, should not disentitle the claimant to relief to which he is otherwise entitled. (1906) 33 Cal 633 (636).

——S. 22 — Delay in applying to the Court for relief is of itself a sufficient reason for the Court, in the exercise of its discretion, to refuse relief. 1905 AWN 147 : 2 ALJ 405 : 27 All 678 (679) (DB); See also (1903) 7 CWN 229: 30 Cal 265 (276, 277) (DB).

4. Discretion of Court.

(a) General.
(b) Refusing specific performance.
(c) Decreeing specific performance.

(a) General.

——S. 22 — Specific relief — Plaintiff setting up false case — Effect.

A plaintiff who is capable of setting up a false case cannot expect a Court of equity to grant him a relief for specific performance where to grant him such relief would do injustice to another person. (1937) MWN 1158 (DB).

——S. 22 — Contract — Wrong construction — Specific performance, if can be given.

Where the plaintiff in a suit on a contract for its specific performance tried to put a construction on the contract which he knew to be wrong : Held, that the plaintiff acted dishonestly and was not entitled to equitable relief. Equity will not help a dishonest suitor who demands what he is not entitled to. AIR (Vol 24) 1937 Pat 425 : 3 BR 739 : 18 PLT 587 : 170 Ind Cas 484 (DB).

——S. 22 — Discretionary relief.

Specific performance is a discretionary relief although the discretion of the Court is to be exercised in accordance with judicial principles. AIR (Vol 21) 1934 Bom 171 : 36 Bom LR 290 : 151 Ind Cas 536.

——S. 22 — Specific performance — Discretion of Court.

In every suit for specific performance Courts of equity have a free discretion limited by those general principles which require all Courts of Justice to act in accordance with sound judical principles and not upon mere caprice and sentiment. What the Court has to look to is whether in the exer-

cise of its discretion the agreement is one which ought to be specifically enforced having regard to the fact whether the enforcing of the contract would not inflict more injury upon the defendant than confer benefit on the plaintiff. AIR (Vol 2) 1915 Bom 109 : 44 Bom 69 : 17 Bom LR 303 : 28 Ind Cas 544.

——S. 22 — Specific performance — Granting of — Discretionary.

The granting of specific performance is purely discretionary with the Court and in so doing the Courts generally apply equitable consideration and not merely look at the terms of the contract. A contract therefore may be perfectly valid in law, yet there may be a want of equality and fairness about it, which would justify a refusal to specifically enforce it. AIR (Vol 2) 1915 Cal 298 :18 CWN 689 : 22 Ind Cas 910 (DB).

——S. 22 — Beneficiary not a party — Effect of.

The jurisdiction to decree specific performance is discretionary and the failure of a beneficiary under the contract to join in a suit to enforce the contract is an important factor in deciding how that discretion is to be exercised. (1913) MWN 995 : 14 MLT 495 : 21 Ind Cas 77 (DB).

(b) Refusing specific performance.

(i) General.

(ii) Unfair advantage.

(iii) Hardship.

(i) General.

——S. 22 — Discretion of Court — Champertous agreement — Refusal of specific performance.

The jurisdiction to decree specific performance is discretionary and a Court is not bound to grant such relief merely because it is lawful to do so. The Court may properly exercise a discretion not to decree sepcific performance of an agreement which is champertous, unconscionable and extortionate. ILR (1949) Nag 663 : 1949 NLJ 370.

——S. 22 — Specific performance against subsequent purchaser having right of pre-emption — Discretion.

Where specific performance is sought to be enforced against a subsequent purchaser who has got a right of pre-emption, the Court should, in the exercise of its discretion, under S. 22, refuse to decree specific performance. Section 22 clearly provides that the right to decree specific performance is discretionary and the Court is not bound to decree specific performance merely because it is lawful to do so. AIR (Vol 29) 1942 Pat 366 : 8 BR 475 : 198 Ind Cas 890 (DB).

——S. 22 — Indefiniteness of time — Effect.

Indefiniteness of time may be a ground for refusing specific performance. Under S. 22, although the jurisdiction to decree specific performance is said to be discretionary, such discretion is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of Appeal. AIR (Vol 20) 1933 All 846 : (1933) ALJ 1584 : 56 A 142 : 148 Ind Cas 229 (DB).

——S. 22 — Decree for specific performance —Discretion — Laches, effect of — Contract — Time, when of the essence of the contract.

Under S. 22, the granting of relief of specific performance is discretionary, and a party guilty of laches ought not be permitted to obtain a decree for specific relief.

A entered into a contract with B to grant him a lease of a tank for a salamia of Rs. 400 to be paid immediately, Rs. 200 were paid next day and the balance was agreed to be paid within a specified period. The balance was not paid within that period and A let out the tank to C on better terms. B instituted a suit for specific performance :

Held, that B should not, in the circumstances of the case, be granted specific performance. AIR (Vol 19) 1932 Cal 493 : 36 CWN 285 : 138 Ind Cas 498 (DB).

——Ss. 22, 26, 28 — Contract of sale — Unilateral mistake — How far ground for refusing specific performance.

Unilateral mistake due to the negligence of the defendant cannot be a ground for refusing decree for specific performance under Ss. 22, 26 and 28 of the Specific Relief Act. 1931 MWN 234 (DB).

——S. 22 — Discretion of Court — Grounds for refusal of specific performance.

A suit for specific performance of a contract of sale cannot fail merely by incomplete description of the properties contracted to be sold especially when the property is identified and reasons for incomplete description are explained. AIR (Vol 7) 1920 Cal 341 : 57 Ind Cas 763 (DB).

——S. 22 — Non-disclosure by grantee of default.

Specific performance of a contract to grant a lease cannot be refused on the ground that the grantee did not disclose before the contract, that he had defaulted in previous transactions with the grantor. AIR (Vol 5) 1918 Cal 985: 46 Ind Cas 558 (DB).

——S. 22 — Contract alleged different from contract proved — Damages.

Where a plff. fails to prove a contract which he alleges in a suit for specific performance the Court will not decree specific performance of the contract proved instead. AIR (Vol 3) 1916 Cal 774 : 19 CWN 933 : 29 Ind Cas 989 (DB).

——S. 22 — Contract to sell — Discretion of Court to refuse — Exception.

A Court can refuse specific performance of a contract to sell, when plff. fails to prove in full the agreement set up by him: this rule does not apply where plff. does not deliberately put forward a false claim. AIR (Vol 1) 1914 Mad 469 : (1914) M WN 339 : 23 Ind Cas 523 (DB).

——S. 22 — Power of attorney given to husband by pardanashin lady — Purchase money.

Where a contract for sale was entered into by the husband of a pardanashin lady who had given a power of attorney and it is shown that the purchase money was far less than that given by a subsequent purchaser and that the variation of time of performance of the contract was not assented to by the lady, held, that the Court could refuse to enforce such a contract. (1912) 16 CLJ 119: 13 Ind Cas 637 (DB).

——S. 22 (II) — Contract for sale of land by Manager — Defective title — Strangers —Discretion of Court — Specific performance —Vendor and purchaser.

Third parties cannot be made parties to a suit for specific performance between vendor and purchaser even though they may claim title by adverse possession. Where the purchaser will be forced to enter upon new litigation, the Court ought to refuse specific performance. The Court must also decide whether the title of the vendor is good, bad or doubtful. A title is doubtful if there is a strong probability of litigation about it. No title offered by the head of a joint Hindu family can be good enough to be forced on an unwilling purchaser unless all the co-parceners concur. (1909) 11 Bom LR 366 and 545 : 6 MLT 200 : 3 Ind Cas 124.

(ii) Unfair advantage.

——S. 22 — Discretion of Court to grant specific performance — Exercise of.

Specific performance of a contract being an equitable relief which the discretion of the Court he who seeks equity must come with clean hands.

Court is not bound to decree a specific performance of a contract to sale, merely because it is lawful. Court can take into consideration the conduct of the parties to the agreement and circumstances attending its execution and can refuse to order specific performance in its discretion. Where the specific performance of the contract would give an unfair advantage to the plaintiff over the defendant, specific performance will be refused.

Where defendant 2, the decree-holder, has obtained a prohibitory order under O. 21, R. 54, Civil P. C. against defendant 1, the judgment-debtor, and the order still stands, the Court will not grant specific performance of the contract to sell the property entered into by the plaintiff and defendant 1, so as to defeat or delay defendant 2 in execution of his decree and to deprive him of the benefits of the prohibitory order even though defendant 2 was not a party to the contract. AIR (Vol 32) 1945 Bom 481 : 47 Bom LR 460 (DB).

——S. 22 — Applicability.

In applying S. 22, the test is did the plaintiff in the particular circumstances take an improper advantage of his position or the difficulties of the defendant. AIR (V 20) 1933 Mad 736: 38 LW 507: 65 MLJ 491 : (1933) MWN 1033 : 145 Ind Cas 1022 (DB).

——S. 22 — Inadequacy of price — Power of Court to grant relief.

Where a vendor asked his agent to negotiate for the sale of his lands and signed an agreement for the sale as per terms arranged by him but the price was very inadequate and the vendor alleged that he was ignorant of the nature and real value of his land :

Held, the Court has a discretion under S. 22 to relieve the vendor from the improvidence of his bargain though the vendee may not be guilty of any fraud or misrepresentation in the matter. Circumstances and considerations with reference to which such discretion should be exercised stated. 35 Ind Cas 871, Doubted. 1930 MWN 638.

— S. 22 — Agreement to convey property in liquidation of debts. — Accepting discharge of part.

Where a debtor agreed in writing to convey his property in liquidation of the whole debt due by him and subsequent to the execution of that document the creditor accepted a property of lesser value in part satisfaction of the obligation and in part payment of the sum due to him, and credited that part payment accordingly, a decree for specific performance of the contract by conveyance of the property cannot be granted. 117 Ind Cas 489 : 7 Rang. 234 : 31 Bom LR 873 : 33 CWN 652 : 30 MLW 18 : 50 CLJ 99 : 1929 MWN 619 : AIR (Vol 16)1929 PC 141 : 57 MLJ 529

—— S. 22 — Agreement due to fear.

Where a Hindu apprehending danger to his life had executed an agreement without consideration in favour of a Mahomedan to cut down a pipal tree venerated by all Hindus for the convenient passing of tazias.

Held, that specific performance should be refused. 115 Ind cas 457 : AIR (Vol 16) 1929 All. 372.

—— S. 22 — Fraudulent preference.

Specifice performance being one which is discretionary and a relief which is granted where parties come to Court with clean hands circumstances which would render a a transaction unfair and avoidable as a fraudulent preference would materially influence the Court in decreeing specific performance. 113 Ind Cas 129 : 1928 MWN 617 : AIR (Vol 15) 1928 Mad. 860. (DB).

——S. 22 — Previous abandonment of contract.

Where a plaintiff in a suit for specific performance of contract of sale of immovable property had in fact abandoned all intention of going on with this cantract, but was stimulated into activity by learning that the property was likely to be sold over his head.

Held, that the case was one in which specific performance should not be granted. 89 Ind Cas 27: 47 All. 784 : 23 AIJ 625 : 6 LRA Civ. 465 : AIR (Vol-12) 1925 All 595 (DB).

——S. 22 — Vendor not responsible — Prejudice to vendee.

Where in a contract of sale of immovable property, the sale could not be completed before obtaining a lease from a certain improvement trust in the vendor's or vendee's name and the obtaining of the lease was delayed by the obstruction of some third parties, by the slow manner in which the said trust moved and by the vendor's non-compliance with certain requisitions put forward by the trust, and it was found that the vendor was not altogether anxious to expedite the transaction.

Held, that the vendee was entitled to terminate the contract by giving notice and that the vendor was not entitled to claim specific performance. The vendor's difficulties in completing the sale were not to be allowed to affect vendee prejudicially.

Held, further that the vendee was entitled to the return of his earnest money with interest and to a charge on the property for the same. 85 Ind Cas 491 : 25 Bom LR 1144: AIR (Vol 11) 1924 Bom 282. (DB).

—— S. 22 — Unfair advantage.

Under S. 22 of the Specific Relief Act the Court may properly exercise its discretion where the circumstances under which the contract is made are such as to give the plff. an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part. Where the plaintiff, at the time when the contract was made, held an unfair advantage owing to the fact that the defendants faculties were enfeebled, the Court might refuse specific performance. (1923) 72 Ind Cas 586 : 5 LLJ 307 (DB).

——S. 22 — Sale-deed executed but not registered owing to vendee's fault.

Where a sale deed duly executed was not registered owing to the vendee's default in allowing the time for registration to expire (by not presenting it for registration in view of the vendee's inconveniences) he is not entitled to a decree for the execution and registration by the vendor or another sale deed. 22 Ind Cas 941 : AIR (Vol 1) 1914 Mad 275. (DB).

—— Ss. 22, cl. (1) ; 23, (b) — "Personal quality" of one party a material ingredient — Unfair advantage to plaintiff.

Where two parties enter into a contract to share a particular property, which is to be sued for and obtained in future, and one of them obtains it after spending money on the litigation, he cannot be specifically compelled to share the property, when it is subject to more burden than at the date of the contract. Where A granted a lease to B as B had consented to undergo all the costs and labour necessary for the purpose of conducting a litigation to recover the property leased and the lessee was to pay rent after obtaining possession.

Held, that the personal quality of the lessee was a material ingredient of the lease and the representatives in interest of the lessee could not enforce specific performance of the contract to lease. (1903) 30 C 265 (275, 276): 7 CWN 229 (DB).

(iii) Hardship

——S. 22 — Sut for specific performance — Self-induced hardship — If can be pleaded in defence.

A party cannot rely on a plea of hardship which is self-induced as a defence to a suit for specific performance. Where an agreement for sale provides that the vendor will sell the property free from all encumbrances, in a suit for specific performance by the purchaser the vendor cannot plead harship on the ground that the dues on the mortgage have increased since the date of the agreement for sale by reason of non-payment of interest by him. AIR (Vol 36) 1949 Cal 510.

——**S. 22 — 'Hardship', meaning of.**

The term 'hardship' on the defendant, in S. 22 (2) of the Specific Relief Act is used in the sense of some collateral hardship and not merely the diminution of the purchase money. AIR (Vol 20) 1933 Mad 736 : 38 LW 507 : 65 MLJ 491 : (1933) MWN 1033 : 145 Ind Cas 1023 (DB).

——**S. 22 — Pre-emption — Right of the defendant.**

Plaintiff brought a suit for specific performance of contract of sale against A, and B who was a vendee from A and co-sharer having a right to pre-empt as against plaintiff :

Held, that it would not be equitable to grant specific performance to plaintiff and under S. 22, Court should exercise its discretion not to grant specific performance to avoid multiplicity of suits. AIR (Vol 13) 1926 Cal 1237 : 44 CLJ 162 : 98 Ind Cas 193 (DB).

——**S. 22 — Completed contract — Sale of immoveable property — Honest mistake of transferee — Delay — Hardship.**

Where a contract for sale of immoveable property was completed and subsequently the property was sold to a third party who under an honest mistake that the original transaction had fallen though purchased it, held, that his honest mistake is no ground for his resisting a suit for specific performance by the 1st purchaser, unless the bargain is so unconscionable that its performance would be inequitable.

A delay of one month in the institution of suit does not justify a refusal of relief by way of specific performance. (Cases cited).

Clause (II) of S. 22 of the Act contemplates a case where the vendor has entered into a contract without full knowledge of the circumstances. Mere improvidence or inadequacy is no hardship unless the bargain is so hard as to be unconscionable and its performance inequitable ; but if the hardship were brought upon by himself the Court will not give him relief.

Where under a contract for sale of immoveable property the transaction was to be completed in three months, within which the vendor was to produce the will under which she claimed and which however, she failed to produce, the vendee could enforce specific performance from the end of the three months, not only against the vendor but also against the subsequent transferee. AIR (Vol 1) 1914 Cal 137 : 41 Cal 852 : 19 CLJ 420 : 19 CWN 89 : 23 Ind Cas 214 (DB).

——S. 22 — The Court can refuse specific performance of the contract conferring an undue advantage on the plantiff and causing a hardship to the defendant not anticipated at the time of the contract. (1912) 10 A L J 498 : 17 Ind Cas 732.

——**S. 22, Cl. (11) — Laches — Hardship of contract — Section merely illustrative.**

A party cannot call upon a Court of equity for specific performance unless he has shown himself ready, desirous, prompt and eager. This rule of law is not in so many words expressed in S. 22. but the first paragraph of that section which gives the Court a judicial discretion must be read as implying and including it. The next paragraph of the section which points out the cases in which specific performance may not be decreed is not intended to be exhaustive, but merely illustrative of the general principle which is embodied in the first paragraph. The 2nd clause of the section no doubt contemplates that, as a general rule, the question of the hardship of a contract is to be judged of at the time at which it is entered into, but it also contemplates an exception to the general rule in cases where events involving hardship have occurred subsequent to the contract in some way to the party who seeks specific performance. (1904) 6 Bom LR 1013 : 29 Bom 234 (247, 248).

(c) Decreeing specific performance.

——**S. 22 — Contract for sale of immoveable property — Purchaser not paying consideration money within stipulated period — If entitled to specific performance — Lapse of time and delay — Effect of — Transfer of Property Act, S. 55 — Contract Act, Ss. 51 and 52.**

If it is found that time is not the essence of a contract, for sale of immoyeable property, the failure of the purchaser to pay the consideration money within the stipulated period is not by itself destructive of his claim for specific performance. In the circumstances of a particular case the Court has to enquire whether the delay which has taken place is properly explained by the plaintiff. The mere fact that there has been some delay is not sufficient to put him out of Court.

The question whether the lapse of time destroys the plaintiff's rights has also to be considered with reference to other attendant circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and is in effect claiming the completion of the legal estate, delay will not, if properly explained, affect his right to obtain specific performance. This principle, however, is subject to a proviso. If the fact that the plaintiff has been in possession is used in extenuation of the delay which has taken place in filing the suit for specific performance, such possession must, in order to have that effect, be a possession under the contract and such that the vendor must know or be taken to know that the purchaser claims to be in possession under the contract. Neither the provisions of S. 55, Transfer of Property Act, nor of Ss. 51 and 52, Contract Act, affect in any way the application of the above principles. AIR (Vol 37) 1950 Cal 526.

——**Ss. 22 and 27 — Contract for sale of immovable property between plaintiff and defendant 1— Consideration payable in instalments — Plaintiff put in possession on payment of first instalment— Default by plaintiff in later instalments — Waiver by Defendant 1 — Subsequent sale by him to Defendant 2 — Contract, if specifically enforceable against Defendants Nos. 1 and 2.**

A contract for a sale of immovable property was entered into between the plaintiff and Defendant No. 1. It was agreed that the consideration would be paid in instalments, that the conveyance would be executed by Defendant No. 1 in favour of the plaintiff upon the payment of the last of such instalments but the plaintiff was to be put in possession of the property upon payment of the first instalment. The plaintiff was put in actual possession of the property in terms of the agreement. The plaintiff paid some instalments but committed default thereafter. Defendant No. 1, however offered to accept the payment of the balance in easier instalments and after this arrangement was made the plaintiff paid some instalments but thereafter again defaulted. There-

upon Defendant No. 1 sold the property to defendant No. 2. In a suit for specific performance.

Held, (i) that there was a subsisting contract with the plaintiff which was capable of specific performance. Although there was failure on the part of the plaintiff to make the payments at the stipulated time, it could not be held that any particular default or defaults would have the consequence of terminating the contract except upon express notice to that effect, having regard to the fact that defendant No. 1 had all along been very lenient in the matter of enforcing payments of the instalments, (ii) that in the circumstances of the case the Court should grant specific performance in the exercise of its discretion. The case could not be brought within any of the clause of S. 21 of the Specific Relief Act which lays down what contracts cannot be specifically enforced. As the contract was for transfer of immovable property, there was a presumption that it could not be adequately relieved by compensation in money. As the plaintiff's default had been consistently waived by defendant No. 1, it was not open to him to complain of such default in the suit, (iii) that the contract should be specifically enforced against defendant No. 2 who was not a bona fide purchaser for value without notice. As the plaintiff was in possession of the property, it was sufficient to put Defendant No. 2 on notice as to the extent and right of the plaintiff's interest, and Defendant No. 2 was affected by all the equities which the plaintiff was entitled to enforce against Defendant No. 1. The mere fact that the plaintiff was in possession through tenants did not make any difference in the application of the doctrine of constructive notice. AIR (Vol 33) 1946 Cal 521 : 229 Ind Cas 73.

——S. 22 — Agreement to mortgage immoveable property — Suit for specific performance — Agreement can be specifically enforced, but mortgage-decree should not be passed.

In a suit for specific performance of an agreement to execute a mortgage of immoveable property to secure the money advanced by the creditor along with the prayer for the mortgage-decree, it is not proper to pass a mortgage-decree, though a decree for specific performance of an agreement can be passed. A I R (Vol 33) 1946 Mad 56 : (1945) 2 MLJ 383 : 58 MLW 550 : 1945 MWN 666 : 223 Ind Cas 89 (DB).

——Ss. 22, 21 — Exercise of discretion — Principles.

Under S. 22 (iii), it is only where a contract is otherwise capable of specific performance and the plaintiff has done some substantial act pursuant to that contract that the Court would exercise its discretion in his favour. Where the contract offends against the provisions of S. 21, the Court should not decree specific performance even if the contract has been partly performed. AIR (Vol 31) 1944 Bom 76 : 45 Bom LR 1075 : 214 Ind Cas 42.

——S. 22 (ii) — Contract of sale deliberately and solemnly entered into by vendor — Court, powers of.

When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of counsel without the slightest suggestion of the vendor having been imposed upon, a Court of Equity will not be entitled to interpose its aid on the ground of inadequacy of price. AIR (V 28) 1941 Oudh 324 : 1941 OWN 265 : 1941 RD 100 : 1941 AWR 151 : 194 Ind Cas 533.

——S. 22 (iii) — Contract fixing rates — Material not available in locality insisted on being used — Right of contractor for transport charges — Profit and loss — Contractor merely entitled to reasonable expenses as to one item — Consideration bearing on profits made in a closely connected item — Relevancy.

Where the rates have been fixed on a particular basis and material of a different kind not available in the locality is insisted on by the Engineer, the contractor is justified in claiming the extra charge incurred for the transport of the material.

Where there is a rate fixed by contract, it may be that the profits or loss made by the contractor under some other head ought not to be taken into account with a view to vary that rate, but where the contractor is merely entitled to reasonable expenses under a particular head not covered by contract, considerations bearing upon profit made by him under a closely connected item of work are quite legitimate and relevant. AIR (Vol 22) 1935 Mad 356 : 41 LW 130 : 1935 MWN 134 : 161 Ind Cas 65 (DB).

——Ss. 22, 12 — Contract not admitting of specific performance — Alternative remedy barred — Specific performance — Discretion of Court.

Where a contract for transfer of immovable property is not such as can be specifically granted, the plaintiff will not be entitled to get that relief merely because he has allowed his alternative relief to be barred by time. But if the contract for specific performance is of such a nature as to admit of being specifically performed, then the mere fact that the other remedy has become barred by time should not deprive the plaintiff from getting the relief to which he is entitled. AIR (Vol 20) 1933 All 846 : 1933 ALJ 1584 : 56 All 142 : 148 Ind Cas 229 (DB).

——S. 22 — Absence of provision in decree for contingency of failure to deposit money — Non-payment of money — Application for time for payment — Discretion of Court.

A decree for specific performance provided that on A's depositing a certain sum of money in Court within a specified time, B should execute and register a kobala in A's favour in respect of the land in suit and in event of B failing to do so, A would be entitled to have the kobala executed and registered through Court. But there was no provision as to what would happen if A did not deposit the amount within the specified time. A failed to deposit the entire amount on the fixed date but applied for extension of time :

Held, that the Court had jurisdiction to grant time in the exercise of its discretion. AIR (V 20) 1933 Cal 580 : 37 CWN 397 : 145 Ind Cas 381.

——S. 22 — Hardship of result.

If the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course and, therefore, of right, as are damages. The mere hardship of the results will not affect the discretion of the Court to grant specific performance. AIR (Vol 14) 1927 Cal 889: 104 Ind Cas 527 (DB).

——S. 22 — Discretion.

Though properties are sold for a sum considerably less than their value, but there is no evidence of any fact unknown to or concealed fraudulently from the vendor of which the vendee was aware or of the use of undue influence, specific relief should be granted. AIR (Vol 4) 1917 Mad 533 : (1916) 2 MWN 191 : 4 LW 397 : 35 Ind Cas 871 (DB).

——S. 22 — Contract for sale of equity of redemption to mortgagee — Onerous terms — No fraud or misrepresentation — Grant of relief.

Although an agreement for sale of the equity of the redemption by the defendant mortgagor to the plaintiff mortgagee contained onerous terms, yet, as neither fraud nor misrepresentation by the plaintiff was proved and the terms of the sale were not unconscionable, and as the plaintiff was not shown to have taken improper advantage of his position or of the defendant's difficulties, the Court below exercised a right discretion in granting a decree for specific performance. (1911) 38 Cal 805 : 38 IA 155 : 15 CWN 934 : 13 Bom LR 704 : (1911) 2 MWN 79 : 14 CLJ 250 : 4 Bur LT 229 : 8 ALJ 1193 : 10 MLT 455 : 21 MLJ 1127 : 11 Ind Cas 801 (PC).

——S. 22 — Lease — Covenant for renewal — Construction of document — Time, whether or not of the essence of a contract.

The plaintiff sued for specific performance of a covenant for renewal contained in a lease, the material clause of which was as follows : — "After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further consideration of payment of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration. Held, on a construction of the lease, that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal. 1905 AWN 154 : 27 All 696 (698, 699) (DB).

5. Interference by Appellate Courts.

——S. 22 — Specific performance — Relief is discretionary — Discretion judicially exercised — High Court will not interfere in second appeal.

The grant of a decree for specific performance is in the discretion of the trial Court, and if that discretion has been judicially exercised on sound principles and the decree is affirmed by the lower appellate Court, the High Court in second appeal will not interfere with that discretion. AIR (V 33) 1946 Nag 139 : 1946 NLJ 43 : ILR (1946) Nag 116 (DB).

——S. 22 (ii) — Powers of Appellate Court.

When the basic findings, which ultimately led the trial Court to dismiss the suit for specific performance are set aside on appeal by the Appellate Court, no question of interference by the Appellate Court with the exercise of discretion by the trial Court arises, and the Appellate Court is competent in the exercise of its own discretion to decree the specific performance. AIR (Vol 28) 1941 Oudh 324 : 1941 OWN 265 : 1941 RD 100 : 1941 AWR 151 : 194 Ind Cas 533.

——S. 22 — Powers of Court of second appeal — Specific performance — Discretion in granting of.

Per Haveliwala, A. J. C. (Rupchand, A. J. C. contra). — Under S. 22, discretion in the grant of specific performance of the contract depends on the facts and circumstances of each case and where that discretion is exercised by the first Appellate Court on the consideration of the evidence recorded in the case, the High Court should not interfere unless it is shown that the discretion was perverse and against judicial principles. More so in second appeal in which questions of fact which are the basis for the exercise of the discretion cannot be gone into. Where interference by the first Appellate Court rests on the consideration of the whole of the evidence and its decision is on the findings of fact, both on the evidence and on the documents which is within the competence of the first Appellate Court to challenge, the High Court cannot and should not interfere unless those findings are vitiated by some error of law. AIR (Vol 24) 1937 Sind 263 : 172 Ind Cas 322 (DB).

——S. 22 — Discretion — Interference in appeal.

As provided by S. 22 the grant of specific performance is discretionary with the Courts. Where the trial Court has exercised this discretion, Appellate Court will interfere only if it is shown that this discretion has been exercised perversely, or against judicial principles. 12 LLJ 172: AIR (V 17) 1930 Lah 1004 (DB).

6. Other illustrative cases.

——S. 22 — Guardian's contract.

Specific performance of a contract by minor's guardian for the sale of immoveable property which at the time was for the benefit of the estate, can be decreed notwithstanding there is an offer of better price subsequent to the contract. AIR (Vol 11) 1924 Mad 863 : 20 MLW 559 : 35 MLT 110 : 1924 MWN 878 : 47 MLJ 683 : 82 Ind Cas 926.

——S. 22 — De facto guardian.

Specific performance will not be granted where de facto guardian has entered into a contract with a third party for sale of the minor's property. To direct the contract to be carried into effect as against the minors is to sanction a plain breach of trust on the part of de facto guardian. AIR (Vol 11) 1924 Pat 81 : 4 PLT 553 : 2 Pat LR Civ 181 : 78 Ind Cas 483 (DB).

——S. 22 — Suit for agreement to lease — Lease not registered — Contract, if divisible.

Although a document which has been executed is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance. (1910) 12 CLJ 464 (466) : 8 Ind Cas 794 (DB).

——S. 23.

See also Contract Act, Ss. 2 (d) and 37.

1. **Scope.**
2. **Clause (a).**
3. **Clause (b).**
4. **Clause (c).**
5. **Benami transaction.**
6. **Stranger, suit by.**

See N. 1 and 4.

1. Scope.

——S. 23 — One or more co-contractors wanting to enforce contract against will of others — S. 23, if applies.

Section 23 covers a case where one or more co-contractors want to enforce the contract against the will of the others.

So long as the plaintiffs are willing to pay the vendors the full price bargained for and ask them to sell to the very persons with whom they had contracted, there is no variation of the contract. Where the case of the plaintiffs is that the defendant agreed to sell a property to the plaintiffs and another person who refuses to join them, the plaintiffs have a right to sue for specific performance even though one of their co-contractors refuses to join them. It is essential that all parties should be before the Court. AIR (Vol 24) 1937 Nag 186 : ILR (1938) Nag 41 : 171 Ind Cas 654 (DB).

——S. 23 — Contract to benefit of stranger — Enforcement.

A stranger to a crontract, which was to his benefit, is entitled to enforce the agreement, even though the arrangement to his benefit was not

communicated to him by the parties to the contract, and was brought to his notice by a mere accident. (1936) 62 CLJ 55 : 164 Ind Cas 477 (DB).

——S. 23 — Mutuality between parties — Suit by one party — Other party if can also enforce specific performance.

For either party to be able to sue for specific performance, there must be mutuality. Once there is that mutuality and one party can sue the other for specific performance, there is no reason why the other party also cannot enforce specific performance. AIR (Vol 21) 1934 Rang 160 : 152 Ind Cas 552.

——S. 23 — Stranger to a contract.

Section 23 does not purport to be, and is not, exhaustive of the case in which specific performance of a contract may be granted in favour of a person. In certain cases even a stranger to a contract can sue for specific performance as where there is a creation of a trust in favour of the plaintiff, the creation of a charge on immovable property in favour of the plaintiff, where the promisor is estopped owing to transactions between the plaintiff and the promisor, and when there is a settlement on marriage in which the plaintiff is beneficially entitled. AIR (Vol 13) 1926 All 7 : 87 Ind Cas 724 (DB).

2. Clause (a).

——S. 23 — Sale by guardian with condition for re-sale to minor — Suit by minor for specific performance of agreement to re-sell.

Where the guardian of a minor sold property belonging to the minor with a stipulation to the following effect : "If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the aobve price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land" and the minor on attaining majority sued to enforce specific performance of the agreement for re-sale :

Held, that the contract was, however, not binding on the minor, and for want of mutuality, could not be specifically enforced by either party. The validity or the enforceability of such a contract does not depend upon the question whether it was conducive to the benefit of the minor or not. AIR (Vol 20) 1933 Mad 322 : 37 LW 340 : 1933 MWN 315 : 56 Mad 433 : 64 MLJ 354 : 142 Ind Cas 315 ((FB).

——S. 23 — Contract by guardian for — Enforceability by minor — T. P. Act, S. 55 (1) (d).

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immovable property. The minor in such a case is not bound by the contract. It is not open to the minor, on attaining majority, to enforce specific performance of the contract. 23 MLJ 610, Not foll. AIR (Vol 7) 1920 Mad 423: 38 MLJ 77: (1920) MWN 129: 27 MLT 264: 55 Ind Cas 377 (DB).

3. Clause (b).

——S. 23 (b) — Sale-deed of certain property with an agreement from vendee that he would re-convey the same on payment of a fixed sum — Vendor assigning to obtain reconveyance to his daughter — Refusal of vendee to reconvey unless further payment of Rs. 500 made — Daughter, held entitled to obtain reconveyance without extra payment. 1942 NLJ 322.

——S. 23 (b) — Option to re-purchase, whether assignable.

Both under the common law and under S. 23 (b), an option to re-purchase property is prima facie assignable though it may be so worded as to show that it was to be personal to the grantee and not assignable. AIR (Vol 27) 1940 Bom 339: 42 Bom LR 653 : ILR (1940) Bom 674 : 191 Ind Cas 139 (DB).

——S. 23 — Third party's right to sue on contract.

The general rule that a person not a party to a contract cannot sue on it is subject to exceptions such as where the plaintiff is claiming through a party to the contract, or he is in the position of a cestui que trust or of a principal suing through an agent. AIR (Vol 23) 1936 Bom 344 : 38 Bom LR 610 : 60 Bom 954 : 165 Ind Cas 338 (DB).

——S. 23 (b) — Scope.

Section 23, cl. (b) permits the representative-in-interest of a party to an agreement to sue for its specific performance. AIR (Vol 22) 1935 Lah 181 : 37 PLR 58 : 153 Ind Cas 437 (DB).

——S. 23 (b) — Sale — Agreement to re-sell — Construction — Right to enforce.

Where a person sells his land or house to another person and the latter enters into a contract to convey the property back to the vendor or his heirs, the right to obtain a reconveyance from the vendee or his heirs is ordinarily assignable even to a stranger who can enforce it by a suit. But when the intention of the parties was that the vendor or his heirs alone should be given the right of repurchasing the property, the assignee outside the family cannot enforce the contract specifically. AIR (Vol 21) 1934 Bom 171 : 36 Bom LR 290 : 151 Ind Cas 536.

——S. 23 — Assignee — Where assignee has no title.

Where a person has only a personal interest which he cannot assign, his assignee can in no sense be regarded as the representative as to be entitled to obtain specific performance under S. 23 (b). AIR (Vol 17) 1930 All 101 : 1930 ALJ 799 (DB).

——S. 23 — Contract for sale can be assigned and representative in interest can enforce it. AIR (Vol 16) 1929 All 817 : 1929 ALJ 1196 (DB).

——S. 23 — Breach of contract — Specific performance possible.

Where a contract between A and B is broken by B, but is such as its specific performance can be obtained by A, the right that A possesses is not a mere right to sue but a right to get specific performance, which can be validly assigned and the assignee can enforce the contract specifically against B. AIR (Vol 16) 1929 Mad 251 : 1929 MWN 142 : 30 MLW 392 : 116 Ind Cas 848 (DB).

——S. 23 — The covenant for renewal of lease of land being a covenant running with the land the assignee of the leasehold is perfectly competent to enforce its terms. AIR (Vol 11) 1924 Cal 346 : 69 Ind Cas 600.

——S. 23 — Assignment — What contracts are assignable.

All contracts capable of specific performance excepting those of the class prohibited by S. 23 of the Specific Relief Act are assignable. In S. 23 of the Specific Relief Act the words "representative in interest" include an assignee oft an interest. AIR (Vol 4) 1917 Mad 358 : 3 LW 435 : 19 MLT 329 : 33 Ind Cas 696 (DB).

4. Clause (c).

——S. 23 — Third party's right to sue on contract.

A stranger to a contract cannot sue on it unless there is something over and above the contract

such as a trust and the like which would entitle him to sue. AIR (Vol 32) 1945 Nag 231 : 1945 NLJ 295 : ILR (1945 Nag 948.

——S. 23 — **Privity of contract.**

The plaintiff sued to recover Rs. 553-4-0 from the defendant. His case was that he sold cotton worth Rs. 576 to one B who took delivery and paid Rs. 26 towards a part payment of the price. The balance outstanding was Rs. 550. He promised to pay this amount to the plaintiff B subsequently sold the cotton to the defendant. The plaintiff's case was that the defendant purchased the cotton of the plaintiff through B and that the defendant promised to pay the amount of Rs. 550 to the plaintiff and gave a chit. The terms of the chit were as under : "To L, accept compliments of D (defendant). Further at the instance of B, W the man of G (plaintiff) wll come. So you will please pay him Rs. 550" :

Held, that chit could not be construed as an agrement by the defendant to pay the amount in suit to the plaintiff. There being no privity of contract between the plaintiff and the defendant, the former could not sue the latter to recover the amount even though the defendant had the cotton belonging to the plaintiff and had got it insured in his name. The plaintiff's case was not covered by any of the exceptions laid down in (AIR (V 17) 1930 Mad 382 : 53 Mad 270 : 124 Ind Cas 55) to the principle that a stranger to a contract cannot sue on an agreement which is for his benefit. The plaintiff had misconceived his remedy and ought to have sued B for the recovery of price. The defendant was liable, if at all, to B. A I R (Vol 31) 1944 Nag 120 : 1944 NLJ 110 : ILR (1944) Nag 46 : 212 Ind Cas 539.

——S. 23 — **Stranger.**

Where there was an agreement between the sons of a deceased Muhammadan that one of them should take the whole property of their father and also pay his debts, such brother does not become personally liable for the debts of the father since the creditors cannot enforce the agreement between the brothers, and therefore cannot apply to adjudicate him an insolvent. AIR (Vol 30) 1943 Sind 190 : ILR (1943) Kar 238 : 210 Ind Cas 25 (DB).

——S. 23 — **Enforceability — Stranger, when can enforce.**

A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian law even though in India the consideration need not move from the promises. There are two well-recognised exceptions to this doctrine. The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party.

Vendor sold his property for a consideration that the vendee would pay the creditors of the vendor. The property was not sold for a fixed consideration and the vendee did not retain out of it a certain sum of money which he undertook to pay to the creditors. The consideration for the transfer was that the vendee would satisfy the creditors of the vendor and release the latter from the liability in respect of two debts. The amount which the vendee was to pay to the creditors would depend upon the arrangement which he might be able to make them. He took the chance of his being able to induce the creditors to give up their claim for interest either in whole or in part. It was for the benefit of the vendor himself and not for the benefit of the creditors that this bargain was entered into :

Held, that the vendee was not in any way a trustee for the creditors in respect of the money due to them. Consequently, the creditors could not enforce the contract. AIR (Vol 29) 1942 Cal 251 : 74 CLJ 327 : ILR (1941) 2 Cal 576 : 201 Ind Cas 138 (DB).

——S. 23 (c) — **Compromise of doubtful rights between members of same family — Applicability.**

Per Rowland J. — Where the rule in Tweddle v. Atkinson, (1861) 121 E R 762, conflicts with a statute the statute must prevail.

There is neither principle nor authority in support of the proposition that there can be no compromise of doubtful rights between members of the same family unless it is between all the members of the family; cl. (c) of S. 23 is specifically designed to meet such case as where the senior members of a family compromise a dispute regarding the rights both of themselves and of the other members of their respective branches. AIR (Vol 29) 1942 Pat 460 : 21 Pat 377 : 24 PLT 33 : 8 BR 812 : 201 Ind Cas 660 (DB).

——S. 23 (c) — **Applicability — Compromise of doubtful rights between members of same family — Junior members not parties to it, if can sue on compromise — Contract — Persons not party to contract, whether can sue on it.**

S, a widow of B brought a suit against M who was the brother of C for possession of certain lands on the allegation that since the death of her husband who was separate from M, she had been in possesson of the disputed lands but M wrongfully dispossessed her therefrom. In that suit, a compromise decree was passed to the effect that M would remain in exclusive possession of all the lands and that he would pay maintenance in kind to S during her lifetime and after her death, he would give similar maintenance to her daughter-in-law J. M gave maintenance allowance to S and on her death to J for some years but subsequently, he stopped the payment. J then brought a suit against M for the recovery of arrears of maintenance :

Held, that as a Hindu widow, J was entitled to maintenance out of the property in which her husband was co-parcener at the time of his death, and the compromise being a compromise of doubtful rights between the members of the same family as contemplated by S. 23 (c), J was entitled to obtain maintenance from M although she was not a party to the compromise. AIR (V 29) 1942 Pat 460 : 21 Pat 377 : 24 PLT 33 : 8 BR 812 : 201 Ind Cas 660 (DB).

——S. 23 — **Third party, when can sue upon contract.**

Where, on a contract between A and B, B agrees to pay a sum of money to C and no more circumstances appear, C being a stranger to the contract cannot sue B for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e. g., (a) where B afterwards agrees with C to pay him direct or becomes estopped from denying his liability to pay him personally: (b) where the contract between A and B creates a trust in favour of C: (c) where the contract charges the money to be paid out of some immovable property or (d) where it is due to C under a marriage settlement, partition or other family arrangement.

AIR (Vol 24) 1937 Oudh 99 : 1936 OWN 1021 : 12 Luck 639 : 165 Ind Cas 113 (DB).

——S. 23 — Composition deed between heirs of deceased debtors and creditors — One of creditors not joining though his name mentioned but electing to abide by it — Such creditor, held can enforce the deed even though he was not a party to it. AIR (Vol 22) 1935 All 441 : 1935 AWR 426 : 157 Ind Cas 983.

——S. 23 — Vendor's creditor.

Where all that appears is that a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie. AIR (Vol 17) 1930 Mad 382 : 31 MLW 371 : 53 Mad 270 : 58 MLJ 420 (FB).

——S. 23 — Anti-nuptial contract.

A Burmese Buddhist can file a suit for specific performance of an anti-nuptial contract entered into by the parents of both sides. AIR (Vol 17) 1930 Rang 172 : 8 Rang 266.

——S. 23 — Beneficiary under contract.

Where a contract is made between A and B for the benefit of C., C is entitled to sue the defaulting party AIR (Vol 15) 1928 Mad 23 : 101 Ind Cas 386 (DB).

——S. 23 — A mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will not necessarily make that third person a cestui que trust, so as to found a suit for money against the obligor. AIR (Vol 13) 1926 Cal 1009: 53 Cal 922 : 30 CWN 812 : 96 Ind Cas 846 (DB).

——S. 23 — Contract — Specific performance — Stranger.

The question whether a person deriving a benefit under a contract to which he is no party can sue to enforce it, is one to be decided on rules of justice, equity and good conscience.

Held, that a creditor was entitled to sue for the debt from an alienee of the debtor who had undertaken to pay off the debts. English cases cited. AIR (Vol 1) 1914 Cal 129 : 41 Cal 137 : 17 CWN 1143 : 18 CLJ 603 : 20 Ind Cas 630 (DB).

——S. 23 — Third party — If can enforce.

A hypothecation bond executed by A to B for a consideration including the amount due by A to C a third party, cannot be enforced by C, he being no party to the bond. AIR (Vol 1) 1914 Mad 701 : 38 Mad 753 : 26 MLJ 127 : 23 Ind Cas 951 (DB).

——S. 23 — Stranger — Right to enforce contract.

Where under an agreement in anticipation of marriage between the parents of the bride and bridegroom an annuity is settled on the wife, she has right to sue thereon though not a party to the contract. (1910) 32 All 410 : 37 IA 152 : 14 CWN 365 : 7 ALJ 871 : (1910) MWN 313 : 8 MLT 147 : 12 CLJ 205 : 12 Bom LR 638 : 20 MLJ 614 : 7 Ind Cas 237 (PC).

——S. 23 (c) — Right of suit — Partition.

A beneficiary having a right to maintenance under a document (viz.) a deed of partition, is entitled to bring a suit to enforce the terms in his favour. (1910) 33 Mad 238 : 8 MLT 249 : 19 MLJ 739 : 4 Ind Cas 1083 (DB).

——S. 23 (c) — Partition deed — Minor member — Right of suit.

By a deed of partition executed by the adult members of a joint Hindu family it was agreed that a certain minor member of the family represented in the execution of the deed by his father should receive a certain share in a particular village "by right of primogeniture" and the agreement further recited that the member in question had been put into possession of the share allotted to him. It was further agreed that inasmuch as the property thus dealt with was subject to two mortgages, the other members of the family would be responsible for the payment of the mortgage-debts and would indemnify the recipient of the mortgaged property in case of proceedings being taken against such property for satisfaction of the mortgage debts :

Held on suit by the minor (after attaining majority) to compel reimbursement by the other members of the family that the partition deed was enforceable in favour of the plaintiff just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him.

Held also, on a construction of the partition deed, that the plaintiff was also entitled to sue having regard to the terms of S. 23 (c). 1906 AWN 261 : 29 All 37 (43) : 3 ALJ 785 (DB).

——S. 23 (c) — Family arrangement — Compromise of doubtful rights — Enforcement by one not party but beneficially entitled.

A person beneficially entitled under a deed of family compromise of doubtful rights may sue to enforce it even though he was no party to such compromise. (1901) 5 CWN 386 (391) (DB).

——S. 23 — Agreement to renew Kanom, Specific performance — Subsequent purchaser with notice, rights of purchaser to eject.

Where there is only an agreement to renew a kanom (or mortgage) for 12 years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanom renewed under the agreement notwithstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement. (1901) 13 MLJ 217 : 27 Mad 202 (204, 205) (DB).

5. Benami transaction.

——S. 23 — Husband of party.

It is a common practice in India that people, while paying money from their own pockets, purchase property for various reasons in the name of the members of their families. Such transactions are well known as benami transactions and their validity has been recognized by the highest Courts of Justice. A husband is therefore competent to sue for specific performance of a contract of sale in favour of his wife. AIR (Vol 14) 1927 Lah 252 : 9 LLJ 199 : 28 PLR 620 : 100 Ind Cas 422 (DB).

——S. 23 — Benamidar — Contract by — Specific performance.

In a suit for specific performance it is not a valid defence that the person who entered into contract has no beneficial interest but is a benamidar. AIR (Vol 3) 1916 Mad 75 : 28 MLJ 617 : 29 Ind Cas 12 (DB).

6. Stranger, suit by.

See N. 1 and 4.

——S. 24.

——S. 24 — Readiness to perform own part — English law.

Although, so far as the Act is concerned, there is no express statement that in a suit for specific performance the averment of readiness and willingness on plaintiff's part up to the date of decree is as necessary as it was always in England, it